

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

ARIZONA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# ARIZONA

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**SIXTH EDITION  
2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



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**FOREWORD**

**Arizona Public Records Law** (A.R.S. §§ 39-121 to -128): The Arizona Public Records Law can be traced to territorial days, when in 1901 the law was first enacted. The Arizona Supreme Court has observed that “[h]istorically, this state has always favored open government and an informed citizenry.” *Arizona Newspapers Ass’n, Inc. v. Superior Court*, 143 Ariz. 560, 564, 694 P.2d 1174, 1178 (1985); see also *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (Ct. App. 2001) (“The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.”) (citation omitted).

Arizona’s statutory scheme is simple, providing “a broad right of inspection to the public.” *Carlson v. Pima County*, 141 Ariz. 487, 489, 687 P.2d 1242, 1244 (1984). By statute, “[p]ublic 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. Once it is determined that a record is “reasonably necessary or appropriate to maintain an accurate knowledge of . . . official activities and of any . . . activities which are supported by monies from the state or any political subdivision of the state,” the document is presumptively open to public inspection. A.R.S. § 39-121.01(B); see also *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. As the Arizona Supreme Court has proclaimed, the Arizona Public Records Law evinces “[a] strong policy favoring open disclosure and access.” *Cox Arizona Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); see also *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246 (noting that “access and disclosure is the strong policy of the law”).

There are no statutory exceptions to disclosure found in the Arizona Public Records Law. The courts, however, have identified three major exceptions to the presumption favoring disclosure: (1) confidentiality (i.e., when some other statute or regulation specifically protects records from disclosure), (2) privacy of persons, and (3) whenever disclosure would be “detrimental to the best interests of the state.” *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245.

Traditionally, the Arizona statutory scheme has favored reporters and other persons seeking access to public records. To date, efforts to have wholesale legislative amendments to the law have failed.

**Arizona’s Open Meetings Law** (A.R.S. §§ 38-431 to -431.09 (“OML”)): Before enactment of open meetings legislation, Arizona provided little official access to governmental meetings. In 1962, after eight previous attempts, the Arizona Legislature finally adopted an open meetings statute. The original Act served as a framework and was not nearly as broad as the current OML. The 1962 Act remained unchanged—in fact, no judicial interpretations of the Act were reported until 1974. The 1974 amendments amplified the Act—expanding definitions, requiring notice and minutes of meetings, detailing execu-

tive sessions, allowing ratification of violations by public bodies, and providing for equitable relief and exceptions. See Ariz. Att’y Gen. Op. No. 75-5 (1975); D. Mitchell, *Public Access to Governmental Records and Meetings in Arizona*, 16 Ariz. L. Rev. 891 (1974).

Since 1974, the Legislature has passed numerous amendments strengthening the Act, many in response to an adverse judicial decision or attorney general’s opinion. Most notably, these changes included (1) replacing the term “governing body” with the current “public body”; (2) using the word “meeting” instead of “proceeding,” “regular meeting” or “official meeting”; and (3) expanding the declaration of public policy for open meetings.

[Note: Due to the numerous substantive amendments, a practitioner must take care not to rely on case law interpreting previous versions of the OML. Because of the changes to the OML, the outline does not refer to Arizona case law regarding the OML that is irrelevant to the current form of the statute.]

Arizona’s OML also contains two unusual provisions. First, a public body may ratify actions it takes in violation of the OML. A.R.S. § 38-431.05. Second, in some circumstances, a court may remove a public officer from office as a penalty for violating the law. A.R.S. § 38-431.07(A).

Despite the numerous changes to the Act, its primary purpose has remained the same—to require multimember public bodies (such as the Legislature, city councils and school boards) to conduct their business openly. See *Long v. City of Glendale*, 208 Ariz. 319, 325, 93 P.3d 519, 525 (Ct. App. 2004) (stating that “the policy [of the OML] is to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret”) (citation and internal quotation marks omitted). To that end, the law clearly and simply provides: “All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” A.R.S. § 38-431.01(A).

The current declaration of public policy is a strong foundation for gaining access to meetings. It states:

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. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.

§ 38-431.09(A). Unfortunately, although occasionally referred to by appellate courts, no appellate court has expressly relied upon this section to support a decision enforcing the OML.

Historically, the Arizona Attorney General’s Office has served as a strong proponent of the Act. When the OML was amended in 1982, the Attorney General was specifically empowered to initiate litigation to secure compliance with the law. Following the 1982 amendments, the Attorney General developed an Open Meetings Law Enforcement Task Force (“OMLET”) designed to achieve enforcement of the Act. The Attorney General’s Office has cooperated with the press in pursuing legal action against violators of the Act. Attorney General Opinions, however, sometimes reflect a retraction from the OML’s general policy of access. Fortunately, Attorney General Opinions are not binding on Arizona courts. See *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 483 n.2, 803 P.2d 891, 894 n.2 (1990).

# Open Records

## I. STATUTE — BASIC APPLICATION

### A. Who can request records?

#### 1. Status of requestor.

Under the Arizona Public Records Law, “any person” may inspect public records. A.R.S. § 39-121.

#### 2. Purpose of request.

“A person’s right to public records under the Public Records Law is not conditioned on his or her showing, or a court finding, that the documents are relevant to anything.” *Bolm v. Custodian of Records of Tucson Police Dep’t*, 193 Ariz. 35, 39, 969 P.2d 200, 204 (Ct. App. 1998).

*Commercial Use.* Public records may be used for commercial purposes. A.R.S. § 39-121.03(A).

If the records custodian determines that the proposed commercial use of public records would constitute “a misuse of public records or . . . an abuse of the right to receive public records, the custodian may apply to the governor requesting that the governor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose.” A.R.S. § 39-121.03(B). If the governor fails to issue an executive order prohibiting the disclosure within thirty (30) days of the application date, the custodian of public records must provide the copies, printouts or photographs upon being paid the statutory fee. *Id.*

#### 3. Use of records.

The Arizona Public Records Law makes no restrictions on the subsequent use of the information provided.

### B. Whose records are and are not subject to the act?

The Arizona Public Records Law contains two operative definitions—“officer” and “public body”—for the purpose of subjecting certain documents to disclosure under the law.

“Officer” is defined as “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)(1).

“Public bodies” are defined by statute as “the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state.” A.R.S. § 39-121.01(A)(2). The operative definition of a “public body” in Arizona is very broad. Indeed, any “public organization or agency” supported by or expending public funds falls within the ambit of the Act.

*Exempt Agencies:* No Arizona agencies are exempted in their entirety.

Every officer and every public body are obligated to preserve, maintain and care for public records pursuant to Arizona law. A.R.S. § 39-121.01(C).

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

As indicated above, the Arizona Public Records Law applies to all documents in the custody of public officers, who are obliged “to make and maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties.” *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. But “the mere fact that a writing is

in the possession of a public officer or public agency does not make it a public record.” *Salt River Pima-Maricopa Indian Cmty.*, 168 Ariz. 531, 538, 815 P.2d 900, 907 (1991). Rather, a public officer must generate or use a record in a capacity related to his official duties for that record to be a “public record.” *Id.* Therefore, “only those documents having a ‘substantial nexus’ with a government agency’s activities qualify as public records.” *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007).

#### 2. What physical form of records are covered?

The statute’s reference to “[p]ublic records *and other matters*” strongly suggests that tangible records other than print material are also subject to inspection and copying under the statute. A.R.S. § 39-121 (emphasis added). In *KPNX-TV v. Superior Court*, the court held that “Arizona’s definition of public records can include videotapes,” as well as “all existing documents, papers, letters, maps, books, tapes, photographs, films, sound recording or other materials, regardless of physical form or characteristics.” 183 Ariz. 589, 592, 905 P.2d 598, 601 (Ct. App. 1995); *see also Star Publ’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 433-34, 891 P.2d 899, 900-01 (Ct. App. 1994) (computer backup tapes which include e-mail communication of employees are subject to public records law).

#### 3. Are certain records available for inspection but not copying?

The statute makes no distinction between the public’s right to “examine” and its related right to obtain “copies, printouts or photographs of any public record during regular office hours.” A.R.S. § 39-121.01(D)(1).

If the custodian “does not have facilities for making copies, printouts or photographs of a public record,” the requester “shall be granted access to the public record for the purpose of making copies, printouts or photographs.” A.R.S. § 39-121.01(D)(2). But the copies, printouts or photographs must be made “while the public record is in the possession, custody and control of the custodian of the public record and shall be subject to the supervision of such custodian.” A.R.S. § 39-121.01(D)(3).

### D. Fee provisions or practices.

The Arizona Public Records Law distinguishes between records requested for a “commercial purpose” versus a “non-commercial purpose.”

#### Non-Commercial Purpose:

For “non-commercial purposes,” the Public Records Law mandates the furnishing of such copies, printouts or photographs and permits the custodian of records to “charge a fee if the facilities are available” for most records. A.R.S. § 39-121.01(D)(1).

State law, however, prohibits a state, county, city or any officer or board from demanding or receiving “a fee or compensation for issuing certified copies of public records or for making search for them, when they are to be used in connection with a claim for a pension, allotment, allowance, compensation, insurance or other benefits which is to be presented to the United States or a bureau or department thereof.” A.R.S. § 39-122(A). Moreover, a crime victim or an immediate family member is entitled to receive one free copy of the police report and the minute entry or transcript “that arises out of the offense committed against the victim and that is reasonably necessary for the purpose of pursuing a claimed victim’s right.” A.R.S. § 39-127(A).

While some public bodies have attempted to impose prohibitively high fees to discourage requests under the law, the media has succeeded in challenging and reducing such fees. *Cf. Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 79-80, 927 P.2d 340, 345-46 (Ct. App. 1996) (finding the high costs imposed by A.R.S. § 16-168(E) for producing voter registration lists was reasonable because “[it] cannot sit as a super-legislature to determine the wisdom, the necessity, or the inconvenience of a legislative enactment”).

## Commercial Purpose:

A “commercial purpose” is defined as

the use of a public record for the purpose of sale or resale or for the purpose of reproducing 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.

A.R.S. § 39-121.03(D).

A person requesting copies, printouts or photographs of public records for a commercial purpose “shall provide a statement setting forth the commercial purpose for which the copies, printouts or photographs will be used.” A.R.S. § 39-121.03(A). Upon receiving the statement, the custodian of records may provide reproductions for a charge consisting of the following:

1. A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.
3. The value of the reproduction on the commercial market as best determined by the public body.

A.R.S. § 39-121.03(A).

If records are used for a commercial purpose when obtained for a noncommercial purpose or for another commercial purpose, the person in addition to other penalties may be liable for (1) three times the amount charged for the records, plus costs and reasonable attorneys’ fees, or (2) three times actual damages if the public records would not have been disclosed for that specific commercial purpose. A.R.S. § 39-121.03(C).

Arizona media consistently have taken the position that journalists involved in newsgathering activities are not seeking records for a “commercial purpose.” The Superior Court and Arizona Attorney General have agreed with that position. *Media America Corp. v. Phoenix Police Dep’t*, 21 Media L. Rep. (BNA) 2087 (Maricopa County Super. Ct. 1993); Ariz. Att’y. Gen. Op. No. I86-90. In addition, the Arizona Court of Appeals has stated that “[l]earning facts from public records that might inform one on a daily occupation or might be newsworthy would not be a commercial purpose.” *Star Publ’g Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837, 838 (Ct. App. 1993).

### E. Who enforces the act?

#### 1. Attorney General’s role.

Not addressed.

#### 2. Availability of an ombudsman.

In Arizona, any citizen may complain to the Office of the Ombudsman-Citizens Aide regarding the actions of an agency. A.R.S. §§ 41-1371 to -1378. In response to a complaint, the Ombudsman-Citizens Aide has the power to investigate the administrative acts of agencies and make recommendations to the governor, the legislature, and/or the appropriate prosecutor. A.R.S. §§ 41-1376 to -1378. Certain governmental entities, including the governor, attorney general, state treasurer and secretary of state, are exempt from this law. A.R.S. § 41-1372.

### 3. Commission or agency enforcement.

Not addressed.

#### F. Are there sanctions for noncompliance?

A person wrongfully denied access to public records “has a cause of action against the officer or public body for any *damages* resulting from the denial.” A.R.S. § 39-121.02(C) (emphasis added).

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

#### 1. Character of exemptions.

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

##### a. General or specific?

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

##### b. Mandatory or discretionary?

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

##### c. Patterned after federal Freedom of Information Act?

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

#### 2. Discussion of each exemption.

There are no specific exceptions to disclosure codified in the Arizona Public Records Law.

### B. Other statutory exclusions.

Arizona’s Public Records Law appears all-encompassing, but numerous separate statutes reduce its impact by deeming several records “confidential.” Generally, the records of certain professional groups, legal proceedings, law enforcement agencies and health facilities are classified as confidential. Several statutes are discussed topically, but there may be other statutes that are applicable to other records.

Moreover, the Public Records Law does not require the disclosure of public records or other matters pertaining to the “location of archaeological discoveries” or “places or objects that are included on or may qualify for inclusion on the Arizona register of historic places[,] . . . if the officer determines that the release of the information creates a reasonable risk of vandalism, theft or other damage” to these places or items. A.R.S. § 39-125.

### C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

The Arizona Supreme Court has recognized three common law circumstances in which documents can be withheld: (i) confidentiality, (ii) privacy or (iii) disclosure against the best interest of the state. *See Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. “If these interests outweigh the public’s right of inspection, the [public body] can properly refuse inspection. The [public body] bears the burden of overcoming the legal presumption favoring disclosure.” *See Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broad. Co.*, 191 Ariz. 297, 300, 955 P.2d 534, 537 (1998) (citation and internal quotation marks omitted).

Arizona Courts also have on occasion looked to the exceptions contained in the federal Freedom of Information Act for guidance. *Church of Scientology v. City of Phoenix Police Dep’t*, 122 Ariz. 338, 340,

594 P.2d 1034, 1036 (Ct. App. 1979); see *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539 n.3, 177 P.3d 275, 280 n.3 (Ct. App. 2008); see also *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258, 806 P.2d 348, 352 (1991); *Salt River Pima-Maricopa Indian Cmty.*, 168 Ariz. at 540-41, 815 P.2d at 909-10.

**D. Are segregable portions of records containing exempt material available?**

Yes.

**E. Homeland Security Measures.**

“Nothing in this chapter requires the disclosure of a risk assessment that is performed by or on behalf of a federal agency to evaluate critical energy, water or telecommunications infrastructure to determine its vulnerability to sabotage or attack.” A.R.S. § 39-126.

**III. STATE LAW ON ELECTRONIC RECORDS**

**A. Can the requester choose a format for receiving records?**

No Arizona statute or case addresses this issue. As a matter of practice, reporters have been able to choose a format for receiving records. If a record is requested in its native format, the public body must provide it in that format. See *Lake v. City of Phoenix*, 222 Ariz. 547, 551, 218 P.3d 1004, 1008 (2009).

**B. Can the requester obtain a customized search of computer databases to fit particular needs?**

No Arizona statute or case addresses this issue.

**C. Does the existence of information in electronic format affect its openness?**

No. *Star Publ'g*, 181 Ariz. at 433-34, 891 P.2d at 900-01. Indeed, “if a public entity maintains a public record in an electronic format, then the electronic version, including any embedded metadata, is subject to disclosure under [Arizona’s] public record laws.” *Lake*, 222 Ariz. at 548, 218 P.3d at 1005.

**D. How is e-mail treated?**

Emails on a government computer system that pertain to government business are public records. See *Griffis*, 215 Ariz. at 5, 156 P.3d at 422. But emails relating solely to personal matters will not have “the requisite substantial nexus to government activities” and therefore are not subject to disclosure. *Id.*

**1. Does e-mail constitute a record?**

Yes.

**2. Public matter on government e-mail or government hardware**

See Section III(D) above.

**3. Private matter on government e-mail or government hardware**

See Section III(D) above.

**4. Public matter on private e-mail**

Arizona courts look at the nature and purpose of the document, not whether it is on a private or public email, to determine whether it is a public record. *Griffis*, 215 Ariz. at 4, 156 P.3d at 421.

**5. Private matter on private e-mail**

Documents that are of a “purely private or personal nature” are not public records. *Griffis*, 215 Ariz. at 4, 156 P.3d at 421.

**E. How are text messages and instant messages treated?**

Arizona courts have not addressed text messages and instance mes-

sages, but the same that applies to email in Section III(D) above would likely apply to text messages and instant messages.

**F. How are social media postings and messages treated?**

Not addressed.

**G. How are online discussion board posts treated?**

Not addressed.

**H. Computer software**

No Arizona statute or case addresses this issue.

**1. Is software public?**

No Arizona statute or case addresses this issue.

**2. Is software and/or file metadata public?**

No Arizona statute or case addresses this issue.

**J. Money-making schemes.**

Not addressed in the statute.

**1. Revenues.**

Not addressed in the statute.

**2. Geographic Information Systems.**

Not addressed in the statute.

**K. On-line dissemination.**

No statute governs online dissemination

**IV. RECORD CATEGORIES — OPEN OR CLOSED**

**A. Autopsy reports.**

Autopsy reports are not “vital records” that are confidential under A.R.S. § 36-342. See A.R.S. § 36-301(33) (defining vital records as either “a registered birth certificate or a registered death certificate”). A.R.S. § 11-597 does not prohibit disclosure of autopsy reports, but it only expressly provides for disclosure to county attorneys. In contrast, A.R.S. § 23-1072(A) expressly provides that the pathologist’s findings become part of the public record when the Industrial Commission of Arizona orders the performance of the autopsy.

In *Parks*, the court held that “autopsy reports are public records under A.R.S. §§ 11-594 and -597” and that the Pima County Forensic Center could not hold up disclosure pending notification of relatives unless it can point to “specific risks with respect to a specific disclosure.” 178 Ariz. at 605, 875 P.2d at 838. Although autopsy reports, autopsy photographs, and investigative materials are public records, a court must conduct an in camera review to balance competing interests before permitting the release of any documents because they “inherently raise significant privacy concerns.” *Schoeneweis v. Hammer*, 223 Ariz. 169, 173, 175-76, 221 P.3d 48, 52, 54-55 (Ct. App. 2009).

**B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)**

“[T]he records of the Industrial Commission’s proceedings, orders and awards must be considered as public records[,] . . . [b]ut information which is not collected to serve as a memorial of an official transaction or for dissemination of information is private except as to a claimant or parties” as defined by statute. *Indus. Comm’n v. Holoban*, 97 Ariz. 122, 126, 397 P.2d 624, 627 (1964).

When investigating minimum wage violations, all payroll or other business records obtained by the Industrial Commission or a law enforcement officer will be kept confidential, unless required by the prosecution. A.R.S. § 23-364(D).

### C. Bank records.

All records of the State Banking Department are *not* public records and cannot be disclosed except to certain specified persons. A.R.S. § 6-129.

But A.R.S. § 6-129.01 provides that all documents filed by enterprises with the State Banking Department are open to public inspection, except for any information the superintendent determines in his judgment must be withheld for the public welfare or for the welfare of the financial enterprise. An “enterprise” is defined as any person under the jurisdiction of the department other than “banks, trust companies, savings and loan associations, credit unions, consumer lenders, international banking facilities and financial institution holding companies” under the department’s jurisdiction. *See* A.R.S. § 6-101(6), (8).

### D. Budgets.

Water facilities districts will keep several records, including its annual budget, open to inspection by the public. A.R.S. § 48-5913(A)(4).

### E. Business records, financial data, trade secrets.

No specific statute generally exempts business records, financial data or trade secrets from the rule favoring disclosure of public records in Arizona. In several areas, however, records, trade secrets and proprietary data have been protected by individual statutes. *See, e.g.*, A.R.S. § 3-374(A)(1) (pesticide control); A.R.S. § 27-112(A) (geologic, engineering and feasibility studies); A.R.S. § 27-234(H) (lease of state lands for mineral claims); A.R.S. § 27-571 (well records); A.R.S. § 28-7707(A) (public-private partnerships in transportation); A.R.S. § 30-808 (electric retail competition information); A.R.S. § 49-487(C)(1) (air pollution); A.R.S. § 49-928(A)(1) (hazardous waste); A.R.S. § 49-967(A)(1) (pollution prevention); A.R.S. § 49-1012(A) (underground storage tanks).

In *Ariz. Portland Cement Co. v. Ariz. State Tax Court*, 185 Ariz. 354, 357, 916 P.2d 1070, 1073 (Ct. App. 1995), the court held that a taxpayer’s private business records, which were disclosed to the county assessor to protest the assessed valuation of its business property, remained confidential and were not subject to A.R.S. § 39-121. Furthermore, to the extent that the court turned to the Freedom of Information Act for guidance in *Church of Scientology*, 122 Ariz. at 340, 594 P.2d at 1036, certain records containing trade secrets or commercial or financial information might be exempted from disclosure. *See* 5 U.S.C. § 552b(4).

### F. Contracts, proposals and bids.

Contracts, proposals and bids are usually only confidential until a contract is awarded, unless the bidder designates and the state concurs that trade secrets or other proprietary data must remain confidential. *See* A.R.S. § 34-603(H) (procurement of professional services); A.R.S. § 28-7366(G) (construction services); A.R.S. § 28-7367(G) (multiple contracts for construction services); A.R.S. § 41-2533(D) (procurement project bids); A.R.S. § 41-2534(D) (procurement project proposals); *see also* A.R.S. § 38-658(A) (information reviewed by the Joint Legislative Budget Committee regarding health plans for state employees); A.R.S. § 41-401(L) (deliberations of the Joint Legislative Budget Committee and the Constitutional Defense Council about legal expenses that will exceed \$50,000).

### G. Collective bargaining records.

No reported decisions.

### H. Coroners reports.

*See* Autopsy Reports.

### I. Economic development records.

Information regarding the assistance provided by the Economic Development Commission is a public record, unless it would reveal the applicant’s trade secrets or “cause substantial harm to the appli-

cant’s competitive position.” A.R.S. §§ 41-1505.06(G), 41-1505.07(J).

### J. Election records.

#### 1. Voter registration records.

A registration form constitutes an official public record once completed and signed by the elector and received by the county recorder. A.R.S. § 16-161. But certain public officials and victims of domestic violence can prevent the general public from accessing their residential address, telephone number, and voting precinct number by filing an affidavit with the state. A.R.S. § 16-153; *see Primary Consultants, L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, 397-98, 111 P.3d 435, 439-40 (Ct. App. 2005) (noting that voter registration records are public records subject to certain restrictions).

A form showing a declination to register to vote is confidential and may be used only for voter registration purposes. A.R.S. § 16-140I. Moreover, public access is prohibited to the death records sent by the Department of Health Services to the Secretary of State for purposes of removing deceased persons from the statewide voter registration database. A.R.S. § 16-165(D).

#### 2. Voting results.

No partial or complete tallies of early elections will be divulged before all precincts have reported or one hour after the polls close on election day, whichever occurs first. A.R.S. § 16-551I. The official canvass of an election becomes part of the public record and is kept by the Secretary of State, the appropriate city and town clerks, or the clerk of the board of supervisors. A.R.S. § 16-646(B), (D).

Code marks on ballots used in the primaries or general election cannot be “marked in any manner that will disclose the identity of the voter who votes that ballot.” A.R.S. §§ 16-466(B), 16-468(2).

The Arizona Secretary of State’s report that includes “information on the number of ballots transmitted to absent uniformed services voters and overseas voters and the number of ballots returned and cast in the election” is available to the public. A.R.S. § 16-142(B).

### K. Gun permits.

Information and records maintained by the Department of Public Safety on applicants for a concealed weapon permit, permit holders, and instructors “shall not be available to any other person or entity except on an order from a state or federal court.” A.R.S. § 13-3112(J).

### L. Hospital reports.

“Unless otherwise provided by law, all medical records . . . are privileged and confidential.” A.R.S. § 12-2292. “Medical record” includes “all communications related to a patient’s physical or mental health or condition that are recorded in any form or medium and that are maintained for purposes of patient diagnosis or treatment, including medical records that are prepared by a health care provider or by other providers.” A.R.S. § 12-2291(5). Thus, medical or other records containing personally identifiable information may only be disclosed pursuant to statute. *See, e.g.*, A.R.S. § 36-160(A) (state or county home health services); A.R.S. § 36-404(A)(2) (health care institutions); A.R.S. § 36-568.01 (developmental disabilities); A.R.S. § 36-509 (behavioral health); A.R.S. § 36-664(F) (communicable diseases); A.R.S. § 36-887(B) (child care facilities); A.R.S. § 36-897.12 (child care group homes); A.R.S. § 36-2152 (parental consent or court proceedings pertaining to unemancipated minors who want abortions); A.R.S. § 36-2220 (emergency medical services).

“The governing body of each licensed hospital or outpatient surgical center shall require that physicians admitted to practice in the hospital or center organize into committees or other organizational structures to review the professional practices within the hospital or center for the purposes of reducing morbidity and mortality and for the improvement of the care of patients provided in the institution.” A.R.S. § 36-445. All proceedings, records, and materials prepared

in connection with these peer reviews are confidential. A.R.S. § 36-445.01.

Many health care related boards acquire hospital and medical records during their investigations; these records are often statutorily protected as confidential. *See, e.g.*, A.R.S. § 32-1451.01(E) (Arizona Medical Board); A.R.S. § 32-1551.01 (Naturopathic Physicians Medical Board); A.R.S. § 32-1664(M) (Board of Nursing); A.R.S. § 36-2245(M) (Department of Health Service's oversight of ambulance services); A.R.S. § 32-3553(K) (Board of Respiratory Care). Not only are the Arizona Medical Board's investigative files not subject to A.R.S. § 39-121, they are absolutely privileged and not discoverable in civil litigation. *Ariz. Bd. of Med. Exam'rs v. Superior Court*, 186 Ariz. 360, 361-62, 922 P.2d 924, 925-26 (Ct. App. 1996); *but see State v. Ditsworth*, 216 Ariz. 339, 342, 166 P.3d 130, 133 (Ct. App. 2007) (finding that § 32-1451(O) requires the Arizona Medical Board to make investigatory evidence available to the appropriate criminal justice agency if it "determines that a criminal violation may have occurred involving the delivery of health care").

Several statutes delegate the authority to form rules of confidentiality about health care records. *See, e.g.*, A.R.S. § 36-107 (giving the Department of Health Services the power to designate confidentiality), A.R.S. § 36-2903(I) (directing the Director of the Arizona Health Care Cost Containment System to "prescribe by rule the types of information that are confidential and circumstances under which such information may be used or released").

Disclosures of medical records also need to comply with the HIPAA privacy regulations. *See* 45 C.F.R. Parts 160, 162 & 164. Similarly, records maintained in connection with the performance of a program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research that is regulated or directly or indirectly assisted by the United States government must comply with the regulations implementing the federal substance abuse law. *See* 42 C.F.R. Part 2.

#### M. Personnel records.

With respect to other information in personnel records, the Arizona Supreme Court has found that individuals' privacy interests can put portions of public personnel files beyond the reach of A.R.S. § 39-121 if those interests outweigh the public's right of inspection. *See Scottsdale Unified School Dist.*, 191 Ariz. at 302-03, 955 P.2d at 539-40 (determining that the public interest in disclosure of the teachers' birth dates was speculative and did not override the privacy interest of the teachers); *Bolm*, 193 Ariz. at 39-40, 969 P.2d at 204-05 (finding that the trial court appropriately concluded that the police department's hiring and official records, but not personnel evaluations or internal affairs records, were subject to disclosure).

##### 1. Salary.

An Arizona court has recognized that payroll records of public employees are public records. *See Phoenix New Times*, 217 Ariz. at 544, 177 P.3d at 286.

##### 2. Disciplinary records.

A public body must provide access to "all records that are reasonably necessary or appropriate to maintain an accurate knowledge of disciplinary actions, including the employee responses to all disciplinary actions, involving public officers or employees of the public body." A.R.S. § 39-128(A). But the public body is not required to disclose any person's home address, home telephone number, or photograph. A.R.S. § 39-128(B).

##### 3. Applications.

In *Bolm v. Custodian of Records of Tucson Police Dep't*, the court held that the police department's disclosure of hiring and official records was proper. 193 Ariz. 35, 969 P.2d 200 (Ct. App. 1998).

For multiple professional groups, the law provides that applica-

tion information in a state board's possession cannot be revealed. *See, e.g.*, A.R.S. § 32-129(A) (architects), A.R.S. § 32-825(F) (podiatrists), A.R.S. § 32-1209 (dentists), A.R.S. § 32-1310(A) (embalmers), A.R.S. § 32-1746 (optometrists), A.R.S. § 32-2214(F) (veterinarians).

#### 4. Personally identifying information.

The Arizona Public Records Law does not require "disclosure from a personnel file by a law enforcement agency or employing state or local governmental entity of the home address or home telephone number of eligible persons." A.R.S. § 39-123(A); *see* A.R.S. § 39-123(F) (4) (defining "eligible person" to include, among others, "a peace officer, justice, judge, commissioner, public defender, prosecutor, code enforcement officer, adult or juvenile corrections officer, corrections support staff member, probation officer, member of the board of executive clemency, law enforcement support staff member" and domestic violence victims). In addition, a law enforcement agency can only release a photograph of a peace officer under certain specified conditions. A.R.S. § 39-123(C).

The names of prospects for university president, and presumably other high-level positions in public agencies, are confidential as revealing this information "could chill the best possible candidates for the position." *Ariz. Bd. of Regents*, 167 Ariz. at 258, 806 P.2d at 352. But "[c]andidates who actively seek a job run the risk of their desire becoming public knowledge" and therefore their names can be released to the media. *Id.*

"The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure" to the public. A.R.S. § 13-757I.

#### N. Police records.

The release of police records is governed by the Arizona Public Records Law. *See Little v. Gilkinson*, 130 Ariz. 415, 416, 636 P.2d 663, 664 (Ct. App. 1981) ("Although many states exempt police investigatory reports from their public-records access statutes, Arizona does not.").

##### 1. Accident reports.

Accident reports are available for review for a non-commercial purpose. However, a law enforcement agency "[s]hall not allow a person to examine the [motor vehicle] accident report or any related investigation report or a reproduction of the accident report or a related investigation report if the request is for a commercial solicitation purpose." A.R.S. § 28-667I(1) (emphasis added).

##### 2. Police blotter.

Not addressed.

##### 3. 911 tapes.

Tapes of 911 calls are available to the public, "unless the government puts forward an interest that justifies withholding access" to the tapes. *See A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, 187, 42 P.3d 615, 618 (Ct. App. 2002) (finding that the privacy of the injured child and his family were sufficient countervailing interests to preclude release of a 911 tape). When transcripts of the calls are available, the public interest in the tapes is decreased because the same information is available by alternate means. *Id.* at 188, 42 P.3d at 188 (noting that the television station did not argue that "the tape advances the purpose of the Public Records Act in any way that the transcript does not satisfy").

##### 4. Investigatory records.

In *Cox Arizona Publications Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1998 (1993), the Arizona Supreme Court reversed the court of appeals' ruling that the public is not entitled to examine police reports in "an active ongoing criminal prosecution." The Arizona Supreme Court held that such a "blanket rule . . . contravenes the strong policy

favoring open disclosure and access.” Thus, public officials bear the “burden of showing the probability that specific, material harm will result from disclosure” before it may withhold police records. *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

However, A.R.S. § 13-2813 prohibits disclosing “an indictment, information or complaint . . . before the accused person is in custody or has been accused.”

#### a. Rules for active investigations.

“[R]eports of ongoing police investigations are not generally exempt from [Arizona’s] public records law,” so they must be disclosed unless the law enforcement agency can “specifically demonstrate how production of the documents would violate rights of privacy or confidentiality, or would be detrimental to the best interests of the state.” *Cox Ariz. Publ’ns*, 175 Ariz. at 14, 852 P.2d at 1198 (internal quotation marks omitted).

### 5. Arrest records.

If accused, the arrest record of a juvenile who has been referred to juvenile court is open for public inspection. A.R.S. § 8-208(A). Arrest reports of other offenders are public records. *Phoenix New Times*, 217 Ariz. at 545, 177 P.3d at 287.

### 6. Compilations of criminal histories.

Criminal histories maintained by the Board of Fingerprinting are exempt from the Arizona Public Records Law, except for a report that provides the number of applications for a good cause exception and the number of applications that were granted. A.R.S. § 41-619.54.

### 7. Victims.

A crime victim or immediate family member is entitled to one free copy of the police report and any applicable minute entry and transcript. A.R.S. § 39-127(A).

### 8. Confessions.

Confessions in police records are public records and thus presumed open for inspection and copying.

### 9. Confidential informants.

“A record of a communication between a person submitting a report of criminal activity to a silent witness, crime stopper or operation game thief program . . . is not a public record.” A.R.S. § 12-2312.

### 10. Police techniques.

Wiretapping activity cannot be revealed except to specific public officials involved in the investigation. A.R.S. § 13-3011.

### 11. Mug shots.

Mug shots are public records and thus presumed open for inspection and copying.

### 12. Sex offender records.

The Department of Public Safety maintains a website for sexual offenders who have been given a level two or level three risk assessment. A.R.S. § 13-3827(A). The website will provide (1) the offender’s name, address, and age, (2) a current photograph, and (3) the offense committed and notification level. *Id.* After a sexual offender has been released from confinement, the local law enforcement agency will notify the community of the offender’s presence. A.R.S. § 13-3825(C).

### 13. Emergency medical services records.

With some exceptions, information, records, and data pertaining to the administration or evaluation of the Arizona emergency medical services system or trauma system are open to the public. A.R.S. § 36-2220(A). Prehospital incident history reports also are available to the public provided confidential or other protected information is removed. A.R.S. § 36-2220(C). But medical records or other records

containing personally identifiable information may not be released unless required by law or pursuant to authorization. A.R.S. § 36-2220(A)(1), (B).

### O. Prison, parole and probation reports.

All records pertaining to the care and custody of prisoners are open to public inspection, except those portions that reveal the identity of a confidential informant, endanger a person’s life or physical safety, or jeopardize an ongoing criminal investigation. A.R.S. § 31-221I; *see, e.g., KPNX-TV*, 183 Ariz. at 593, 905 P.2d at 602 (determining that the state has a legitimate security concern about disclosing a videotape showing undercover officers because of the risk, however slight, that they might be harmed).

A prisoner’s medical history, however, is confidential and may be used only in accordance with A.R.S. § 41-1606(B) and other applicable laws.

### P. Public utility records.

“No information furnished to the [Arizona Corporation Commission] by a public service corporation, except matters specifically required to be open to public inspection, shall be open to public inspection or made public except on order of the commission . . . or by the commission or a commissioner in the course of a hearing or proceeding.” A.R.S. § 40-204I. A plan for constructing a new plant in Arizona “is not open to public inspection and shall not be made public if disclosure of the information in the plan could give a material advantage to competitors.” A.R.S. § 40-360.02(D).

Schedules containing rates that are filed with the commission are open for public inspection. A.R.S. §§ 40-365, 40-367(B).

A.R.S. § 27-522(B) provides that records of an oil or gas well drilled in unproven territory shall be confidential for one year after completion of the drilling.

### Q. Real estate appraisals, negotiations.

No case law.

#### 1. Appraisals.

No case law.

#### 2. Negotiations.

No case law.

#### 3. Transactions.

Public notice, which includes the legal description, must be provided of all proposed sales and exchanges of state lands. A.R.S. §§ 37-237, 37-604I(7). In addition, all purchase offers for real property being disposed of by a state agency are public. A.R.S. § 37-803(B)(2).

Information submitted by lessees of state lands to the state land department is confidential and not subject to public inspection, unless it pertains to the land. A.R.S. § 37-282.

### R. School and university records.

The Public Records Law governs access to athletic, trustee and student records generally.

Access to certain educational records is controlled by federal law. A.R.S. § 15-141.

Some assessment and investigation records are specifically exempt from the Public Records Law.

A.R.S. §§ 15-350(A) and (B) provide that the Board of Education’s records from an immoral or unprofessional conduct investigation are “confidential and are not a public record.” However, the board can provide these records to the school that currently employs that individual.

A.R.S. § 15-537(G) provides that “assessment and evaluation reports of a certificated teacher . . . are confidential [and] do not constitute a public record . . . .” However, these records can be revealed to the certificated teacher or in an official proceeding regarding that individual’s employment.

§ 15-551(A), (C) provide that the identity of any student who participates in a hearing regarding the discipline or dismissal of a teacher will be kept confidential.

In *Arizona Board of Regents v. Phoenix Newspapers Inc.*, the court drew a distinction between a “prospect,” whose name was not subject to disclosure, and a “candidate,” whose was. The court stated that “the public’s interest in ensuring the state’s ability to secure the most qualified candidates for the university president’s position is more compelling than its interest in, or need to know, the names of all of the prospects,” but held that releasing the names of the 17 final candidates served “the public’s legitimate interest” and thus outweighed the candidates’ countervailing interests of privacy and confidentiality. 167 Ariz. 254, 258, 806 P.2d 348, 352.

“The right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational and privacy rights act of 1974 . . . and federal regulations issued pursuant to such act.” A.R.S. § 15-141(A). The Family Educational Rights and Privacy Act of 1974 (“FERPA”) and associated regulations only permit disclosure of educational records with written parental consent, to comply with a judicial order, or pursuant to a lawfully issued subpoena. See *Catrone v. Miles*, 215 Ariz. 446, 452-53, 160 P.3d 1204, 1210-11 (Ct. App. 2007) (citing 20 U.S.C. § 1232g (2000 & Supp. 2006) and 34 C.F.R. § 99.31(a)(9)(i) (July 1, 2006 and Oct. 13, 2006)).

### 3. Student records.

Student records are not public records. See *Congress Elementary Sch. Dist. No. 17 of Yavapai County v. Warren*, 2011 WL 1206192, at \*1 n.2 (Ct. App. Mar. 31, 2011).

### 4. Other.

A.R.S. § 15-746 provides that additional copies of school report cards, which include (among other things) a summary of the student results, the school’s current expenditures, the attendance rate, law enforcement contacts, and percentage of students graduating to the next level or from high school, “shall be available on request.”

The following university records are exempt from the Arizona Public Records Law: (1) intellectual property or trade secrets, (2) historical records or materials, if restricted access was a condition of donation, and (3) records pertaining to donors or potential donors, other than the name, description, date, amount, and condition of donations. A.R.S. § 15-1640.

### S. Vital statistics.

Vital records are confidential and can only be disclosed in accordance with the statute. A.R.S. § 36-342; see *Schoeneweis*, 223 Ariz. at 174-75, 221 P.3d at 53-54 (determining that death certificates cannot be released to the general public). A “vital record” is defined as either “a registered birth certificate or a registered death certificate.” A.R.S. § 36-301(33).

## V. PROCEDURE FOR OBTAINING RECORDS

### A. How to start.

#### 1. Who receives a request?

Requests to inspect public records should be directed to the public “officer” who maintains custody of the documents. While some agencies may have freedom of information officers assigned to disclosure requests, it is advisable also to direct such requests to the “person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, super-

intendent or chairman of any public body.” A.R.S. § 39-121.01(A)(1).

### 2. Does the law cover oral requests?

#### a. Arrangements to inspect & copy.

The Arizona Public Records Law no longer requires the submission of a written request for “non-commercial” matters.

#### b. If an oral request is denied:

If a request is denied, the person should submit a written request for access to the documents to the head of the applicable agency.

### 3. Contents of a written request.

The request should be drafted narrowly, identifying the documents to be inspected with as precisely as possible.

#### d. Can the request be for future records?

A person may make “an ongoing request for disclosure of a narrowly defined, clearly identifiable category of to-be-created [public records].” *West Valley View, Inc. v. Maricopa County Sheriff’s Office*, 216 Ariz. 225, 229, 165 P.3d 203, 207 (Ct. App. 2007) (future press releases).

### B. How long to wait.

Since the Arizona Public Records Law mandates that “[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours,” the law creates a presumption in favor of immediate access to the documents. A.R.S. § 39-121. A.R.S. § 39-121.01(E) also provides that “[a]ccess to a public records is deemed denied if a custodian fails to promptly respond to a request for production of a public record.”

“Although Arizona law requires that the documents be promptly furnished, it does not specify a specific number of days from the request by which time a public body must furnish the documents.” *Phoenix New Times*, 217 Ariz. at 538, 177 P.3d at 280. Courts, therefore, have relied on a dictionary definition of “promptly” to require that public records be produced “at once or without delay.” *West Valley View*, 216 Ariz. at 230, 165 P.3d at 208. But they recognize that “whether a government agency’s response to a wide variety of document requests was sufficiently prompt will ultimately be dependent upon the facts and circumstances of each request.” *Phoenix New Times*, 217 Ariz. at 538, 177 P.3d at 280 (citation and internal quotation marks omitted); *but see id.* at 541, 177 P.3d at 283 (noting that “evidence of inattentiveness on the part of the public body does not establish the promptness of a response”). Some requests will require more time for the custodian to locate the records or to review and determine whether certain information should be deleted from them.

### 3. Is delay recognized as a denial for appeal purposes?

Yes. See *Phoenix New Times*, 217 Ariz. at 538, 177 P.3d at 280 (stating the failure to promptly produce records in response to a request constitutes a denial of access to public records and gives the superior court discretion to award attorneys’ fees).

### C. Administrative appeal.

There is no requirement that an administrative appeal be submitted prior to the initiation of a lawsuit.

#### 2. To whom is an appeal directed?

#### 4. Contents of appeal letter.

### D. Court action.

#### 1. Who may sue?

“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).

## 9. Litigation expenses.

### a. Attorney fees.

Before it was amended in 2006, A.R.S. § 39-121.02(B) provided for an award of attorneys’ fees against the records custodian if the custodian’s actions were “arbitrary, capricious, or in bad faith.” The current statute provides that “[t]he 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.” A.R.S. § 39-121.02(B). Accordingly, attorneys’ fees and costs can now be assessed against any non-prevailing party. *Arpaio v. Citizen Publ’g Co.*, 221 Ariz. 130, 133, 211 P.3d 8, 11 (Ct. App. 2008). Specifically, the statute “does not prohibit a trial court from requiring a party other than the custodian of the requested records to pay attorney fees to the prevailing party. The trial court may require parties adverse to the requesting party to pay that party’s attorney fees if the requesting party substantially prevails.” *Id.* at 134, 211 P.3d at 12.

## 11. Other penalties.

If wrongfully denied access to public records, the person also “has a cause of action against the officer or public body for any damages resulting from the denial.” A.R.S. § 39-121.02(C) (emphasis added).

### E. Appealing initial court decisions.

Pursuant to the rules governing special actions in Arizona, the denial of access through a special action may be pursued in the Court of Appeals or the Arizona Supreme Court in appropriate circumstances.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state’s highest court.

### F. Addressing government suits against disclosure.

Not addressed.

# Open Meetings

## I. STATUTE — BASIC APPLICATION.

### A. Who may attend?

“All persons so desiring shall be permitted to attend and listen to the deliberations and proceedings” of any public meeting. A.R.S. § 38-431.01(A). The Open Meetings Law (“OML”), however, does not provide for active public participation in the meeting. Ariz. Att’y Gen. Op. Nos. I84-133, I83-49.

Meetings may not be conducted in a language (e.g., Navajo) if its use prevents the public from understanding the business of the meeting. Ariz. Att’y Gen. Op. No. I84-133.

### B. What governments are subject to the law?

The OML applies to the state as well as “*all political subdivisions of the state*” which includes without limitation “all counties, cities and towns, school districts and special districts.” A.R.S. § 38-431(5).

### C. What bodies are covered by the law?

The Arizona OML applies to “any public body.” A.R.S. § 38-431.01(A).

“Public body” is defined as

the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

A.R.S. § 38-431(6). What constitutes a “public body” is fairly expansive and may turn on unique facts or circumstances. For example, what constitutes “institutions and instrumentalities of the state or political subdivision” might depend heavily on the relationship between the body and the political subdivision.

#### 1. Executive branch agencies.

Agencies headed by a single director are *not* subject to the OML because there is no multi-member body making decisions. Decisions are made by the director or Governor. *See* Ariz. Att’y Gen. Op. No. 75-7.

But if the Governor or agency head appoints a committee or board (*see* A.R.S. § 38-431(1)), there is debate as to whether any meeting by that body is a public meeting. *See* Ariz. Att’y Gen. Op. No. 75-7. Attorney General Opinions conflict on this issue. *Compare* Ariz. Att’y Gen. Op. No. I90-013 (advisory committee appointed by Governor subject to OML) *with* Ariz. Att’y Gen. Op. No. I92-007 (advisory committee appointed by Governor not subject to OML).

#### 2. Legislative bodies.

The OML generally applies to the Legislature. A.R.S. § 38-431(6). But the OML does not apply to any “political caucus”—i.e., the consideration of party policy with respect to a particular legislative issue *without* reaching a collective decision, promise or commitment. A.R.S. § 38-431.08(A)(1). Attorney General Opinions conflict on this issue. *Compare* Ariz. Att’y Gen. Op. No. I90-013 (advisory committee appointed by Governor subject to OML) *with* Ariz. Att’y Gen. Op. No. I92-007 (advisory committee appointed by Governor not subject to OML).

Conference committees of the legislature must be open to the public but need not follow the notice and minute requirements of the OML. A.R.S. § 38-431.08(A)(2).

### 3. Courts.

Judicial proceedings are not covered by the OML. A.R.S. § 38-431.08(A)(1).

### 4. Nongovernmental bodies receiving public funds or benefits.

Arizona does *not* tie receipt of public funds directly to applicability of the OML.

### 5. Nongovernmental groups whose members include governmental officials.

The OML may apply depending on a variety of factors such as (a) the group's function or (b) who appointed the members and how they were appointed.

### 6. Multi-state or regional bodies.

The OML may apply depending on a variety of factors such as (a) the group's function or (b) who appointed the members and how they were appointed.

### 7. Advisory boards and commissions, quasi-governmental entities.

The OML applies to "all standing, special or advisory committees or subcommittees of, or appointed by, such public body." A.R.S. § 38-431(6).

The OML also applies to committees even if the committee members are not members of the public body. Ariz. Att'y Gen. Op. No. I80-202. "Advisory committees" are defined as "any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and 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).

OML applies to a quasi-judicial body, which is "a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims." A.R.S. § 38-431(7).

### 8. Other bodies to which governmental or public functions are delegated.

"Institutions" or "instrumentalities" of a public body, including without limitation "all *corporations and other instrumentalities* whose boards of directors are appointed or elected by the state or political subdivision" are subject to the OML. A.R.S. § 38-431(6) (emphasis added). To be an "institution," the entity must be "a creation of the law itself, . . . rather [than] the creation of a group of private individuals acting together as authorized by Arizona's statutes . . ." *Prescott Newspapers, Inc. v. Yavapai Cmty. Hosp. Ass'n*, 163 Ariz. 33, 39, 785 P.2d 1221, 1227 (Ct. App. 1989). An "instrumentality" must be "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ or subsidiary branch esp. of a governing body." *Id.* (quoting *Webster's Third New International Dictionary* 1172); see Ariz. Att'y Gen. Op. No. I07-001 (finding the Board of Trustees appointed to administer the Northern Arizona Employees Benefits Trust is an instrumentality of the participating political subdivisions and therefore falls within the definition of a public body).

### 9. Appointed as well as elected bodies.

As long as they fall within the definition of a public body, both appointed and elected bodies must comply with the OML. For example, the OML applies to the Finance Committee of the Board of Regents, Ariz. Att'y Gen. Op. No. I78-285, as well as the board of trustees of an employees' benefit-trust created by a school district board, Ariz. Att'y Gen. Op. No. I83-18.

## D. What constitutes a meeting subject to the law.

"All meetings" of public bodies, including "deliberations and proceedings," are subject to the OML. A.R.S. § 38-431.01(A). But "a communication with the media that may [subsequently] reach a quorum of the board's members is not a 'gathering' of the public body, and, for that reason, it is not a meeting." Ariz. Att'y Gen. Op. No. I07-013.

### 1. Number that must be present.

"Meeting" is defined as "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).

#### a. Must a minimum number be present to constitute a "meeting"?

"es. The OML does not apply if a quorum is not present.

#### b. What effect does absence of a quorum have?

Discussions and deliberations between less than a quorum, when used to circumvent the purposes of the OML, would constitute a violation of the OML. Ariz. Att'y Gen. Op. No. 75-8.

### 2. Nature of business subject to the law.

#### a. "Information gathering" and "fact-finding" sessions.

"Information gathering" and "fact-finding" sessions may be covered by the OML if they would foreseeably aid in or require a decision by the body (i.e. constitute a "deliberation"). Ariz. Att'y Gen. Op. No. 75-8.

#### b. Deliberations toward decisions.

"Deliberations" are expressly included. A.R.S. §§ 38-431(4); 38-431.01(A).

### 3. Electronic meetings.

A "meeting" may occur in person or by using technological devices. A.R.S. § 38-431(4).

#### a. Conference calls and video/Internet conferencing.

A meeting for purposes of the OML also may occur by telephone or video conferencing. See Ariz. Att'y Gen. Op. I91-033.

#### b. E-mail.

"When members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML." Ariz. Att'y Gen. Op. I05-004.

#### c. Text messages.

The same reasoning that applies to email communications in Section I(D)(3)(b) above would apply to text messages as well.

#### d. Instant messaging.

The same reasoning that applies to email communications in Section I(D)(3)(b) above would apply to instant messages as well.

#### e. Social media and online discussion boards.

The same reasoning that applies to email communications in Section I(D)(3)(b) above would apply to social media and online discussion boards as well.

## E. Categories of meetings subject to the law.

### 1. Regular meetings.

#### a. Definition.

As noted above, “meeting” means “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).

#### b. Notice.

##### (1). Time limit for giving notice.

Other than an actual emergency, the notice of a meeting must be posted at least 24 hours in advance. A.R.S. § 38-431.02(C). “The twenty-four hour period includes Saturdays if the public has access to the physical posted location in addition to any website posting, but excludes Sundays and other holidays prescribed in section 1-301.” *Id.*

A meeting can be recessed and resumed with less notice than 24 hours if proper notice of meeting had been given and, if prior to recessing, “notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given.” A.R.S. § 38-431.02(E).

“A public body that intends to meet for a specified calendar period, on a regular day, date or event during the calendar period, and at a regular place and time, may post public notice of the meetings at the beginning of the period.” A.R.S. § 38-431.02(F).

##### (2). To whom notice is given.

Notice must be given to members of the public body and the general public. A.R.S. § 38-431.02(C).

##### (3). Where posted.

Notice for most public bodies must be provided as follows:

(a) Conspicuously post a statement on their website stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website and give additional public notice as is reasonable and practicable to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

A.R.S. § 38-431.02(A)(1), (2), and (4). Special districts formed pursuant to title 48 may comply with these requirements. A.R.S. § 38-431.02(A)(3).

##### (4). Public agenda items required.

Notice “shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda.” A.R.S. § 38-431.02(G).

Agendas “shall list the specific matters to be discussed, considered or decided at the meeting.” A.R.S. § 38-431.02(H). They must be available at least 24 hours before the meeting except in the case of an actual emergency. A.R.S. § 38-431.02(G).

Public bodies may only discuss, consider or decide those “matters listed on the agenda and other matters related thereto.” A.R.S. § 38-431.02(H). Nothing can be added to an agenda once a meeting has begun, not even by a majority vote of the public body (except in the case of an actual emergency). *Ariz. Att’y Gen. Op. No. I79-192.*

In cases of actual emergencies, however, matters not listed on the agenda can be discussed, considered, and decided at the public meeting. A.R.S. § 38-431.02(J). Moreover, the presiding officer or a member of the public body may summarize current events without listing the specific matters on the agenda, provided the summary is listed and the public body does not discuss or take legal action on any matter not properly noticed. A.R.S. § 38-431.02(H). In addition, public bodies also may make open calls to the public to discuss matters that fall within their jurisdiction. A.R.S. § 38-431.01(H).

##### (5). Other information required in notice.

None.

##### (6). Penalties and remedies for failure to give adequate notice.

Other than challenges to the validity of executive sessions, “the burden of proving a violation of the open meeting law generally is on the party asserting the violation.” *City of Prescott*, 166 *Ariz.* at 486 n.4, 803 P.2d at 897 n.4.

#### a. Penalties:

Arizona law provides for penalties for failure to comply with Notice and Agenda Requirements.

“All legal action transacted by any public body during a meeting held in violation of any provision of [the OML] is null and void” unless properly ratified by the public body. A.R.S. § 38-431.05(A) (emphasis added); *see Cooper v. Ariz. W. College Dist. Governing Bd.*, 125 *Ariz.* 463, 610 P.2d 465 (Ct. App. 1980); *Ariz. Att’y Gen. Op. No. I79-45*; *but see Ariz. Att’y Gen. Op. No. I80-001* (determining that “a violation of the OML during the meeting with respect to a single agenda item does not render all legal action taken with respect to other agenda items null and void”).

A technical violation or a “minor deviation,” however, will *not* nullify all business undertaken at a meeting when there is no demonstrated prejudicial effect on the complaining party and the meeting complies with the intent of OML. *Karol v. Bd. of Educ. Trustees*, 122 *Ariz.* 95, 98, 593 P.2d 649, 652 (1979); *see Ahmert v. Sunnyside Unified Sch. Dist. No. 12*, 126 *Ariz.* 473, 475, 616 P.2d 933, 935 (Ct. App. 1980). In addition, a matter that was inappropriately decided at an executive session may be corrected by a formal vote at a public meeting that complies with the OML. *See Valencia v. Cota*, 126 *Ariz.* 555, 557, 617 P.2d 63, 65 (Ct. App. 1980).

For any violation of the OML, the court may (1) award attorneys’ fees and costs in favor of plaintiff and against the public body, (2) impose up to \$500 in civil penalties against the person violating or knowingly aiding, agreeing to aid, or attempting to aid in the violation of the OML, and (3) remove the offending public officer from office and assess the officer and/or any person who knowingly aids, agrees to aid, or attempts to aid the officer with all costs and attorneys’ fees awarded to the plaintiff. A.R.S. § 38-431.07(A).

#### b. Ratification of actions done in violation of open meetings law:

Legal actions violating OML are usually null and void. A.R.S. § 38-431.05(A); *see, e.g., Thurston v. City of Phoenix*, 157 *Ariz.* 343, 345, 757 P.2d 619, 621 (Ct. App. 1988) (voiding otherwise lawful action taken by the city because the action was not on the meeting’s agenda).

A public body, however, may ratify any legal action taken in violation of the OML by complying with the following requirements:

1. Ratification shall take place at a public meeting within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.

2. The notice for the meeting shall include a description of the action to be ratified, a clear statement that the public

body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified.

3. The public body shall make available to the public a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action. The written description shall also be included as part of the minutes of the meeting at which ratification is taken.

4. The public body shall make available to the public the notice and detailed written description required by this section at least seventy-two hours in advance of the public meeting at which the ratification is taken.

A.R.S. § 38-431.05(B). A judicial determination that the public body took legal action in violation of the OML triggers the 30-day period for ratification. *See Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini*, 206 Ariz. 200, 208-10, 76 P.3d 874, 882-84 (Ct. App. 2003).

### c. Minutes.

“All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions.” A.R.S. § 38-431.01(B).

#### (1). Information required.

Minutes for regular meetings, not including executive sessions, must include at least:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.

A.R.S. § 38-431.01(B). Minutes must be sufficiently detailed to comply with statute but verbatim transcripts are not necessary. *Ariz. Att’y Gen. Op. No. I83-6.*

#### (2). Are minutes public record?

“The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting, except as otherwise specifically provided by this article.” A.R.S. § 38-431.01(D); *see* A.R.S. § 38-431.01(E) (providing specific time requirements for public bodies of cities and towns with populations of more than 2,500 persons).

### 2. Special or emergency meetings.

#### a. Definition.

Emergency meetings require an “actual emergency.” A.R.S. § 38-431.02(D), (J). The Arizona Court of Appeals requires that the emergency be “real” and “existing in fact,” not “nominal” or “‘constructive’ or merely ‘possible’ or ‘conceivable.’” *Carefree Improvement Ass’n v. City of Scottsdale*, 133 Ariz. 106, 113, 649 P.2d 985, 992 (Ct. App. 1982). An “emergency” is “an unforeseen combination of circumstances which call for immediate action.” *Id.*

Emergency executive sessions may also be held. A.R.S. § 38-431.02(D).

#### b. Notice requirements.

#### (1). Time limit for giving notice.

In the case of an actual emergency, the meeting “may be held on such notice as is appropriate to the circumstance.” A.R.S. § 38-431.02(D). But if an emergency session is conducted at a previously scheduled meeting, “the public body must post a public notice within twenty-four hours declaring that an emergency session has been held.” *Id.*

#### (2). To whom notice is given.

The public body must provide public notice that the emergency session was held. A.R.S. § 38-431.02(D).

#### (3). Where posted.

This public notice must be properly posted (like a notice for a regular meeting) and must include an agenda or, if an executive session, a general description of the matters considered. A.R.S. § 38-431.02(A), (D), (H), (I).

#### (4). Public agenda items required.

The agenda for an emergency meeting must include the same information as required for a regular meeting agenda. A.R.S. § 38-431.02(D), (H).

### c. Minutes.

Minutes must be taken for an emergency meeting. A.R.S. § 38-431.01(B).

#### (1). Information required.

Minutes must also include a statement setting forth the reasons why the emergency meeting was necessary. A.R.S. § 38-431.02(J).

#### (2). Are minutes a public record?

Yes. *See* A.R.S. § 38-431.01(D).

### 3. Closed meetings or executive sessions.

The public may be excluded from executive sessions. *See* A.R.S. § 38-431(2) (defining “executive session” as “a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.01.”). In addition to members of the public body, specific employees and appointees, and the auditor general, “only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.” *Id.*

#### a. Definition.

Executive sessions may only be hold for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. . . .
2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.
3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.
4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body’s position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.
5. Discussions or consultations with designated representatives

of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.

6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.

7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.

A.R.S. § 38-431.03(A); see *City of Prescott*, 166 Ariz. at 483, 803 P.2d at 894 (“This section is intended to establish an equilibrium between the public’s desire for access and the governmental agency’s need to act in private, short of reaching a collective decision, commitment or promise.”) (citation and internal quotation marks omitted); see also *Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 167, 962 P.2d 230, 241 (Ct. App. 1998) (determining that the board appropriately deliberated over confidential credit records in an executive session).

When the validity of an executive session is challenged, the burden shifts to the public body to prove that the executive session did not violate the OML. *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 122, 912 P.2d 1345, 1351 (Ct. App. 1995).

“Legal action involving a final vote or decisions shall not be taken at an executive session, but the public body may instruct its attorneys or representatives as provided in subsection A, paragraphs 4, 5 and 7 of this section.” A.R.S. § 38-431.03(D). A public body cannot hold an executive session merely because its attorney is present if the discussion is not for legal advice. *City of Prescott*, 166 Ariz. at 485, 803 P.2d at 896. [A] consultation between a governmental entity and its attorney for legal advice is not legal action involving a final vote or decision, and . . . a governmental entity may therefore meet in executive session with its attorney to receive legal advice.” *Id.* “However, once the members of the public body commence any discussion regarding the merits of enacting the legislation or what action to take based upon the attorney’s advice, the discussion moves beyond the realm of legal advice and must be open to the public.” *Id.* at 486, 803 P.2d at 897; see *Fisher*, 185 Ariz. at 124, 912 P.2d at 1353 (“It is the debate over what action to take, including the pros and cons and policy implications, of competing alternative courses of action, that must take place in public.”).

#### b. Notice requirements.

“[N]otice of executive sessions shall be required to include only a general description of the matters to be considered.” A.R.S. § 38-431.02(I). In *Shelby Sch.*, the court found that a motion containing broad language similar to A.R.S. § 38-431.03(A)(2) and (3) satisfied the notice requirements of A.R.S. § 38-431.02(I). 192 Ariz. at 167-68, 962 P.2d at 241-42. Except for cases of actual emergencies, “a public body shall not discuss any matter in an executive session which is not described in the notice of the executive session.” A.R.S. § 38-431.03(E).

##### (1). Time limit for giving notice.

Other than an actual emergency, the notice of a meeting must be posted at least 24 hours in advance. A.R.S. § 38-431.02(C). “The twenty-four hour period includes Saturdays if the public has access to the physical posted location in addition to any website posting, but excludes Sundays and other holidays prescribed in section 1-301.” *Id.*

A meeting can be recessed and resumed with less notice than 24 hours if proper notice of meeting had been given and, if prior to re-

cessing, “notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given.” A.R.S. § 38-431.02(E).

##### (2). To whom notice is given.

Notice of executive sessions must be given to the members of the public body and the general public. A.R.S. § 38-431.02(B).

##### (3). Where posted.

The same posting requirements as for regular meetings must be followed for executive sessions. A.R.S. § 38-431.02(A).

##### (4). Public agenda items required.

An agenda is also required for an executive session and must “provide more than just a recital of the statutory provisions authorizing the executive session, but need not contain information that would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee or compromise the attorney-client privilege.” A.R.S. § 38-431.02(I).

##### (5). Other information required in notice.

The notice must include “the provision of law authorizing the executive session.” A.R.S. § 38-431.02(B).

#### c. Minutes.

Written minutes or a recording of the session are required for all executive sessions by public bodies. A.R.S. § 38-431.01(B). But these minutes, as well as any discussions, are confidential subject to specific exemptions. A.R.S. § 38-431.03(B).

##### (1). Information required.

Executive session minutes must include the following:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.

A.R.S. § 38-431.01(B). In addition, the minutes must provide “an accurate description of instructions given” to its attorneys or representatives and “such other matters as may be deemed appropriate by the public body.” A.R.S. § 38-431.01(C).

##### (2). Are minutes a public record?

Minutes of executive sessions are kept confidential subject to specific exceptions. A.R.S. § 38-431.03(B). In some instances, however, “the interest [of] full disclosure warrants the revelation of information pertinent to [a] decision,” even if the information comes from the proceedings of an executive session or might otherwise be confidential. *Shelby Sch.*, 192 Ariz. at 168, 962 P.2d at 242.

The public body can disclose the minutes to members of the public body who met in the session, the officers, appointees, or employees who were the subject of consideration, the auditor general, and the Attorney General or county attorney who are investigating alleged violations of the OML. A.R.S. § 38-431.03(B); see *Picture Rocks Fire Dist. v. Updike*, 145 Ariz. 79, 81, 699 P.2d 1310, 1312 (Ct. App. 1985) (Executive session minutes may be given to a member of the public body who was absent from the executive session.). The disclosure of executive session information to any of these parties does not waive any attorney-client privilege. A.R.S. § 38-431.03(F).

In an action challenging an executive session’s validity, “[a] court may review in camera the minutes of the executive session, and if the court in its discretion determines that the minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part or all of the minutes.” A.R.S. § 38-431.07(C). “Any

court that reviews executive session information shall take appropriate action to protect privileged information.” A.R.S. § 38-431.03(F).

**d. Requirement to meet in public before closing meeting.**

A public body may hold an executive session only “upon a *public* majority vote of the members constituting a quorum.” A.R.S. § 38-431.03(A) (emphasis added); *see Shelby Sch.*, 192 Ariz. at 167, 962 P.2d at 241 (finding the Board of Education’s deliberations in an executive session followed by a final decision in an open meeting complied with the OML).

**e. Requirement to state statutory authority for closing meetings before closure.**

No such requirement.

**f. Tape recording requirements.**

There is no requirement that the executive sessions be tape recorded.

**F. Recording/broadcast of meetings.**

“All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder, camera or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.” A.R.S. § 38-431.01(F).

**G. Are there sanctions for noncompliance?**

For any violation of the OML, the court may (1) award attorneys’ fees and costs in favor of plaintiff and against the public body, (2) impose up to \$500 in civil penalties against the person violating or knowingly aiding, agreeing to aid, or attempting to aid in the violation of the OML, and (3) remove the offending public officer from office and assess the officer and/or any person who knowingly aids, agrees to aid, or attempts to aid the officer with all costs and attorneys’ fees awarded to the plaintiff. A.R.S. § 38-431.07(A). Any assessed civil penalties will be deposited in the public body’s general fund. *Id.*

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

**1. Character of exemptions.**

Not specified.

**2. Description of each exemption.**

The OML does not apply to the following:

1. Any judicial proceeding of any court or any political caucus of the legislature.
2. Any conference committee of the legislature, except that all such meetings shall be open to the public.
3. The commissions on appellate and trial court appointments and the commission on judicial qualifications.
4. Good cause exception determinations and hearings conducted by the board of fingerprinting pursuant to section 41-619.55.

A.R.S. § 38-431.08(A). Moreover, “[e]ither house of the legislature may adopt a rule or procedure, pursuant to article IV, part 2, section 8, Constitution of Arizona, to provide an exemption to the notice and agenda requirements of [the OML] or to allow standing or conference committees to meet through technological devices rather than only in person.” A.R.S. § 38-431.08(D).

Arizona’s OML does not include any provision for closure of meetings “in the public interest” or for “discretionary reasons.”

**B. Any other statutory requirements for closed or open meetings.**

**Closed Meeting Requirements:**

1. Student disciplinary, suspension or expulsion proceedings can be done in executive session, unless, subject to some exceptions, the parent or guardian wants an open meeting. A.R.S. § 15-843(A), (G). Notice and minutes are required. A.R.S. § 15-843(A).

2. A school board’s review of teacher decision either to promote or retain (i.e., flunking) a student in elementary school or to pass or fail a student in a high school course can be done in an executive session, unless the parent, guardian, or emancipated student wants an open meeting. A.R.S. § 15-342(11).

3. Meetings of advisory committees of the Arizona Board of Regents may be held in executive sessions, except that a student whose records are being discussed may request an open meeting. A.R.S. § 15-1624.

4. Emergency ringside meetings by Arizona State Boxing Commission are exempt from the OML. A.R.S. § 5-223(B).

5. Conference call meetings of the board of trustees for the Public Safety Personnel Retirement System “that are held for investment purposes only” are not subject to the OML, except that the minutes shall be available for public inspection within 24 hours after the meeting. A.R.S. § 38-848(F). The board must ratify all legal actions taken during these conference calls at the next regular public meeting. *Id.*

6. A subcommittee of the military family relief advisory committee may meet in executive session without providing advance notice. A.R.S. § 41-608.04 (E). If notice is provided, the full advisory committee can meet in executive session “to review and evaluate applications or review recommendations of the subcommittee.” *Id.*

7. “The constitutional defense council shall brief the joint legislative budget committee in executive session regarding contracts for legal representation over the amount of fifty thousand dollars.” A.R.S. § 41-401(L).

8. “[T]he director of the department of administration shall meet with and review for the joint legislative budget committee in executive session the planned contribution strategy for each health plan, including indemnity health insurance, hospital and medical service plans, dental plans and health maintenance organizations.” A.R.S. § 38-658(A).

9. The Agricultural Employment Relations Board may meet in executive session by majority vote. A.R.S. § 23-1386(G).

10. Hearings may be by closed at the discretion of the director of the Department of Insurance, “but the hearing shall be open to the public if so requested in writing by any principal party to the hearing.” A.R.S. § 20-164(A).

11. Informal conferences of advisory committees to the Board of Technical Registration are confidential and closed to the public. A.R.S. § 32-129(C).

12. Meetings of the property and casualty insurance guaranty fund in which any member insurer’s financial condition is discussed are closed to the public. A.R.S. § 20-671.

**Open Meeting Requirements:**

1. The Arizona Corporation Commission’s meeting are “open to the public.” A.R.S. § 40-102(B).

2. Before promulgating rules, state agencies must permit public participation by providing an opportunity to submit written statements and, if requested, to present oral testimony. A.R.S. § 41-1023. A similar requirement is imposed on air pollution control officers for proposed rules or ordinance making actions. A.R.S. § 49-471.06.

3. A school board must require that all committee meetings authorized for textbook review and selection are open to the public. A.R.S. § 15-721(F)(2).

4. Dental Board's meetings must be conducted pursuant to the OML. A.R.S. § 32-1205(B). In addition, meetings of the Board of Chiropractic Examiners, the Board of Occupational Therapy Examiners, and the Board of Respiratory Care Examiners generally are open to the public. A.R.S. §§ 32-902(B), 32-3402(C), 32-3503(B).

5. Other than meetings to interview candidates or to make preliminary selections, meetings of the Ombudsman-Citizens Aide Selection Committee are open to the public. A.R.S. § 41-1373(C).

6. Except when reviewing a domestic violence fatality case, the public may attend meetings of the Domestic Violence Fatality Review Teams. A.R.S. § 41-198(F).

7. Hearings held as a result of any inspection pertaining to the safety and health of workers exposed to pesticides and any other safety and health issue not covered by the industrial commission are open to the public. A.R.S. § 3-3107(F).

8. The public may attend meetings and access records of community based alternative programs for juveniles. A.R.S. § 8-321(D)(5).

9. All proceedings of the County Sports Authority are open to the public. A.R.S. § 11-702(D)(2).

10. Several statutes contain provisions mandating public access to specific meetings, including (1) the Advisory Council on Indian Health Care (A.R.S. § 36-2902.01(H)); (2) the Merit System Council for Law Enforcement Officers (A.R.S. § 38-1002(D)); (3) the Personnel Board (A.R.S. § 41-781(C)); (4) board meetings for stadium districts (A.R.S. § 48-4203(D)(2)) and for public health services districts (A.R.S. § 48-5804(A)(2)); and (5) meetings of the water quality assurance revolving fund advisory board (A.R.S. § 49-289.04(F)) and the underground storage tank policy commission (A.R.S. § 49-1092(F)).

11. "To ensure transparency, the [Independent Redistricting] Commission must conduct its business "in meetings open to the public, with 48 or more hours public notice provided." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 591, 208 P.3d 676, 680 (2009) (quoting Ariz. Const. art. 4, pt. 2, § 1(12)).

### C. Court mandated opening, closing.

When the provisions of the OML are violated, "a court of competent jurisdiction may issue a writ of mandamus requiring that a meeting be open to the public." A.R.S. § 38-431.04.

This action is now accomplished through a statutory special action directed at the public body.

## III. MEETING CATEGORIES — OPEN OR CLOSED.

### A. Adjudications by administrative bodies.

Any proceedings by a "quasi-judicial body" consisting of a board of more than one member must comply with the OML. A.R.S. § 38-

431(6)(7). Proceedings by a *single* administrative judge do not fall under the OML. These proceedings may be open or closed depending on the nature and circumstances of the proceeding and the applicable statutes and agency regulations.

### B. Budget sessions.

Budget sessions are subject to OML if conducted by a "public body." Ariz. Att'y Gen. Op. No. I81-58.

### C. Business and industry relations.

Business and industry relations are subject to OML if discussed by public body.

### D. Federal programs.

A public body may hold an executive session about a federal program, if pertaining to a "discussion, consultation or consideration for international and interstate negotiations." See A.R.S. § 38-431.03(A)(6). The provision, however, does not apply to meetings at which the public body receives recommendations from a federal agency. Ariz. Att'y Gen. Op. No. I80-159.

### E. Financial data of public bodies.

Such discussions are covered by OML *unless* the information or records are "exempt by law from public inspection." A.R.S. § 38-431.03(A)(2).

### F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Such discussions are covered *unless* the information or records are "exempt by law from public inspection." A.R.S. § 38-431.03(A)(2).

### G. Gifts, trusts and honorary degrees.

Discussions by a public body should fall under OML.

### H. Grand jury testimony by public employees.

All grand jury proceedings are closed to the general public. Ariz. R. Crim. P. 12.5. Disclosure of information presented to the grand jury is a criminal offense. A.R.S. § 13-2812.

### I. Licensing examinations.

No directly applicable law, but OML should apply to all multi-member licensing boards because the examination is a deliberation with respect to a legal action. See § 38-431(3), (6).

### J. Litigation; pending litigation or other attorney-client privileges.

Any "[d]iscussion or consultation for legal advice with the attorney or attorneys of the public body" can be done in closed executive session. A.R.S. § 38-431.03(A)(3); *cf. Fisher*, 185 Ariz. at 124, 912 P.2d at 1353 (cautioning that permitting "public bodies to delegate responsibilities to attorneys and then cloak negotiations and executive sessions in secrecy" would frustrate the OML).

Any "[d]iscussion or consultation with the attorneys of the public body in order to consider its position and instruct attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation" may be conducted in closed executive session. A.R.S. § 38-431.03(A)(4).

But "[a] public vote shall be taken before any legal action binds the public body." A.R.S. § 38-431.03(D). In addition, "all legal actions [must] be preceded . . . by disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting." *Karol*, 122 Ariz. at 98, 593 P.2d at 652.

## K. Negotiations and collective bargaining of public employees.

### 1. Any sessions regarding collective bargaining.

Negotiations and collective bargaining by at least a quorum of the public body or by a multi-member committee appointed by the public body must comply with the OML.

### 2. Only those between the public employees and the public body.

But “[d]iscussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body” may be done in closed executive sessions. A.R.S. § 38-431.03(A)(5); *see* Ariz. Att’y Gen. Op. No. I80-146.

### L. Parole board meetings, or meetings involving parole board decisions.

They are subject to OML. When meetings are held within a prison facility, however, the director of the department of corrections may restrict access in the following ways:

1. Prohibit, on written findings that are made public within five days of so finding, any person from attending a hearing whose attendance would constitute a serious threat to the life or physical safety of any person or to the safe, secure and orderly operation of the prison.
2. Require a person who attends a hearing to sign an attendance log. If the person is over sixteen years of age, the person shall produce photographic identification which verifies the person’s signature.
3. Prevent and prohibit any articles from being taken into a hearing except recording devices, and if the person who attends a hearing is a member of the media, cameras.
4. Require that a person who attends a hearing submit to a reasonable search on entering the facility.

A.R.S. § 38-431.08(B).

### M. Patients; discussions on individual patients.

Arizona statutes do not specifically exempt from OML requirements any discussions about patients. Many types of medical records, however, are exempt from public inspection. *E.g.*, A.R.S. § 12-2292A.R.S (“Unless otherwise provided by law, all medical records . . . are privileged and confidential.”). Moreover, discussion or consideration of records exempt from public inspection may occur in executive session. A.R.S. § 38-431.03(A)(2).

### N. Personnel matters.

A public body may consider in closed executive session any “[d]iscussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration should occur at a public meeting.” A.R.S. § 38-431.03(A)(1).

Any other personnel matter discussed by a public body should be done in an open meeting. For example, the formulation of the intention to contract or not to contract with employees must be taken at a public meeting. *See Abnert*, 126 Ariz. at 475, 616 P.2d at 935; *Karol*, 122 Ariz. at 96-97, 593 P.2d at 650-51.

### O. Real estate negotiations.

Any “[d]iscussions or consultations with designated representatives of the public body in order to consider its position and instruct its

representatives regarding negotiations for the purchase, sale or lease of real property” may occur in closed executive sessions. A.R.S. § 38-431.03(A)(7). Although it cannot select the construction site in a closed session, a public body may “discuss its position in executive session before it actually commences negotiating with a land owner or purchaser.” *Tanque Verde Unified Sch. Dist.*, 206 Ariz. at 208, 76 P.3d at 882.

The actual negotiations may or may not be conducted in public meetings, depending on the entity negotiating on behalf of the public body (i.e., multimember special committee versus single-person attorney or representative).

### P. Security, national and/or state, of buildings, personnel or other.

Not expressly exempted from open meetings by any Arizona statute.

### Q. Students; discussions on individual students.

Curriculum discussions must be done in open meeting. Ariz. Att’y Gen. Op. No. I81-060.

See also Section II.B.1, *supra*.

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

Arizona’s OML allows legal challenges *both* before a violation will occur and after a violation has occurred.

#### Before violation:

A person may bring an action “for the purposes of requiring compliance with, or the prevention of violations of, [the OML] . . . or to determine the applicability of [the OML] to matters or legal actions of the public body.” A.R.S. § 38-431.07(A).

A person also may seek a writ of mandamus ordering future compliance with the OML if potential violations seem likely. A.R.S. § 38-431.04. This is now done through a procedure known as a statutory special action. *See* Arizona Rules of Procedure for Special Actions.

**After violation:** A.R.S. § 38-431.07(A) provides for actions against public bodies and their members who have violated the OML.

#### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

The OML does not contain any express expedited procedures for reviewing OML actions, but a special statutory action combined with a request for a temporary restraining order or a preliminary injunction would expedite the procedure.

### B. How to start.

The OML expressly provides that an action may be brought in “the superior court in the county in which the public body ordinarily meets.” A.R.S. § 38-431.07(A).

No Arizona statute requires or provides for administrative proceedings for resolving OML violations.

#### 1. Where to ask for ruling.

##### a. Administrative forum.

#### C. Court review of administrative decision.

##### 1. Who may sue?

An action may be brought by (1) any person affected by an alleged violation of the OML, (2) the Arizona attorney general, (3) or the county attorney for the county in which the alleged violation occurred. A.R.S. § 38-431.07(A).

##### 2. Will the court give priority to the pleading?

The OML does not contain any express expedited procedures for reviewing OML actions. Combining the special action with a request

for a temporary restraining order or a preliminary injunction will expedite the procedure.

### 3. Pro se possibility, advisability.

Due to procedural complexities of the special action and the technical nature of the OML, *pro se* plaintiffs may run into difficulty.

### 4. What issues will the court address?

A court may (1) require a public body and its members comply with OML; (2) prohibit a public body and its members from violating the OML; (3) determine the applicability of the OML to matters or legal actions of the public body; (4) impose civil penalties; (5) assess costs and attorney fees; (6) order the removal of a public officer who acted with intent to deprive the public of information; and/or (7) “order such equitable relief as it deems appropriate in the circumstances.” A.R.S. § 38-431.07(A).

### 5. Pleading format.

**Special action:** This type of action is now the proper procedure to obtain relief previously obtained by writs of certiorari, mandamus or prohibition. See Rules of Procedure for Special Actions (Ariz. R.P.S.A.).

Special actions regarding OML typically involve situations where the public body has failed to perform a duty required by law as to which it has no discretion. Ariz. R.P.S.A. 3(a).

**Declaratory judgment action:** Occasionally such actions are brought by a public body to resolve its duties under the OML. See Ariz. R. Civ. P. 57.

### 6. Time limit for filing suit.

See Ariz. R.P.S.A 4(c).

### 7. What court.

An action may be brought in “the superior court in the county in which the public body ordinarily meets.” A.R.S. § 38-431.07(A).

### 8. Judicial remedies available.

Courts have wide-ranging powers to ensure compliance with the OML. A.R.S. § 38-431.09 states that “any person or entity charged with the interpretations of [the OML] shall construe [the OML] in favor of open and public meetings.” See *Carefree Improvement Ass’n*, 133 Ariz. at 107, 649 P.2d at 986 (noting that, “[i]n construing the open meeting law and the declaration of policy, the language must be liberally construed to effect their objects and to promote justice”) (citation and internal quotation marks omitted).

### 9. Availability of court costs and attorneys’ fees.

The court has discretion to “order payment to a successful plaintiff in a suit brought under this section of the plaintiff’s reasonable attorney fees, by the defendant state, the political subdivision of the state or the incorporated city or town of which the public body is a part or to which it reports.” A.R.S. § 38-431.07(A). In determining whether to assess attorney fees and costs, courts may consider the overall behavior of the public body and its attempt to comply with the spirit of the OML. See *Carefree Improvement Ass’n*, 133 Ariz. at 114-15, 649 P.2d at 993-94.

Moreover, the Court may assess a public officer individually with all costs and attorneys fees awarded to plaintiff if it “determines that a public officer with intent to deprive the public of information violated any provision of [the OML].” A.R.S. § 38-431.07(A).

### 10. Fines.

A civil penalty not to exceed *five hundred dollars* may be imposed against a person who violates or knowingly aids in the violation of the OML. A.R.S. § 38-431.07(A). Any penalty assessed shall be deposited in the public body’s general fund. *Id.*

## 11. Other penalties.

The Court has discretion to remove a public officer from office if it “determines that a public officer with intent to deprive the public of information violated any provision of [the OML].” A.R.S. § 38-431.07(A).

### D. Appealing initial court decisions.

#### 1. Appeal routes.

**Special action to appellate court:** Special action, however, is not available when “there is an equally plain, speedy, and adequate remedy by appeal.” Ariz. R.P.S.A. 1(a); see Ariz. R.P.S.A. 8. Such an appeal should be heard as soon as is necessary to preserve the legal rights of appellant.

**Regular appeal:** A regular appeal is not an expedited action but may be accelerated by order of the appellate court.

#### 2. Time limits for filing appeals.

Normal timing for appeals is set forth in the Arizona Rules of Civil Appellate Procedure. Currently, “[a] notice of appeal required by Rule 8 shall be filed with the clerk of the superior court not later than 30 days after the entry of the judgment from which the appeal is taken, unless a different time is provided by law.” Ariz. R. Civ. App. P. 9.

#### 3. Contact of interested amici.

If not already involved in the action, the First Amendment Coalition of Arizona Inc. may be interested in participating as an *amicus*. The Coalition may be contacted through the authors of this outline.

In addition, the Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state’s highest court.

## V. ASSERTING A RIGHT TO COMMENT.

### A. Is there a right to participate in public meetings?

Arizona’s OML allows a member of the public to address a public body on any issue within that body’s jurisdiction if an open call to the public has been made during a public meeting. See A.R.S. § 38-431.01(H).

### B. Must a commenter give notice of intentions to comment?

The OML does not contain any express provisions requiring a commenter to notify the public body of his intent to speak at a public meeting. Members of the public body are prohibited from discussing or taking legal action on matters brought up during an open call unless those matters were properly noticed on the meeting agenda. See *id.* At the conclusion of the open call, however, “individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda.” *Id.*

### C. Can a public body limit comment?

Yes. A public body may limit public comment during an open call by imposing reasonable time, place and manner restrictions. See *id.* “Although it is legally appropriate to stop a speaker who is reasonably perceived as threatening, disorderly, or impeding the fair progress of discussion, public bodies must be cautious not to halt a speaker because of the speaker’s viewpoint.” Ariz. Att’y Gen. Op. No. I99-006.

### D. How can a participant assert rights to comment?

Please see section A above.

### E. Are there sanctions for unapproved comment?

Arizona’s OML does contain any sanctions for unapproved comment.

## Statute

### Open Records

*Arizona Revised Statutes Annotated*

*Title 39. Public Records, Printing and Notices*

*Chapter 1. Public Records*

*Article 1. Requirements for Material Used*

*§ 39-101. Permanent public records; quality; storage; violation; classification*

A. Permanent public records of the state, a county, city or town, or other political subdivision of the state, shall be transcribed or kept on paper or other material which is of durable or permanent quality and which conforms to standards established by the director of the Arizona state library, archives and public records.

B. Permanent public records transcribed or kept as provided in subsection A shall be stored and maintained according to standards for the storage of permanent public records established by the director of the Arizona state library, archives and public records.

C. A public officer charged with transcribing or keeping such public records who violates this section is guilty of a class 2 misdemeanor.

*§ 39-102. Annual report; copies*

Unless otherwise specifically required by law, each agency, board, commission and department which prepares an annual report of its activities shall prepare and distribute as provided by law copies of such annual report on twenty pound bond paper printed with black ink except that the cover and back pages may be of sixty-five pound or less cover paper.

*§ 39-103. Size of public records; exemptions*

A. All public records of this state or a political subdivision of this state created on paper, regardless of weight or composition, shall conform to standard letter size of eight and one-half inches by eleven inches, within standard paper manufacturing tolerances.

B. This section does not apply to public records smaller than eight and one-half inches by eleven inches, public records otherwise required by law to be of a different size, engineering drawings, architectural drawings, maps, computer generated printout, output from test measurement and diagnostic equipment, machine generated paper tapes and public records otherwise exempt by law. Additionally, records kept exclusively on photography, film, microfiche, digital imaging or other type of reproduction or electronic media as provided in section 41-1348, subsection A are exempt from the size restrictions of this section. On written application the director of the Arizona state library, archives and public records may approve additional exemptions from this section if based on such application the director finds that the cost of producing a particular type of public record in accordance with subsection A of this section is so great as to not be in the best interests of this state.

*Article 2. Searches and Copies*

*§ 39-121. Inspection of public records*

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.

*§ 39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index*

A. In this article, unless the context otherwise requires:

1. "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.
2. "Public body" means the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state.

B. All officers and public bodies shall maintain all records, including records as defined in section 41-1350, 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 the state or any political subdivision of

the state.

C. Each public body shall be responsible for the preservation, maintenance and care of that body's public records, and each officer shall be responsible for the preservation, maintenance and care of that officer's public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to sections 41-1347 and 41-1351.

D. Subject to section 39-121.03:

1. Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's web site to the requesting person. The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. The custodian of such records shall promptly furnish such copies, printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in section 39-122 or 39-127 shall be furnished without charge.

2. If requested, the custodian of the records of an agency shall also furnish an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person. The custodian shall not include in the index information that is expressly made privileged or confidential in statute or a court order. This paragraph shall not be construed by an administrative tribunal or a court of competent jurisdiction to prevent or require an order compelling a public body other than an agency to furnish an index. For the purposes of this paragraph, "agency" has the same meaning prescribed in section 41-1001, but does not include the department of public safety, the department of transportation motor vehicle division, the department of juvenile corrections and the state department of corrections.

3. If the custodian of a public record does not have facilities for making copies, printouts or photographs of a public record which a person has a right to inspect, such person shall be granted access to the public record for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the public record is in the possession, custody and control of the custodian of the public record and shall be subject to the supervision of such custodian.

E. Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record or fails to provide to the requesting person an index of any record or categories of records that are withheld from production pursuant to subsection D, paragraph 2 of this section.

*§ 39-121.02. Action upon denial of access; expenses and attorney fees; damages*

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.

B. The 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. Nothing in this paragraph shall limit the rights of any party to recover attorney fees pursuant to section 12-341.01, subsection C, or attorney fees, expenses and double damages pursuant to section 12-349.

C. 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.

*§ 39-121.03. Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition*

A. When a person requests copies, printouts or photographs of public records for a commercial purpose, the person shall provide a statement setting forth the commercial purpose for which the copies, printouts or photographs will be used. Upon being furnished the statement the custodian of such records may furnish reproductions, the charge for which shall include the following:

1. A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.

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

B. If the custodian of a public record determines that the commercial purpose stated in the statement is a misuse of public records or is an abuse of the right to receive public records, the custodian may apply to the governor requesting that the governor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose. The governor, upon application from a custodian of public records, shall determine whether the commercial purpose is a misuse or an abuse of the public record. If the governor determines that the public record shall not be provided for such commercial purpose the governor shall issue an executive order prohibiting the providing of such public records for such commercial purpose. If no order is issued within thirty days of the date of application, the custodian of public records shall provide such copies, printouts or photographs upon being paid the fee determined pursuant to subsection A.

C. A person who obtains a public record for a commercial purpose without indicating the commercial purpose or who obtains a public record for a non-commercial purpose and uses or knowingly allows the use of such public record for a commercial purpose or who obtains a public record for a commercial purpose and uses or knowingly allows the use of such public record for a different commercial purpose or who obtains a public record from anyone other than the custodian of such records and uses it for a commercial purpose shall in addition to other penalties be liable to the state or the political subdivision from which the public record was obtained for damages in the amount of three times the amount which would have been charged for the public record had the commercial purpose been stated plus costs and reasonable attorney fees or shall be liable to the state or the political subdivision for the amount of three times the actual damages if it can be shown that the public record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the records.

D. For the purposes of this section, "commercial purpose" means 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.

*§ 39-122. Free searches for and copies of public records to be used in claims against United States; liability for noncompliance*

A. No state, county or city, or any officer or board thereof shall demand or receive a fee or compensation for issuing certified copies of public records or for making search for them, when they are to be used in connection with a claim for a pension, allotment, allowance, compensation, insurance or other benefits which is to be presented to the United States or a bureau or department thereof.

B. Notaries public shall not charge for an acknowledgment to a document which is to be so filed or presented.

C. The services specified in subsections A and B shall be rendered on request of an official of the United States, a claimant, his guardian or attorney. For each failure or refusal so to do, the officer so failing shall be liable on his official bond.

*§ 39-123. Information identifying eligible persons; confidentiality; definitions*

A. Nothing in this chapter requires disclosure from a personnel file by a law enforcement agency or employing state or local governmental entity of the home address or home telephone number of eligible persons.

B. The agency or governmental entity may release the information in subsection A of this section only if either:

1. The person consents in writing to the release.
2. The custodian of records of the agency or governmental entity determines that release of the information does not create a reasonable risk of physical injury to the person or the person's immediate family or damage to the property of the person or the person's immediate family.

C. A law enforcement agency may release a photograph of a peace officer if either:

1. The peace officer has been arrested or has been formally charged by complaint, information or indictment for a misdemeanor or a felony of-

fense.

2. The photograph is requested by a representative of a newspaper for a specific newsworthy event unless:

- (a) The peace officer is serving in an undercover capacity or is scheduled to be serving in an undercover capacity within sixty days.
- (b) The release of the photograph is not in the best interest of this state after taking into consideration the privacy, confidentiality and safety of the peace officer.
- (c) An order pursuant to section 28-454 is in effect.

D. This section does not prohibit the use of a peace officer's photograph that is either:

1. Used by a law enforcement agency to assist a person who has a complaint against an officer to identify the officer.
2. Obtained from a source other than the law enforcement agency.

E. This section does not apply to a certified peace officer or code enforcement officer who is no longer employed as a peace officer or code enforcement officer by a state or local government entity.

F. For the purposes of this section:

1. "Code enforcement officer" means a person who is employed by a state or local government and whose duties include performing field inspections of buildings, structures or property to ensure compliance with and enforce national, state and local laws, ordinances and codes.
2. "Commissioner" means a commissioner of the superior court.
3. "Corrections support staff member" means an adult or juvenile corrections employee who has direct contact with inmates.
4. "Eligible person" means a peace officer, justice, judge, commissioner, public defender, prosecutor, code enforcement officer, adult or juvenile corrections officer, corrections support staff member, probation officer, member of the board of executive clemency, law enforcement support staff member, national guard member who is acting in support of a law enforcement agency, person who is protected under an order of protection or injunction against harassment, firefighter who is assigned to the Arizona counterterrorism center in the department of public safety or victim of domestic violence or stalking who is protected under an order of protection or injunction against harassment.
5. "Judge" means a judge of the United States district court, the United States court of appeals, the United States magistrate court, the United States bankruptcy court, the Arizona court of appeals, the superior court or a municipal court.
6. "Justice" means a justice of the United States or Arizona supreme court or a justice of the peace.
7. "Law enforcement support staff member" means a person who serves in the role of an investigator or prosecutorial assistant in an agency that investigates or prosecutes crimes, who is integral to the investigation or prosecution of crimes and whose name or identity will be revealed in the course of public proceedings.
8. "Peace officer" has the same meaning prescribed in section 13-105.
9. "Prosecutor" means a county attorney, a municipal prosecutor, the attorney general or a United States attorney and includes an assistant or deputy United States attorney, county attorney, municipal prosecutor or attorney general.
10. "Public defender" means a federal public defender, county public defender, county legal defender or county contract indigent defense counsel and includes an assistant or deputy federal public defender, county public defender or county legal defender.

*§ 39-124. Releasing information identifying an eligible person; violations; classification; definitions*

A. Any person who is employed by a state or local government entity and who, in violation of section 39-123, knowingly releases the home address or home telephone number of an eligible person with the intent to hinder an investigation, cause physical injury to an eligible person or the eligible person's immediate family or cause damage to the property of an eligible person or the eligible person's immediate family is guilty of a class 6 felony.

B. Any person who is employed by a state or local government entity and who, in violation of section 39-123, knowingly releases a photograph of a peace officer with the intent to hinder an investigation, cause physical injury to a peace officer or the peace officer's immediate family or cause damage to the property of a peace officer or the peace officer's immediate family is guilty of a class 6 felony.

C. For the purposes of this section:

1. "Code enforcement officer" means a person who is employed by a state or local government and whose duties include performing field inspections of buildings, structures or property to ensure compliance with and enforce national, state and local laws, ordinances and codes.
2. "Commissioner" means a commissioner of the superior court.
3. "Corrections support staff member" means an adult or juvenile corrections employee who has direct contact with inmates.
4. "Eligible person" means a peace officer, justice, judge, commissioner, public defender, prosecutor, code enforcement officer, adult or juvenile corrections officer, corrections support staff member, probation officer, member of the board of executive clemency, law enforcement support staff member, national guard member who is acting in support of a law enforcement agency, person who is protected under an order of protection or injunction against harassment, firefighter who is assigned to the Arizona counterterrorism center in the department of public safety or victim of domestic violence or stalking who is protected under an order of protection or injunction against harassment.
5. "Judge" means a judge of the United States district court, the United States court of appeals, the United States magistrate court, the United States bankruptcy court, the Arizona court of appeals, the superior court or a municipal court.
6. "Justice" means a justice of the United States or Arizona supreme court or a justice of the peace.
7. "Law enforcement support staff member" means a person who serves in the role of an investigator or prosecutorial assistant in an agency that investigates or prosecutes crimes, who is integral to the investigation or prosecution of crimes and whose name or identity will be revealed in the course of public proceedings.
8. "Peace officer" has the same meaning prescribed in section 13-105.
9. "Prosecutor" means a county attorney, a municipal prosecutor, the attorney general or a United States attorney and includes an assistant or deputy United States attorney, county attorney, municipal prosecutor or attorney general.
10. "Public defender" means a federal public defender, county public defender, county legal defender or county contract indigent defense counsel and includes an assistant or deputy federal public defender, county public defender or county legal defender.

*§ 39-125. Information relating to location of archaeological discoveries and places or objects included or eligible for inclusion on the Arizona register of historic places; confidentiality*

Nothing in this chapter requires the disclosure of public records or other matters in the office of any officer that relate to the location of archaeological discoveries as described in section 41-841 or 41-844 or places or objects that are included on or may qualify for inclusion on the Arizona register of historic places as described in section 41-511.04, subsection A, paragraph 9. An officer may decline to release this information if the officer determines that the release of the information creates a reasonable risk of vandalism, theft or other damage to the archaeological discoveries or the places or objects that are included on or may qualify for inclusion on the register. In making a decision to disclose public records pursuant to this section, an officer may consult with the director of the Arizona state museum or the state historic preservation officer.

*§ 39-126. Federal risk assessments of infrastructure; confidentiality*

Nothing in this chapter requires the disclosure of a risk assessment that is performed by or on behalf of a federal agency to evaluate critical energy, water or telecommunications infrastructure to determine its vulnerability to sabotage or attack.

*§ 39-127. Free copies of police reports and transcripts for crime victims; definition*

A. A victim of a criminal offense that is a part I crime under the statewide uniform crime reporting program or an immediate family member of the victim if the victim is killed or incapacitated has the right to receive one copy of the police report from the investigating law enforcement agency at no charge and, on request of the victim, the court or the clerk of the court shall provide, at no charge, the minute entry or portion of the record of any proceeding in the case that arises out of the offense committed against the victim and that is reasonably necessary for the purpose of pursuing a claimed victim's right.

B. For the purposes of this section, "criminal offense", "immediate family" and "victim" have the same meanings prescribed in section 13-4401.

*§ 39-128. Disciplinary records of police officers and employees; disclosure; exceptions*

A. A public body shall maintain all records that are reasonably necessary or appropriate to maintain an accurate knowledge of disciplinary actions, including the employee responses to all disciplinary actions, involving public officers or employees of the public body. The records shall be open to inspection and copying pursuant to this article, unless inspection or disclosure of the records or information in the records is contrary to law.

B. This section does not:

1. Require disclosure of the home address, home telephone number or photograph of any person who is protected pursuant to sections 39-123 and 39-124.
2. Limit the duty of a public body or officer to make public records open to inspection and copying pursuant to this article.

*Article 3. Lost Records*

*§ 39-141. Proof of certain lost or destroyed documents or instruments*

Any deed, bond, bill of sale, mortgage, deed of trust, power of attorney or conveyance which is required or permitted by law to be acknowledged or recorded which has been so acknowledged or recorded, or any judgment, order or decree of a court of record in this state or the record or minute containing such judgment, which is lost or destroyed, may be supplied by parol proof of its contents.

*§ 39-142. Action for restoration and substitution of lost or destroyed documents*

Upon loss or destruction of an instrument as indicated in section 39-141, a person interested therein may bring an action in the superior court of the county where the loss or destruction occurred for restoration and substitution of such instrument against the grantor in a deed, or the parties interested in the instrument, or the parties who were interested adversely to plaintiff at the time of the rendition of judgment, or who are then adversely interested, or the heirs and legal representatives of such parties.

*§ 39-143. Judgment of restoration; recording of judgment; judgment as substitute for original instrument*

A. If upon the trial of the action provided for in section 39-142, the court finds that such instrument existed, and has been lost or destroyed and determines the contents thereof, it shall enter a judgment containing the finding and a description of the lost instrument and contents thereof.

B. A certified copy of the judgment may be recorded, and shall be substituted for and have the same force and effect as the original instrument.

*§ 39-144. Recording of certified copies of lost or destroyed records or records of a former county*

Certified copies from a record of a county, the record of which has been lost or destroyed, and certified copies from records of the county from which a new county was created, may be recorded in such county when the loss of the original has been first established.

*§ 39-145. Re-recording of original papers when record destroyed*

When the original papers have been preserved but the record thereof has been lost or destroyed, they may again be recorded within four years from the loss or destruction of such record. The last registration shall have force and effect from the date of the original registration.

*Article 4. False Instruments and Records*

*§ 39-161. Presentment of false instrument for filing; classification*

A person who acknowledges, certifies, notarizes, procures or offers to be filed, registered or recorded in a public office in this state an instrument he

knows to be false or forged, which, if genuine, could be filed, registered or recorded under any law of this state or the United States, or in compliance with established procedure is guilty of a class 6 felony. As used in this section “instrument” includes a written instrument as defined in section 13-2001.

## Open Meetings

*Arizona Revised Statutes Annotated*

*Title 38. Public Officers and Employees*

*Chapter 3. Conduct of Office*

*Article 3.1. Public Meetings and Proceedings*

*§ 38-431. Definitions*

In this article, unless the context otherwise requires:

1. “Advisory committee” or “subcommittee” means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and 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.
2. “Executive session” means a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03. In addition to the members of the public body, officers, appointees and employees as provided in section 38-431.03 and the auditor general as provided in section 41-1279.04, only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.
3. “Legal action” means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body’s charter, bylaws or specified scope of appointment and the laws of this state.
4. “Meeting” means 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.
5. “Political subdivision” means all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.
6. “Public body” means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.
7. “Quasi-judicial body” means a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.

*§ 38-431.01. Meetings shall be open to the public*

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. For meetings other than executive sessions, such minutes or recording shall include, but not be limited to:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about

which they made statements or presented material.

C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, an accurate description of all instructions given pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and such other matters as may be deemed appropriate by the public body.

D. The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.

E. A public body of a city or town with a population of more than two thousand five hundred persons shall:

1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its website, if applicable, either:

(a) A statement describing the legal actions taken by the public body of the city or town during the meeting.

(b) Any recording of the meeting.

2. Within two working days following approval of the minutes, post approved minutes of city or town council meetings on its website, if applicable, except as otherwise specifically provided by this article.

3. Within ten working days after a subcommittee or advisory committee meeting, post on its website, if applicable, either:

(a) A statement describing legal action, if any.

(b) A recording of the meeting.

F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.

G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall conspicuously post open meeting law materials prepared and approved by the attorney general on their website. A person elected or appointed to a public body shall review the open meeting law materials at least one day before the day that person takes office.

H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

J. Any posting required by subsection E of this section must remain on the applicable website for at least one year after the date of the posting.

*§ 38-431.02. Notice of meetings*

A. Public notice of all meetings of public bodies shall be given as follows:

1. The public bodies of this state, including governing bodies of charter schools, shall:

(a) Conspicuously post a statement on their website stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website and give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

2. The public bodies of the counties and school districts shall:

(a) Conspicuously post a statement on their website stating where all

public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website and give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

3. Special districts that are formed pursuant to title 48:

(a) May conspicuously post a statement on their website stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) May post all public meeting notices on their website and shall give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

(c) If a statement or notice is not posted pursuant to subdivision (a) or (b) of this paragraph, shall file a statement with the clerk of the board of supervisors stating where all public notices of their meetings will be posted and shall give additional public notice as is reasonable and practicable as to all meetings.

4. The public bodies of the cities and towns shall:

(a) Conspicuously post a statement on their website or on a website of an association of cities and towns stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website or on a website of an association of cities and towns and give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

B. If an executive session is scheduled, a notice of the executive session shall state the provision of law authorizing the executive session, and the notice shall be provided to the:

1. Members of the public body.
2. General public.

C. Except as provided in subsections D and E of this section, meetings shall not be held without at least twenty-four hours' notice to the members of the public body and to the general public. The twenty-four hour period includes Saturdays if the public has access to the physical posted location in addition to any website posting, but excludes Sundays and other holidays prescribed in section 1-301.

D. In case of an actual emergency, a meeting, including an executive session, may be held on such notice as is appropriate to the circumstances. If this subsection is utilized for conduct of an emergency session or the consideration of an emergency measure at a previously scheduled meeting the public body must post a public notice within twenty-four hours declaring that an emergency session has been held and setting forth the information required in subsections H and I of this section.

E. A meeting may be recessed and resumed with less than twenty-four hours' notice if public notice of the initial session of the meeting is given as required in subsection A of this section, and if, before recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given.

F. A public body that intends to meet for a specified calendar period, on a regular day, date or event during the calendar period, and at a regular place and time, may post public notice of the meetings at the beginning of the period.

The notice shall specify the period for which notice is applicable.

G. Notice required under this section shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda. The agenda must be available to the public at least twenty-four hours before the meeting, except in the case of an actual emergency under subsection D of this section. The twenty-four hour period includes Saturdays if the public has access to the physical posted location in addition to any website posting, but excludes Sundays and other holidays prescribed in section 1-301.

H. Agendas required under this section shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.

I. Notwithstanding the other provisions of this section, notice of executive sessions shall be required to include only a general description of the matters to be considered. The agenda shall provide more than just a recital of the statutory provisions authorizing the executive session, but need not contain information that would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee or compromise the attorney-client privilege.

J. Notwithstanding subsections H and I of this section, in the case of an actual emergency a matter may be discussed and considered and, at public meetings, decided, if the matter was not listed on the agenda and a statement setting forth the reasons necessitating the discussion, consideration or decision is placed in the minutes of the meeting and is publicly announced at the public meeting. In the case of an executive session, the reason for consideration of the emergency measure shall be announced publicly immediately before the executive session.

K. Notwithstanding subsection H of this section, the chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized, if:

1. The summary is listed on the agenda.
2. The public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.

§ 38-431.03. *Executive sessions*

A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.
2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.
3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.
4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.
5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.
6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representa-

tives, of an Indian reservation located within or adjacent to the city or town.

7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.

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

1. Members of the public body which met in executive session.
2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section.
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 this article.

C. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.

D. Legal action involving a final vote or decision shall not be taken at an executive session, except that the public body may instruct its attorneys or representatives as provided in subsection A, paragraphs 4, 5 and 7 of this section. A public vote shall be taken before any legal action binds the public body.

E. Except as provided in section 38-431.02, subsections I and J, a public body shall not discuss any matter in an executive session which is not described in the notice of the executive session.

F. Disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.

#### § 38-431.04. *Writ of mandamus*

Where the provisions of this article are not complied with, a court of competent jurisdiction may issue a writ of mandamus requiring that a meeting be open to the public.

#### § 38-431.05. *Meeting held in violation of article; business transacted null and void; ratification*

A. All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.

B. A public body may ratify legal action taken in violation of this article in accordance with the following requirements:

1. Ratification shall take place at a public meeting within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.
2. The notice for the meeting shall include a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified.
3. The public body shall make available to the public a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action. The written description shall also be included as part of the minutes of the meeting at which ratification is taken.
4. The public body shall make available to the public the notice and detailed written description required by this section at least seventy-two hours in advance of the public meeting at which the ratification is taken.

#### § 38-431.06. *Investigations; written investigative demands*

A. On receipt of a written complaint signed by a complainant alleging a violation of this article or on their own initiative, the attorney general or the county attorney for the county in which the alleged violation occurred may begin an investigation.

B. In addition to other powers conferred by this article, in order to carry out

the duties prescribed in this article, the attorney general or the county attorney for the county in which the alleged violation occurred, or their designees, may:

1. Issue written investigative demands to any person.
2. Administer an oath or affirmation to any person for testimony.
3. Examine under oath any person in connection with the investigation of the alleged violation of this article.
4. Examine by means of inspecting, studying or copying any account, book, computer, document, minutes, paper, recording or record.
5. Require any person to file on prescribed forms a statement or report in writing and under oath of all the facts and circumstances requested by the attorney general or county attorney.

C. The written investigative demand shall:

1. Be served on the person in the manner required for service of process in this state or by certified mail, return receipt requested.
2. Describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified.
3. Prescribe a reasonable time at which the person shall appear to testify and within which the document or object shall be produced and advise the person that objections to or reasons for not complying with the demand may be filed with the attorney general or county attorney on or before that time.
4. Specify a place for the taking of testimony or for production of a document or object and designate a person who shall be the custodian of the document or object.

D. If a person objects to or otherwise fails to comply with the written investigation demand served on the person pursuant to subsection C, the attorney general or county attorney may file an action in the superior court for an order to enforce the demand. Venue for the action to enforce the demand shall be in Maricopa county or in the county in which the alleged violation occurred. Notice of hearing the action to enforce the demand and a copy of the action shall be served on the person in the same manner as that prescribed in the Arizona rules of civil procedure. If a court finds that the demand is proper, including that the compliance will not violate a privilege and that there is not a conflict of interest on the part of the attorney general or county attorney, that there is reasonable cause to believe there may have been a violation of this article and that the information sought or document or object demanded is relevant to the violation, the court shall order the person to comply with the demand, subject to modifications the court may prescribe. If the person fails to comply with the court's order, the court may issue any of the following orders until the person complies with the order:

1. Adjudging the person in contempt of court.
2. Granting injunctive relief against the person to whom the demand is issued to restrain the conduct that is the subject of the investigation.
3. Granting other relief the court deems proper.

#### § 38-431.07. *Violations; enforcement; removal from office; in camera review*

A. Any person affected by an alleged violation of this article, the attorney general or the county attorney for the county in which an alleged violation of this article occurred may commence a suit in the superior court in the county in which the public body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of, this article, by members of the public body, or to determine the applicability of this article to matters or legal actions of the public body. For each violation the court may impose a civil penalty not to exceed five hundred dollars against a person who violates this article or who knowingly aids, agrees to aid or attempts to aid another person in violating this article and order such equitable relief as it deems appropriate in the circumstances. The civil penalties awarded pursuant to this section shall be deposited into the general fund of the public body concerned. The court may also order payment to a successful plaintiff in a suit brought under this section of the plaintiff's reasonable attorney fees, by the defendant state, the political subdivision of the state or the incorporated city or town of which the public body is a part or to which it reports. If the court determines that a public officer with intent to deprive the public of information violated any provision of this article the court may remove the public officer from office and shall assess the public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating this article, or both, with all of the costs and attorney fees awarded to the plaintiff pursuant to this section.

B. A public body shall not expend public monies to employ or retain legal counsel to provide legal services or representation to the public body or any of its officers in any legal action commenced pursuant to any provisions of this article, unless the public body has authority to make such expenditure pursuant to other provisions of law and takes a legal action at a properly noticed open meeting approving such expenditure prior to incurring any such obligation or indebtedness.

C. In any action brought pursuant to this section challenging the validity of an executive session, the court may review in camera the minutes of the executive session, and if the court in its discretion determines that the minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part or all of the minutes.

*§ 38-431.08. Exceptions; limitation*

A. This article does not apply to:

1. Any judicial proceeding of any court or any political caucus of the legislature.
2. Any conference committee of the legislature, except that all such meetings shall be open to the public.
3. The commissions on appellate and trial court appointments and the commission on judicial qualifications.
4. Good cause exception determinations and hearings conducted by the board of fingerprinting pursuant to section 41-619.55.

B. A hearing held within a prison facility by the board of executive clemency is subject to this article, except that the director of the state department of corrections may:

1. Prohibit, on written findings that are made public within five days of so finding, any person from attending a hearing whose attendance would constitute a serious threat to the life or physical safety of any person or to the safe, secure and orderly operation of the prison.
2. Require a person who attends a hearing to sign an attendance log. If the person is over sixteen years of age, the person shall produce photographic

identification which verifies the person's signature.

3. Prevent and prohibit any articles from being taken into a hearing except recording devices, and if the person who attends a hearing is a member of the media, cameras.

4. Require that a person who attends a hearing submit to a reasonable search on entering the facility.

C. The exclusive remedies available to any person who is denied attendance at or removed from a hearing by the director of the state department of corrections in violation of this section shall be those remedies available in section 38-431.07, as against the director only.

D. Either house of the legislature may adopt a rule or procedure pursuant to article IV, part 2, section 8, Constitution of Arizona, to provide an exemption to the notice and agenda requirements of this article or to allow standing or conference committees to meet through technological devices rather than only in person.

*§ 38-431.09. Declaration of public policy*

A. 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. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.

B. Notwithstanding subsection A, it is not a violation of this article if a member of a public body expresses an opinion or discusses an issue with the public either at a venue other than at a meeting that is subject to this article, personally, through the media or other form of public broadcast communication or through technological means if:

1. The opinion or discussion is not principally directed at or directly given to another member of the public body.
2. There is no concerted plan to engage in collective deliberation to take legal action.