PUBLIC RECORDS LAW

I. ARIZONA'S POLICY OF PUBLIC DISCLOSURE (A.R.S. § 39-121)

Public records and other matters in the custody of any public officer shall be open to inspection for any person at all times during business hours. *See Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). The law serves to open government activity to public scrutiny. *See Griffis v. Pinal County*, 215 Ariz. 1, 4 ¶ 11, 156 P.3d 418, 421 (2007). The core purpose of the law is to allow public access to official records and other governmental information so that the public may monitor the performance of government officials and their employees. *Id*.

Arizona's Public Records Act ("PRA") is broader than the Freedom of Information Act ("FOIA") (*see* 5 U.S.C. § 522) but "when interpreting the [PRA], it is appropriate to look to FOIA for guidance". *See Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 539, ¶ 15, n.3, 177 P.3d 275, 281 (App. Div. I, 2008).

II. WHY SHOULD ANYBODY CARE?

A person who is denied access to public records could have a cause of action against the officer or public body for any damages resulting from the denial and may appeal the denial through a special action filed in superior court. The court may award attorney fees and other legal costs that are reasonably incurred if the person seeking public records has substantially prevailed in their lawsuit against the government by showing the refusal to disclose or produce the records was done in bad faith. A party may substantially prevail only to the extent an action is necessary to accomplish the purpose of the original public records request. *See Paradigm DKD Group, LLC v. Pima County Assessor*, 246 Ariz. 429, 439 P.3d 1210 (App. Div. II, 2019). Under A.R.S. § 39-121.02 (B), the trial court has wide latitude to award attorney fees to the prevailing party. *See Democratic Party of Pima County v. Ford*, 228 Ariz. 545, 269 P.3d 721 (App. Div. II, 2012). However, a plaintiff seeking attorney fees and costs for a public entity's failure to produce records will be awarded such fees when it "substantially prevails", *i.e.* – the court will order the costs and fees if, after a comprehensive examination by the trial court, plaintiff was more successful than not in obtaining the requested records, defeating the government entity's denial of access to public records, or securing other relief concerning issues that were contested before the litigation was initiated. *See ACLU v. Arizona Department of Child Services*, 51 Ariz. Cases Digest 56, Arizona Supreme Court (Decided August 25, 2021); *see also* A.R.S. § 39-121.02(B). To prevent such a result, the public body can request a hearing before a judge who can review the documents *in camera* (in

chambers) and can then decide what is appropriate to release or what to block out or "redact".

III. DEFINITION OF A PUBLIC RECORD

A) General Definition. Interestingly, the PRA under A.R.S. §§ 39-121 *et seq*. does not define the term "public records". However, through case law interpretation and other statutes such as A.R.S. § 41-3150, the term "public records" include: all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media, including electronic computer metadata, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. *See also Matthews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).

The PRA requires public entities and officers to maintain all records, reasonably necessary and appropriate to maintain an accurate knowledge of their official activities and any activities supported by monies of the state or counties, cities and towns, and other municipal organizations.

The PRA also requires public officers to disclose "other matters," including documents held by a public officer in his or her official capacity and in which the public's interest in disclosure outweighs the governmental interest in confidentiality. *See Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531,539,815 P.2d 900, 908 (1991).

B) Prompt Disclosure. Once public records are identified, there is a presumption of disclosure and the burden of overcoming that presumption falls upon the public official who seeks to block access. *See Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 191 Ariz. 297, 300 ¶ 9, 955 P.2d 534, 537 (1998). *See Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1197 (1993). Under A.R.S. § 39-121.01(D) and (E), the public entity must "promptly" furnish the public records upon request. *See McKee v. Peoria Unified School District*, 236 Ariz. 254 (App. Div. I, 2014). Mere inconvenience to staff to service the request does not warrant a delay. The term "promptly" also means: quick to act or do what is required, or without

delay. *See West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 165 P.3d 203 (App. Div. I, 2007) (*review denied*). A rolling disclosure is compliant with the PRA; and "promptness" is based on the particular facts and circumstances. *See McKee, supra*. (unintentional failure to include a set of notes with a 150 plus page disclosure and quickly correcting the mistake is not bad faith and does not undermine the overall reasonableness/promptness of the response). Even if the record is available by alternate means, that is not reason to withhold access to review or provide copies. *See A.H. Belo Corp. v. Mesa Police Dept.*, 202 Ariz. 184, 187, 42 P.3d 615, 618 (App. Div. I, 2002). To determine if producing documents poses an unreasonable administrative burden, courts consider whether the general presumption in favor of disclosure is overcome by: 1) the resources and time it will take to locate, compile, and redact the requested materials; 2) the volume of materials requested; and 3) the extent to which compliance with the request will disrupt the agency's ability to perform its core functions. *See Hodai v. City of Tucson*, 239 Ariz. 34, 365 P.3d 959 (App. Div. II, 2016). Failure to provide any communication to a requesting party by a governmental entity relating to a PRR and then only providing the documents after the requesting party files a law suit shows a failure in promptly responding. *ACLU v. Department of Child Services, supra*.

C) Exceptions. The open access requirement is subject to: 1) statutory confidential exclusions; 2) privacy interests; and 3) best interests of the state. *See Carlson, supra.* at 490, 687 P.2d at 1245. Examples of things that do not need to be disclosed include dates of birth, social security numbers, home addresses, phone numbers, medical information, tax records, student records, utility customer information, credit card information, retirement account information, savings/checking account numbers, driver's license numbers, criminal histories, grand jury transcripts, and photographs of police officers. Information withheld just because it is embarrassing to the city would be contrary to the PRA. *See Dunwell v. University of Arizona*, 134 Ariz. 504, 508, 657 P.2d 914, 921 (App. Div. II, 1983). Additionally, personal identifying victim information under A.R.S. § 39-123.01 may not be released, nor a photo of a police officer, or home address or home telephone number of a law enforcement officer, prosecutor, judge, code enforcement officer or other law enforcement official. *See* A.R.S. § 39-124.

IV. WHO CAN OBTAIN PUBLIC RECORDS?

Any person may request examination of public records or copies, printouts or photographs thereof 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 website to the requesting person. *See* A.R.S. § 39-121.01(D)(1). A written request is not required by statute but it is encouraged to avoid speculation and ambiguity.

V. PUBLIC ENTITIES CAN CHARGE A FEE

A) General rule (A.R.S. § 39-121.01(D)(1)). The custodian may require any person requesting a copy of any public record to pay in advance for any copying and postage charges. However, no fee can be charged for inspection of documents. *See also* Ariz.Op.Atty.Gen. No. I13-012. Victims of crime and their attorneys however, under A.R.S. § 39-127, cannot be charged fees for police reports. Public record requests made for court documents have a different fee schedule than the general agency fee schedule pursuant to A.R.S. § 22-404.

B) For non-commercial use. A person requesting copies, printouts, or photographs of public records for a non-commercial purpose may be charged a fee for the records in advance. An agency may charge a fee it deems appropriate for copying records, including a reasonable amount for the cost of time, equipment, and personnel used in reproducing copies of records, but not for costs of searching for the records. *See* A.R.S. § 39-121.01(D); *see also Hanania v. City of Tucson*, 128 Ariz. 135, 624 P.2d 332 (App. Div. II, 1980); and Atty.Gen.Op. I86-90. However, a victim of a crime and their attorney cannot be charged for copies of police reports under A.R.S. § 39-127.

C) For commercial use. Persons requesting reproductions for a commercial purpose as defined under A.R.S. § 39-121.03(A) must provide a statement setting forth the commercial purpose for which the records are requested. The fee can include a reasonable cost for time, materials, equipment and personnel in reproducing the record and value of reproduction. The city can obtain an exemption from the governor not to release the records if it feels disclosure of the records is not in the best interest of the public. Pursuant to A.R.S. § 39-121.03(D), "commercial purpose" means 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 for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct 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. *See Primary Consultants, LDC v. Maricopa County Recorder*, 210 Ariz. 393, 111 P.3d 435 (App. Div. I, 2005);

see also LaWall v. Robertson, 237 Ariz. 495, 353 P.3d 375 (App. Div. I, 2015) (where the court ruled the records do not have to be legally admissible, nor be used for a "specific", "contemplated" or "pending" action at the time of the request and in the end affirmed the attorney fee award of $30,000).

VI. MISCELLANEOUS CASE LAW & AUTHORITIES

Offense reports of jail inmates are public records. However, redaction can be made for protected information but charges cannot be made for redactions. *See Carlson v. Pima County, supra*.

Names and résumé's of applicants in a pool for a public position are not public records, but names and résumés of final candidates for a public position are public records. *See Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 806 P.2d 348 (1991).

A school district could not obtain prospective relief under the PRA to enjoin four individuals from making prospective public records requests without court leave; the requests made by defendants and individuals did not constitute a public nuisance; and the defending individuals were entitled to attorney fees for their successful defense. *See Congress Elementary School v. Jean Warren*, 227 Ariz. 16 (App. Div. I, 2011) (involving public records requests requiring more than 417 hours to review nearly 9,000 pages of documents).

Autopsy reports prepared by county medical examiners are public records for news gathering and cannot be withheld for privacy considerations. *See Star Publishing Company v. Parks*, 178 Ariz. 604, 875 P.2d 837 (App. Div. I, 1993) (*review denied* July 6, 1994); however, the privacy interests of survivors must be weighed against the need for public awareness of the government's performance of its law enforcement functions. *See Schoeneweis v. Hammer*, 223 Ariz. 169, 175-176, ¶ 23, 221 P.3d 48, 54-55 (App. Div. I, 2009). Additionally, a political consulting firm's use of voter information in furtherance of its business is not a "commercial purpose". *See Primary Consultants v. Maricopa County Recorder, Id*.

The PRA does not contain sweeping exemptions for police reports in active, ongoing criminal prosecution, although a balancing scheme might, in particular and in exceptional cases, lead to an exemption of records from disclosure. *See Cox Arizona Publishing Inc. v. Collins, Id.*

Teachers had confidentiality or privacy interest in their birth dates even though the birth dates were available from other public sources. The court held the public

interest in disclosure to enable a broadcasting company and reporter to run criminal background checks on teachers was, at best, speculative, and therefore upheld the nondisclosure. *See Scottsdale Unified School District No. 48 v. KPNX Broadcasting Co., Id.*

The City of Mesa Police Department was not required to release an audiotape of a 911 call in which an injured child was heard crying and whimpering to a television station during a tragic and stressful incident. A transcript was released instead, which on balance preserved the child's privacy. *See AH Belo Corp. v. Mesa Police Department, supra*.

E-mails generated or maintained on a government-owned computer system are not automatically public records as there are privacy issues to be considered. *See Griffis v. Pinal County, supra*.

The electronic version of a computer-based record, including any embedded metadata, is subject to disclosure under public records law, but an agency is not required to create a record. *See Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009).

The best interest of the agency includes the overall interest of the government and the people, whether the release would adversely affect the agency's mission, and must prove specifically how this adverse affect outweighs the presumption of disclosure. *See Phoenix Newspaper Inc., v. Keegan*, 201 Ariz. 344, 35 P.3d 105 (App. Div. I, 2001).

A contractual promise to keep material confidential is not enough to stop disclosure; this includes clauses in settlement agreements and notice of claims with sexual assault allegations. *See PNI v. Ellis*, 215 Ariz. 268, 159 P.3d (App. Div. I, 2007); *see also Moorehead v. Arnold*, 130 Ariz. 503, 637 P.2d 305 (App. 1991).

Electronic messages sent via cellphone, text or other social media on either public or private personal devices are subject to public records disclosure under the PRA as long as they have a substantial nexus to government activities. Atty.Gen.Op. No. 117-004CR-15-026, July 7, 2017.

Arizona's public records act requires the government to "query and search its database to identify, retrieve and produce responsive records for inspection" if the agency maintains public records in an electronic database; but agencies are not required to "tally and compile previously untallied and uncompiled information or data available in electronic databases"; research services also need not be provided.

See Lunney v. State, 244 Ariz. 170, 418 P.3d 943 (App. Div. I, 2018); nor is the government required to create a new record that compiles analytical information about preexisting records. *See ACLU v. Arizona Department of Child Services*, 240 Ariz. 142, 377 P.2d 339, App. Div. I. 2016, *review denied*.

There is a privacy interest in home addresses and home phone numbers. Ariz.Atty.Gen.Op. I91-004 (January 4, 1991).

An informant's identity is non-disclosable. *Grimm v. Ariz. Bd. of Pardons & Parolees*, 115 Ariz. 260, 268-69, 564 P.2d 1227, 1235-36 (1977).

Press release requests on an ongoing basis shall be complied with under the Arizona PRA. *West Valley View, Inc. v. Maricopa County Sheriff's Office, Id.*

A mayor's security duty records and activity logs were subject to the PRA, as the city could not show a security risk in disclosing them to the a public interest group. *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 267 P.3d 1185 (App. Div. I, 2011).

A news organization had no right of access to investigate reports, files or materials relating to a joint federal/state criminal investigation of an attempted assassination of a Member of Congress (Giffords). The records were not considered public records under Arizona law, A.R.S. § 39-121, *et seq.* was not applicable to federal law and the records law was outweighed by an interest in protecting defendant's 6th Amendment right to be tried fairly by an impartial jury. *U.S. v. Loughner*, 807 F. Supp. 2d 828 (D. Ariz. 2011).

Public officials cannot use private electronic devices and social media accounts for the purpose of concealing official conduct. Ariz.Op.Atty.Gen. No. I17-004 (July 7, 2017).

The failure to turn over one specific document in an agency's search does not alone render a search for records inadequate under the Arizona Public Records Act. *See Hodai v. City of Tucson*, 239 Ariz. 34, 365 P.3d 959 (App. Div. 2, 2016) (where the best interests of the state outweighed presumption of disclosure of records regarding functioning of cell phone tracking devices used by city police department, and thus records were exempt from disclosure under PRA). In addition, a request for all communications from a twelve month period between city police department and federal bureau of investigation was deemed unreasonably burdensome. (1,400 email accounts needing search and redaction). *Id.*