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OGC

The Office of General Counsel

6 attorneys

All contracts, leases, procurements, employment (12K),
student matters

Student Matters

Academic (access/integrity), FERPA, HIPAA, Judicial,
Collections, First Amendment

Arizona Public Records Act



“Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.” A.R.S. § 39-121

What is a Record?

All books, papers, maps, photographs or other documentary materials, regardless of physical form... made or received by any governmental agency.

A.R.S. §41-1350

Includes Paper *and* Electronic

What is a “public” record?

Arizona’s public records statute. A “public record” is a record that is “reasonably necessary or appropriate to maintain an accurate knowledge of . . . [a public officer’s or public body’s] official activities and of any of their activities which are supported by monies from the state or any political subdivision of the state.” A.R.S. § 39-121.01(B).

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

According to the *Griffis* Court:

That definition of “public records” does not encompass documents of a purely private or personal nature. Instead, only those documents having a “substantial nexus” with a government agency’s activities qualify as public records.

What if the record is not created or stored in a public office?

It is not the location of the record or who has possession that makes a record “public.” It is the nature and purpose of a record that determines its status. *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421 at ¶ 11 (2007).

- Creating and/or storing a public record on a personal computer does not remove it from coverage of the public records laws.
- Creating and/or storing a public record on a server operated by a private entity does not remove it from coverage of the public records laws. *NCAA v. The Associated Press et al.*, Florida District Court of Appeal, First District (2009).
- Creating and/or storing a public record at home does not remove it from coverage of the public records laws.

Markings

- “Confidential” documents
- “Draft” documents (deliberative process)
- A public body or public officer is not required to create a new document in order to respond to a request

The Two Primary Requirements of Arizona's Public Records Laws

All officers and public bodies must:

1. Maintain all public records in accordance with their established retention schedules; and
2. Make public records available for public inspection.

Arizona Public Records Law

- Requests need not be in writing
- Requests need not state a purpose or reason (*but see*, requests made for a commercial purpose)

Arizona Public Records Law

Commercial Purpose

1. the use of a public record for the purpose of sale or resale
2. producing a document containing all or part of the copy, printout or photograph for sale

Arizona Public Records Law

Commercial Purpose

3. obtaining names and addresses from public records for the purpose of solicitation
4. the sale of names and addresses to another for the purpose of solicitation

Arizona Public Records Law

- ASU must respond to requests “promptly”
- ASU may charge different fees depending on whether the request is for non-commercial or commercial purpose
 - Non-Commercial: 20¢ per page, \$10.00 per hour of staff time to copy (first 25 pages free)
 - Commercial: the above fees plus the value of the record in the commercial market

Arizona Public Records Law

- Federal Freedom of Information Act is not directly applicable to ASU; however, the Arizona Supreme Court has held that federal cases interpreting FOIA may guide Arizona courts in construing Arizona's public records statute

Public Records Exemptions

- Student education records (FERPA)
- Certain research and intellectual property records (A.R.S. § 15-1640)
- Records concerning donors or prospective donors except:
 - name of donor
 - date of donation
 - amount of donation
 - description of donation including conditions, if any

The *Carlson* Balancing Test

For purposes of inspection and access, all records required to be made and maintained by § 39-121.01(B) and preserved by (C) are to be available for inspection under § 39-121 and copying under § 39-121.01(D), subject to the official's discretion to deny or restrict access where recognition of the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities **outweigh** the general policy of open access.

Carlson v. Pima County, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984) (emphasis added).

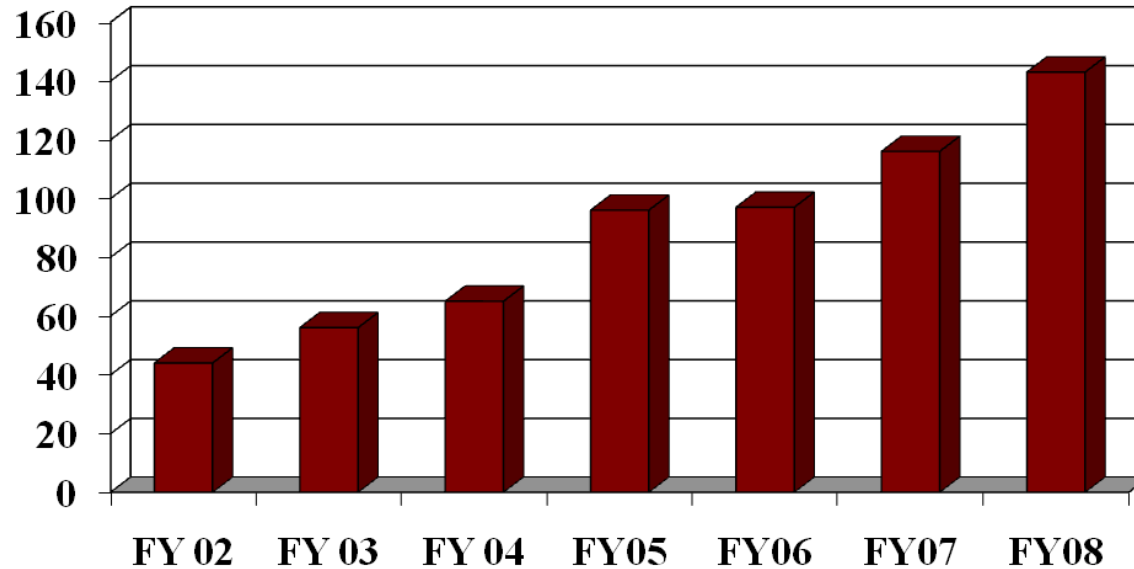
How Long Must You Keep A Record?

- **ASU policies are not legal authorization to destroy records**
- **Two Types of Records Retention Schedules:**
 - **Generic**
 - **Office-Specific**

For More Information

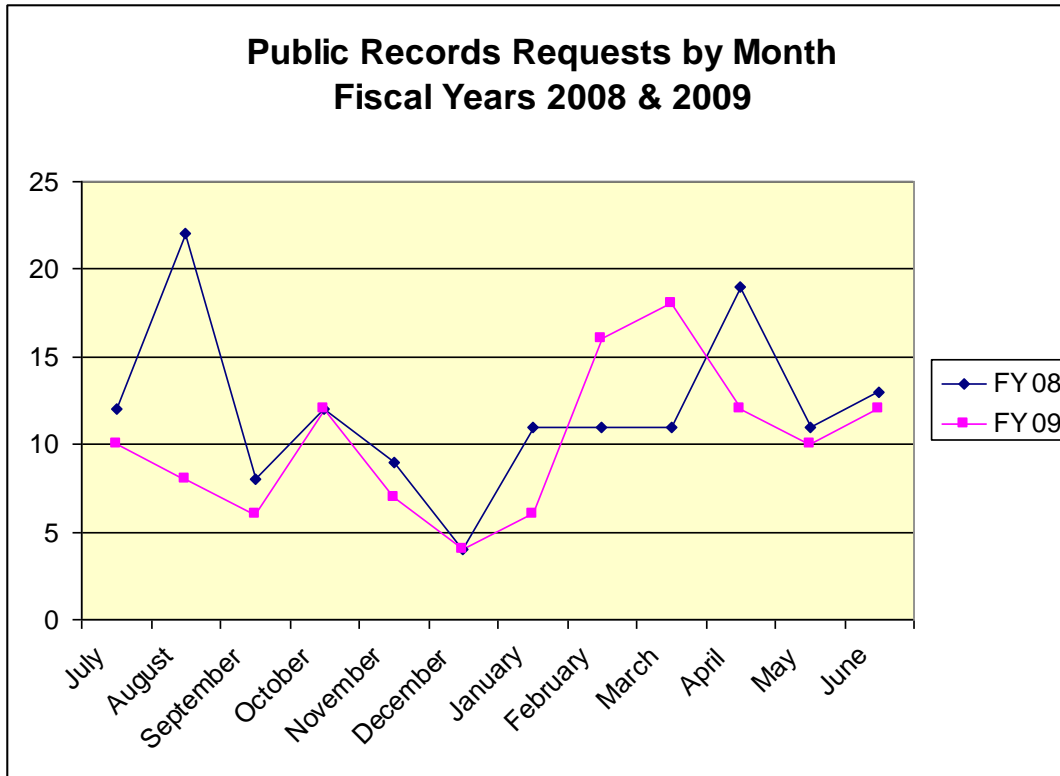
- **See University Archives Records Management Website:**
<http://www.asu.edu/lib/archives/records.htm>
- **See PCS-703 for detailed instructions**

ASU Public Records Requests



	Total requests
FY 03	56
FY 04	65
FY05	96
FY06	97
FY07	116
FY08	143
FY09	121

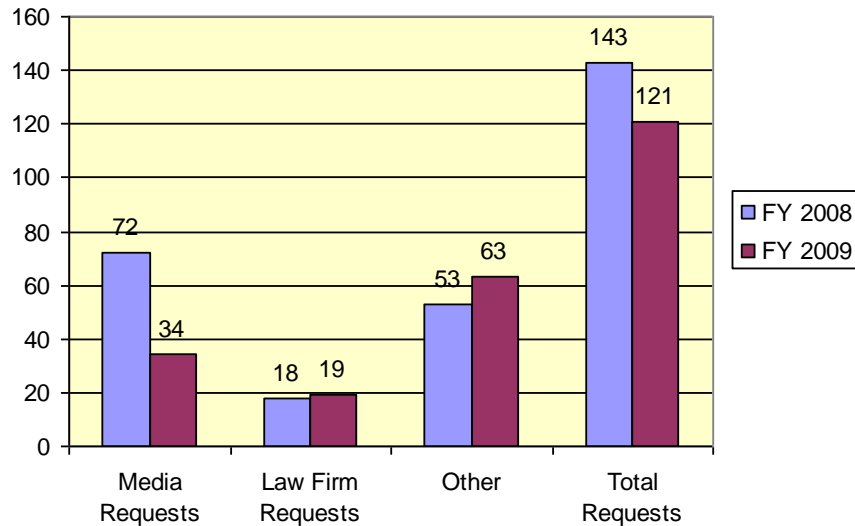
ASU Public Records Requests



	FY 08	FY 09
July	12	10
August	22	8
September	8	6
October	12	12
November	9	7
December	4	4
January	11	6
February	11	16
March	11	18
April	19	12
May	11	10
June	13	12

ASU Public Records Requests

Public Records Requests FY08--FY09



Type of Request	Fiscal Year 2008	Fiscal Year 2009
Athletics—Compensation of Coaches	33	29
Athletics—Agreements for Apparel, Media, Game Schedules	8	12
Grade Distribution Reports, Class/Course Schedules	7	8
Employees—Compensation, Lists	12	13
Student Matters including Greek Life Requests	14	9
Purchasing Agreements	10	7
Litigation Matters	5	6
South Campus	7	4
Other: Res. Life, Parking & Transit , Research Grants, Google Apps, Bookstore Sales Reports, MU Fire, Air Quality Reports	47	33
Total	143	121

ASU's process for responding to public records requests

- The request is routed to OGC.
- OGC notifies the custodian.
- The custodian provides the responsive documents to OGC.
- OGC reviews to determine if the responsive documents contain information that is exempt from disclosure.
- OGC responds or coordinates ASU's response to the requestor.

Personnel Records

Personnel information that is subject to public disclosure:

- **ASU employee directory and pay information:**

- Name
- titles or positions, including academic degree and honors received
- department
- campus telephone number
- employment dates
- salary or rate of pay; and
- e-mail address

- **Employee discipline records:**

- “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. *See also* ABOR 6-912.

Working in a public records environment

- Use the “front page” test for all communications
- Use a personal e-mail account and your home computer for personal communications
- Observe your department’s records retention policy

Things NOT to do

- Do not respond yourself
 - Several parts of the university may have received the same request
 - You may overlook exempt material that should be redacted

Things NOT to do

- Do not destroy documents when you learn of a PRR!!!
 - Documents in your possession may be embarrassing or put the university in a poor light, but that will not excuse destruction of the document

Things NOT to do

- Do not mark the document “draft” or “confidential” with the hope of avoiding disclosure

Things NOT to do

- NEVER forward privileged information (information from the Office of General Counsel) to a third party unless you clear it with OGC first

Things NOT to do

- Don't forget the long lost telephone...
Why draft a sensitive e-mail when it would be more prudent to have a conversation?
- Don't become part of public records lore



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