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AS A PUBLIC OFFICIAL

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League of Arizona Cities and Towns

INTRODUCTION

The League prepared this report to help you avoid some of the potential legal pitfalls of holding local public office, whether elected or appointed. The report reviews seven areas of state law that affect public officers: open meetings, conflicts of interests, public records, incompatibility of office, nepotism, financial disclosure, and limitations on entertainment.

The life of a public official is not an easy one. State laws, like the seven highlighted in this report, continually affect the decision-making process. Good intentions (like, "but I didn't mean to violate the law") help. However, good intentions alone are not sufficient because violations of these laws can carry stiff penalties. Therefore, you need to be familiar with the laws governing your conduct in public office.

We hope you will take the time to read this report and retain it for future reference. Most importantly we hope this report will prompt you to discuss each of these laws with your city or town attorney. This report is not intended to replace the need for you to review these laws with your local attorney; it's really only a starting point for discussion of your particular situation in your city or town.

OPEN MEETING LAW

General Provisions[1]

The operation of government and, specifically, the activities of government officials are issues of concern to the general public. Although there are many reasons for this movement toward public awareness, there seems to be one distinct message delivered by the public: THE PUBLIC'S BUSINESS MUST BE CONDUCTED IN PUBLIC!

The Arizona Legislature has declared its policy concerning open meetings very clearly:

> 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 [law] shall construe any provision of this [law] in favor of open and public meetings.[2]

Arizona's Open Meeting Law (Law) provides very simply that, with a few limited exceptions, all meetings of a public body shall be open to all persons desiring to attend and listen to the deliberations and proceedings.[3] The Law defines a "meeting" 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."[4] The label attached to a meeting does not alter application of the Law. Whether the meeting is referred to as regular or special, workshop or study session, the Law's requirements must be met. The only exception to the public meeting requirement is an executive session, which is discussed later.

"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, such public body."[5]

This broad definition includes planning and zoning commissions, boards of adjustment, state licensing boards, library boards, and school boards. It also includes advisory committees and subcommittees, even if no member of the original appointing public body is a member of the advisory group.[6]

Public Notices of Meetings

The Law requires a public body to give advance notice of every public meeting and executive session to the general public and to each member of the public body. In giving notice, the first step is to file with the appropriate official a statement identifying where notices of the meetings of the public body will be posted. Those officials include the Secretary of State (for state public bodies), the Clerk of the Board of Supervisors (for county, school district, and special district public bodies), and the City or Town Clerk or Mayor's Office (for public bodies of cities and towns).[7]

Once this statement has been filed, the Law requires the public body post notice of each of its meetings in accordance with this statement and "give such additional public notice as is reasonable and practicable."[8] Notice of individual meetings is not necessary if the public body intends to meet at a regular day, time, and place and chooses to post one notice of all of its meetings during a specified time period.[9] Such notice must be posted at the beginning of the period.

Except in the case of an actual emergency, no public meeting or executive session may be held with less than 24 hours' notice to the general public and each member of the public body.[10] The notice must include the date, time, and place of the meeting. If an executive session will be held, the notice must also cite the specific provision of law authorizing the executive session.[11]

There are three exceptions to the notice requirements outlined above. First, a meeting for which notice has been properly posted may be recessed and resumed with less than 24 hours' notice, although the date, time, and place of the resumed meeting must be announced prior to recessing the originally posted meeting.[12] Second, an emergency meeting may be held with less than 24 hours' notice in the case of an *actual* emergency. Such an emergency exists when, due to unforeseen circumstances, immediate action is necessary to avoid some serious consequences that would result from waiting until the required notice could be given. Prior to the emergency discussion or action, the public body must give as much notice as possible, announce the nature of the emergency, include those reasons in the minutes of the emergency meeting, and post a public notice within 24 hours declaring that an emergency session has been held and setting forth the agenda items covered.[13] Third, notice of a meeting to consider ratification of a prior act taken in violation of the Law requires at least 72 hours advance notice.[14]

Agendas

In addition to notice of the date, time, and place of the meeting, the Law requires that the notice include either an agenda of the matters to be discussed, considered, or decided at the meeting, or information on how the public may obtain a copy of the agenda. The agenda for a public meeting must list the "specific matters to be discussed, considered or decided,"[15] and should contain "such information as is reasonably necessary to inform the public of the matters to be discussed or decided."[16] Such items as "new business" or "old business" are insufficient unless the specific items of new or old business are identified.

Agendas for executive sessions must contain a "general description of the matters to be considered" and must "provide more than just a mere recital of the statutory provisions authorizing the executive session," but the agenda should not contain information that "would defeat the purpose of the executive session."[17]

The agenda may be made part of the public notice or, if the notice advises members of the public how they can obtain an agenda, then it can be distributed separate from the notice. In either case, the agenda must be made available at least 24 hours before the meeting, unless an actual emergency exists. Supporting documentation that is referred to in or made part of the agenda must be made available to the public in the same time frame. It may be appended to the actual agenda itself (provided the public can read it), or the agenda may advise the public where such supporting documentation can be obtained.

The agenda sets the parameters of what can be done during a public meeting. Only those items specifically listed on the agenda or matters related thereto may be discussed, considered, or decided.[18] Two quasi-exceptions apply.

First, agendas may include a "summary of current events" item, during which any member of the public body or the chief administrator "may present a brief summary of current events without listing in the agenda the specific matters to be summarized."[19] However, the public body may not propose, discuss, deliberate, or otherwise take legal action on such a matter at that meeting, unless that particular matter also has been specifically identified on the posted agenda.

Second, a public body may (but is not required to) put an "open call to the public" on its agenda to allow members of the public to address the public body on matters not otherwise listed on the agenda. However, the public may only raise issues within the jurisdiction of the public body, and members of the public body may not discuss or take legal action on new matters raised during an open call to the public. Members of the public body have four options: sit in silence or wait until "the conclusion of an open call to the public" and then respond to criticism, ask staff to review a matter, or ask that a matter be put on a future agenda so it can be discussed.[20]

Executive Sessions

The Law permits an executive session (a closed meeting) to be held for seven limited purposes. In addition to the notice and agenda requirements set forth earlier, members of the public body must vote during a public meeting to agree to meet in executive session. The general public is properly excluded from an executive session. Only those "individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session." [21] The public body must instruct those present at the executive session that all matters discussed in the executive session, as well as the minutes, must be kept confidential. [22] Finally, no vote may be taken during an executive session. Any final action on an item discussed in an executive session must be taken during a public meeting.[23]

The only purposes for which an executive session discussion may be held are the following:

1. Personnel matters involving a specific position or individual (and these individuals must be given written notice at least 24 hours in advance in case they want to be discussed in open session).[24]

2. Confidential information specifically exempt by law from public inspection.

3. Legal advice provided by the public body's attorney.[25]

4. Discussion with the public body's attorney regarding pending or contemplated litigation, settlement discussions to avoid or resolve litigation, or contract negotiations.

5. Instruction of designated representatives concerning salary and compensation negotiations with employee organizations.

6. International and interstate negotiations and negotiations by a city or town with a tribal council located within or adjacent thereto.

7. Instruction of designated representatives concerning negotiations for the purchase, sale, or lease of real property.[26]

Improper use of the executive session provision is one of the most common types of Open Meeting Law violations. Therefore, a public body, with the assistance of its attorney, should establish a clear procedure to use before holding an executive session.

Minutes

All public bodies, except subcommittees and advisory committees, must take and retain written minutes or a recording of all meetings.[27] The minutes or a recording of all public meetings must include, at a minimum, 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 discussed or considered.

4. An accurate description of all legal actions proposed, discussed, or taken, and the names of members who proposed each motion.

5. The names of persons making statements or presenting material to the public body and a reference to the specific legal action addressed by the person.

6. Sufficient information to permit further investigation of the background or specific facts of a decision if the discussion in the public session does not adequately disclose the subject matter and specifics of the action taken.

7. In case of an actual emergency, a statement setting forth the reasons necessitating a discussion, consideration, or decision without the matter being placed on an advance agenda.

8. In case of ratification, a copy of the required disclosure statement.

The minutes of executive sessions must contain the information described in paragraphs 1, 2, 3, and 7 above, and an accurate description of all instructions given in an executive session.[28]

The minutes or a recording of any meeting (*except* an executive session) must be open to public inspection no later than three working days after the meeting.[29] Minutes must be taken in executive sessions and must be kept confidential except from the members of the public body that met in executive session; the officers, appointees, or employees who were the subject of discussion in a personnel executive session; the auditor general when conducting an audit; or the Attorney General or county attorney when investigating alleged violations of the Law.[30] If the public body wishes to exclude all staff from attending the executive session, then the minutes should be kept or recorded by a member of the public body.

In addition to written or recorded minutes of the meeting, the Law provides that any part of a public meeting may be recorded by any person in attendance by means of a tape recorder, camera, or other means of sonic reproduction as long as there is no active interference with the conduct of the meeting.[31]

E-Mail Violations

The Law applies to all meetings of a public body, regardless whether a quorum gathers "in person or through technological devices." [32] Therefore, you should be extra careful when communicating with any other council members – even less than a quorum – via technology, such as by telephone or electronic mail ("e-mail"). Otherwise, you may find that you have violated the Law.

A "meeting" occurs when a quorum of a public body "gathers" and takes any one of four actions: discusses legal action, proposes legal action, takes legal action, or deliberates with respect to any such actions.[33] A recent Attorney General Opinion notes that the simple act of a public body member sending out a single e-mail to a quorum of the public body could violate the Law if the e-mail proposes legal

action.[34] Moreover, "[t]hree of these activities [to discuss, deliberate, or take action] necessarily involve more than a one-way exchange between a quorum of a public body," so even the simple act of a member of the public body responding to, exchanging, or otherwise circulating e-mails regarding legal action among a quorum could be interpreted as a violation of the Law.[35] Therefore, you should be extra cautious whenever communicating with other council members using e-mail or other technological devices.

To help public bodies comply with the Law, the Attorney General recommended that, while it is not legally required, members of public bodies who send e-mails to each other might want to include the following language in their e-mail message to remind colleagues that replying or circulating an e-mail to others could be construed as discussing, deliberating, or taking legal action:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.

For similar reasons, the Attorney General advised that staff might want to use the following language:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members.

Ratification

A public body may ratify legal action previously taken in violation of the Law. Ratification is appropriate when the public body needs to validate retroactively a prior act in order to preserve the earlier effective date of the action.

Ratification merely validates the prior action. It does not eliminate liability of the public body or others for violation of the Law.

All legal action transacted during a meeting held in violation of the Law is null and void unless ratified. The procedure for ratification is prescribed in A.R.S. § 38-431.05(B). It is a detailed and complicated procedure that must be followed carefully, "within thirty days after discovery of the violation," and with advice by the public body's attorney.

Sanctions

If any business of a public body is conducted in violation of the Law, the actions taken at such a meeting are automatically null and void.[36] The Law can be enforced against a member of a public body and any person who knowingly aids, agrees to aid, or attempts to aid anyone in violating the Law.[37] Any person affected by an alleged violation, the Attorney General, or the county attorney for the county in which an alleged violation occurred, may file an action and obtain civil penalties of up to $500 for each violation, attorney's fees and court injunctions against the offending public body or public official. If the court finds that a public officer intentionally violated the Law, the court may remove the officer from office and assess the officer personally with the attorney's fee award. Moreover, a member of a public body shall not direct staff to communicate in violation of the Law. [38]

CONFLICT OF INTERESTS

One of the most misunderstood phrases in the media today is conflict of interests. The phrase carries such negative connotations, and yet it is only natural, in our system of part-time citizen legislators, for elected and appointed officials to face potential conflict of interests situations. It is not "bad" to have a conflict of interests, but it is illegal to fail to declare a conflict of interests under Arizona law or to participate or otherwise be involved in discussions on issues or contracts where such a conflict exists.

This portion of the report may help you identify potential conflicts of interests and how you may avoid violations of this state law, which is one of the most complicated set of laws on the books. To understand its effect on your actions we suggest you discuss the law and your particular situation with your own private attorney or the city or town attorney. FIND OUT AHEAD OF TIME WHAT YOUR CONFLICTS ARE!

Applicability

The conflict of interests law covers all public officers and employees of incorporated cities and towns. This includes the mayor, council members, and members of all appointed boards and commissions (parks, planning and zoning, libraries, etc.); the city manager, his or her appointees, and all consultants; and full-time, part-time, and contractual employees of the city or town.

The conflict of interests law is also applicable when the private interests of a public official's or public employee's relative are under consideration. The law broadly defines a relative to be not only a husband or wife, child, grandchild, parent, grandparent, brother or sister (and their spouses) but also the following in-laws: brothers, sisters, parents, and the child of a spouse.[39] All other relatives, whether by blood or marriage, are not subject to the restrictions of this law.

Conflict of Interests Defined

The conflict of interests law distinguishes between interests that are "remote" and those that are "substantial."[40]

Essentially what it says is that remote interests are so minor that they do not constitute illegal conflicts of interests, and that any interest which is not remote, as detailed in state law, is a substantial interest. If you have only a "remote interest" in a matter before the council, then you can vote and participate in the discussion. Here is what the law defines as a remote interest.

REMOTE INTERESTS exist when the public officer or employee or a relative is:

1. A nonsalaried officer or member of a nonprofit corporation. Thus, being a nonsalaried officer or a member of a nonprofit health agency doing business or requesting a grant from the city or town technically would not constitute a conflict.

2. The landlord or tenant of a contracting party. For example, a council member may lease office space to a party that has a private interest in a public matter without it resulting in a conflict of interests.

3. An attorney of a contracting party.

4. A member of a nonprofit cooperative marketing association.

5. The owner of less than three percent of the shares of a corporation with an interest in a matter with the city or town, provided that:

    a. Total annual income from dividends, including the value of stock dividends, does not exceed five percent of the officer's or employee's total annual income; and

    b. Any other payments made to the officer or employee by the corporation do not exceed five percent of the officer's or employee's total annual income.

6. Being reimbursed only for actual and necessary expenses incurred in performance of official duties.

7. Receiving municipal services on the same terms and conditions as if the person were not an officer or employee of the municipality. Thus, when a council member who owns a business within the city or town votes for or against an increase in the business license tax, a conflict would not exist because this action would apply to all businesses in the corporate limits.

8. An officer or employee of another political subdivision, a public agency of another political subdivision, or any other public agency unless it is the same governmental entity being served who is voting on a contract or decision which would not confer a direct economic benefit or detriment upon the officer. Thus, a council member who is a school teacher may vote to enter into an intergovernmental agreement with the school district, unless such agreement would confer some direct economic benefit, such as a salary increase, upon the council member.

9. A member of a trade, business, occupation, profession, or class of persons and has no greater interest than the other members of that trade, business, occupation, profession, or class of persons. A class must consist of at least ten members to qualify the interest as remote.

SUBSTANTIAL INTEREST is defined in this law as any pecuniary or proprietary interest, either direct or indirect, other than those that are remote.[41] In general, a conflict of interests will result when an officer or employee of a city or town is involved in substantial ownership or salaried employment with a private corporation doing business with the city or town. For example, if a council member owns or is employed by a lumberyard selling to the city, then a conflict may exist. On the other hand, if the council member is the lawyer for that lumberyard, or if the council member leased land to the lumberyard, then it is possible that no conflict exists.

A public officer or an employee may sell equipment, material, supplies, or services to the municipality in which the officer or employee serves if this is done through an award or contract let after public competitive bidding.[42] An exception to this law allows cities and towns to purchase supplies, materials, and equipment from a member of the council without going to public competitive bid as long as the single transaction does not exceed three hundred dollars and the annual total of such transactions with a member of the council does not exceed one thousand dollars.[43] The city or town must adopt a policy governing such purchases and must approve this policy on an annual basis.[44] All transactions above these limits must take place as a result of public competitive bidding. However, the city or town officer or employee would not be allowed to influence the bidding process in any way and must make known such interest in the official records of the city or town.

The Attorney General has concluded that there is no statutory restriction on a school board member or employee bidding on property being sold by the district, as long as the board member or employee publicly discloses such interest in the property being sold and refrains from participating in any manner in the decision to sell the property.[45]

Additional Provisions

The conflict of interests law also contains the following restrictions on the activities of public officers and employees that should be reviewed with your city or town attorney.

1. When a public officer or employee has been directly concerned or has exercised "administrative discretion" in an issue, that officer or employee may not represent another person before an agency of the city or town on the same issue and receive compensation for such representation. This restriction extends to twelve months after termination of office or employment with the city or town.[46]

2. A public officer or employee cannot disclose or use confidential information obtained during the term of office or employment.[47]

3. A public officer or employee cannot receive any compensation (other than as provided by law) for performance of services in any case, special proceeding, application, or other matter pending before any agency of the city or town.[48]

4. A public officer or employee cannot use or even attempt to use his or her position to obtain anything of value that normally would not be received in the performance of official duties. Something is considered to have "value" when it exerts a "substantial and improper" influence on the duties of the public official.[49]

The State Bar of Arizona has placed another restriction on local elected officials who are lawyers. The State Bar ruled that attorneys on city or town councils cannot represent clients in the city or town's courts.[50] However, the Arizona Supreme Court has ruled that attorneys on city and town councils may represent clients in superior court in cases that involve members of the police department in such council member's city as adverse witnesses.[51]

Declaration of a Conflict

When a public officer or employee (or their relative) has a substantial interest in any decision of or contract, sale, purchase, or service to their city or town, the public officer or employee must:

1. Refrain from participating in any manner (voting, discussing, or in any way attempting to influence) a decision of the governing body or agency of the city or town; and

2. Declare that a substantial interest exists and make it known in the official records of the city or town. For a member of the council, this can be done by declaring at a council meeting that a conflict of interests exists and having this declaration officially entered in the minutes. For an employee who faces a conflict of interests situation, the employee should file a letter with the manager or clerk declaring in writing that a conflict exists and refrain from participating in any manner in the decision or issue.[52]

The provisions of state law relating to conflict of interests, specifically the requirement that members of the council refrain from participating in or attempting to influence a decision in which they have a substantial interest, may preclude the council from acting as required by law in its official capacity. For example, this situation may occur when a majority of the members of the *entire* council (not just those present at a particular meeting) have a substantial conflict of interests. To address this potential problem, state law provides that if the conflict of interests statutes prevent a public body from acting as required by law in its official capacity, such action shall be allowed if the members of the public body with the apparent conflicts make known their substantial interests in the official records of the public body.[53] For example, each affected council member should state that he or she has a substantial interest in the issue before the council, and then make sure it is recorded in the official minutes of the meeting. Such statement should be made at the beginning of any discussion of the issue by the council. This process can be tricky, so seek legal counsel before proceeding.

Legal Opinions

If you ask your city or town attorney for an opinion on conflict of interests, the request is confidential. However, formal final opinions are a matter of public record and must be filed with the city or town clerk.[54] This filing requirement does not apply to verbal communications between a mayor or council member and the city/town attorney.

Filing of Disclosures

The clerk must maintain a special file for all disclosures of conflicts of interests. One method to comply with this requirement would be to place a separate copy of the council meeting minutes when a conflict is declared in a special file labeled "Conflict of Interests Disclosures."

Penalties

A public officer or employee who intentionally or knowingly conceals or fails to disclose any substantial interest or engages in any of the activities prohibited by A.R.S. § 38-503 through 38-505, is guilty of a class 6 felony, which carries a penalty of one and one-half years imprisonment or a maximum fine of $150,000, plus a conviction will automatically forfeit office. A public officer or employee who negligently or recklessly violates the conflict of interests law by failing to disclose a

substantial interest or engaging in the activities prohibited by A.R.S. § 38-503 through 38-505, is guilty of a class 1 misdemeanor, which is punishable by imprisonment for up to six months or a fine of not more than $2,500. Any person affected by a decision of a public agency where a conflict of interests is alleged may bring a civil suit in superior court, which may order equitable relief including attorneys fees to the prevailing party. In addition, any contract made in violation of the law may be voided by action of the city or town.[55] WHEN IN DOUBT ABOUT POTENTIAL CONFLICTS, ASK YOUR ATTORNEY!

PUBLIC RECORDS

Arizona's Public Records Law is an odd paradox. On the one hand, the sweeping language of its core provisions makes the law appear to be straightforward and simple. On the other hand, the hundreds of exceptions in other statutes and judicial decisions can make application of the law rather complex at times. Given this unique blend of simplicity and complexity, you should learn the following basics, but then seek immediate assistance if you directly receive a request for public records.

Simple and Sweeping

Arizona's Public Records Law commands 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." [56] The law applies to, among others, officers of cities and towns.[57] The definition of "public records" is quite sweeping, so the law reaches not only paper items (including "all books, papers, maps, photographs or other documentary materials"), but also all other information "regardless of physical form or characteristics, including … items produced or reproduced on film or electronic media." [58] Importantly, if any doubts exist about whether a member of the public can see a particular document, courts have declared that public records are "presumed open to the public for inspection."[59]

Complex Maze of Exceptions

That presumption of openness, however, is just a presumption and not an absolute rule. Indeed, the Arizona Supreme Court has recognized three sets of exemptions to the sweeping presumption of openness: when confidentiality restrictions apply, when privacy interests of individuals prevail over the public's right to know, or when the best interests of the government outweigh the public's right to inspection.[60]

First, Congress and the Legislature have enacted hundreds of confidentiality exceptions to the Public Records Law. Often buried in obscure niches of federal and state statute books, these confidentiality restrictions usually are designed to protect the public at large (*e.g.*, prevent disclosure of the vulnerability of certain facilities to sabotage or attack),[61] guard the safety of certain individuals (*e.g.*, prevent disclosure of the home addresses of judges, prosecutors, public defenders, peace officers, and victims of domestic violence, stalking, or harassment),[62] and protect against identity theft (*e.g.*, prevent disclosure of social security numbers).[63] Note that you do not have independent authority to promise that documents will be protected as confidential.[64]

Second, privacy interests may protect certain information in public records from being released. For example, the Arizona Supreme Court declared that a public teacher's birth date could be withheld from public inspection, based on the court's recognition that such personal identifying information could be combined with other information, which in turn could lead to identity theft.[65]

Finally, a record may be withheld from public inspection when disclosure would be detrimental to "the best interest" of the government. The Arizona Court of Appeals later clarified this otherwise broad exemption when it noted that while "public records are presumed open to the public for inspection," certain records may be withheld if "the public official can demonstrate a factual basis why a particular record ought not be disclosed to further an important public or private interest."[66] Note that the burden is on the public official to prove that the record should be kept from the public rather than on the person seeking the record.

Steps to Comply

Public officials should keep the following seven steps in mind to comply with public records requests.

Step One: Properly Maintain Public Records.
Arizona law imposes duties on public officers even before they receive a request to produce public records for inspection. For example, the law mandates that "[a]ll officers and public bodies shall maintain all records … 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."[67] Moreover, "[e]ach 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" an authorized document retention policy.[68]

Step Two: Seek Assistance. With the exceptions to the Public Records Law ever evolving and sometimes "hidden" in statute books and judicial decisions, application of Arizona's Public Records Law can be complex. Therefore, if you ever receive a request for a public record, then the best practice is to seek help immediately from staff members who are more familiar with the law. Staff members, in turn, should contact their legal counsel for guidance to avoid problems.

Step Three: Receiving a Public Records Request. The law allows "any person" to request access to a public record. Importantly, the law does not require people to identify themselves when they are seeking access to public records. Nor do they have to identify why they want to see the record.

Step Four: Act "Promptly." The law declares that "[a]ccess to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record," although the amendment does not define precisely what "promptly" means.[69] Denying access to a public record exposes the public body to liability, so reasonable efforts must be made to provide the requested documents "promptly."

Step Five: Inspection and Copying. Members of the public actually have three rights relating to public records. First, they have a right to "inspect" those documents, which essentially means they may "examine" or "look at" the requested records.[70] Second, in light of the numerous exceptions to the Public Records Law, a person may request the custodian of the public records to "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."[71] (A court still may review the withheld documents and order them disclosed.) Third, if a person wants, they are entitled to get "copies, printouts or photographs" of the records, which must be provided "promptly."

Certain records may contain information that legitimately should be withheld from public inspection. In those situations, the information that is confidential, private, or harmful to the best interest of the government should be withheld but the rest of the record should be made available to the person requesting the public record.[72]

Step Six: Recovering Costs. Searching for and making copies of public records costs time and money. The law recognizes two categories of requestors and limits what each may be charged. When a person requests public records for a "commercial purpose" – for example, obtaining lists of names to try to sell insurance – then the public body may charge a "reasonable fee" for both the time searching for the records and the actual cost of the copying.[73] When, however, the request is not for a commercial purpose, then the public body may charge only for the cost of the copying; it is not authorized to charge for the cost of searching for the records.

NOTE: Because of the First Amendment, requests by journalists are *not* for a commercial purpose.

Step Seven: Mailing. A recent amendment allows a person to "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."[74]

Violations

Violations of public records laws come in two forms: "governmental" violations and "personal" violations.

"Governmental" violations occur when the government (operating through public officials and employees) fails to comply with the public records law by, for example, refusing to produce public records, purposefully delaying the release of public records, refusing to release records based on speculation that they may contain information that does not need to be produced,[75] or overcharging for copies of public records.[76] A person "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 …. If the court determines that a person was wrongfully denied access to or the right to copy a public record and if the court finds that the custodian of such public record acted in bad faith, or in an arbitrary or capricious manner, the superior court may award to the petitioner legal costs, including reasonable attorney fees, as determined by the court."[77] Additionally, "[a]ny person who is wrongfully denied access to public records pursuant to the provisions of this article shall have a cause of action against the officer or public body for any damages resulting therefrom."[78]

"Personal" violations occur when, for example, a public officer or employee releases confidential information that is protected from disclosure by statute,[79] steals or in an unauthorized way removes, secretes, mutilates, or defaces a public record,[80] or otherwise "tampers with a public record" by destroying, altering, or falsifying a public record.[81] The penalties for personal violations can range from removal from office and imposition of civil penalties to being convicted of a class 4, 5, or 6 felony.

Practical Tips

To avoid problems, you might want to keep the following three tips in mind. First, whenever creating documents (including informal writings,

such as email, which are subject to the Public Records Law[82]), presume they will be public records available for inspection, copying, and printing on the front page of the local newspaper. Therefore, be as careful with the tone and language of the document as you are with the substantive accuracy of your writing.

Second, don't "tamper" with a public record – by destroying it, backdating it, hiding it, altering it (such as erasing or changing portions of it), or otherwise falsifying it. Each of these acts is a crime in Arizona.

Third, whenever you receive a request for a public record, it is a sound practice to immediately seek help from staff.

INCOMPATIBILITY OF OFFICES

On many occasions, local officials have asked the League whether a public official may hold two or more public offices at one time. In response to these requests, we compiled the following information to help in determining when two or more public offices may be incompatible.

Early Concepts of Incompatible Offices

Arizona's law prohibiting the holding of incompatible offices can be traced, in large part, to early English common law. Offices were said to be incompatible or inconsistent if:

1. The main duties of the two offices could not be carried out with care and ability; or

2. One office is subordinate to and interferes with the other office such that the duties of the two offices cannot be performed at the same time with "impartiality and honesty."

Very few laws, if any, have been based upon the first principle. Apparently, it has been difficult to determine when an individual fails to execute the duties of two public offices with "care and ability." The second principle mentioned above has been the basis for most Arizona law on the incompatibility of public offices.[83]

State Laws and Interpretations

From Arizona's Constitution and statutes, and interpretations by the Attorney General and the League's General Counsel, we have compiled a list of legal provisions focusing on the issue of incompatible public offices.

Arizona State Constitution

1. No member of the Legislature may hold any other office or be employed by the state or any county, city, or town, except a legislator may also be a school board member or a teacher.[84]

2. Incumbents of a salaried elective office may not "offer" themselves for nomination or election to any salaried local, state, or federal office unless during the final year of their term. However, an incumbent may resign and then run for another office.[85]

3. Justices of the peace may hold the additional position of police magistrate in incorporated cities and towns.[86]

State Statutes

1. A public official may not hold two salaried public offices at the same time. However, elected officials in the final year of their term of office may offer themselves for nomination to another elected office. The point in time at which an elected official is determined to have offered herself or himself for nomination or election to another public office is upon the filing of nomination papers or upon formal declaration of candidacy for such office, whichever occurs first.[87]

2. Mayors, aldermen, or council members cannot receive any compensation from the city or town during the term of office for which they were elected in addition to the compensation paid to them as elected officials.[88] As a result, city and town elected officials cannot hold any other paid public office with the city or town. In the opinion of our League General Counsel, this provision also prevents a mayor or council member from resigning office and accepting another compensated position with the municipality prior to the end of the term of office for which the person was elected.[89]

3. Public defenders employed by the county may also serve as public defenders for a city or town. State law requires the city or town to reimburse the county for the public defender's services.[90]

4. Members of the State Personnel Board and most state employees cannot be candidates for nomination or be elected to any paid public office, nor may they take part in managing a political party or political campaign.[91] Certain state employees are exempted from these restrictions, so we suggest that you discuss individual cases with your city or town attorney.

5. A person may not be a candidate for more than one public office if the elections for the offices are held on the same day and the person would be prohibited from serving both positions simultaneously.[92]

City Charter Provisions

If you are holding office in a charter city, there may be additional limitations placed on your ability to hold other public offices. We suggest you consult the charter or your city attorney on any such provisions.

Attorney General Opinions

The Attorney General has issued a number of opinions on the topic of incompatibility of office. Of particular interest to cities and towns:

1. State employees subject to the State Personnel Commission may not hold the position of city or town council member, if the council position is compensated.[93]

2. The positions of school board member and council member could be held by the same individual because the school board position was uncompensated.[94]

3. A legislator may not assume an elective office in a charter city during the legislative term for which he or she was elected.[95]

4. The duties of a county supervisor are not inherently inconsistent with the duties imposed on a member of the Arizona Board of Regents.[96]

League General Counsel Opinions

The League's General Counsel has been requested on a number of occasions to issue opinions on possible instances of incompatible offices. The following is a list of these opinions:

1. One individual in a non-chartered city cannot hold the positions of mayor and police judge at the same time.[97]

2. The compensated positions of city alderman and volunteer fireman could not be held at the same time by one individual because aldermen can only receive the specific compensation designated by law for their service as aldermen.[98]

3. A police judge, during absence from his post, may request another police judge or justice of the peace from a neighboring city or town to serve in his post. The city or town should, however, adopt an ordinance authorizing this arrangement.[99]

4. The General Counsel of the League also suggests that the offices of town manager and police magistrate not be held by one individual.

Before an employee accepts another public office, local ordinance provisions and personnel rules and regulations should be consulted. For particular employees there may be departmental regulations that also govern such activities.

NEPOTISM

As a city or town official, you must exercise caution when your relatives are being considered for appointment to offices or positions of employment with the city or town. Arizona's anti-nepotism statute prohibits public officials from appointing their relatives to offices or positions of employment compensated from public funds.[100]

Specifically, any executive, legislative, ministerial, or judicial officer cannot appoint or vote for (or even suggest, arrange, or be a party to) the appointment of a relative who is related by blood or marriage "within the third degree" to a paid office or position of employment. Public officers of a city or town subject to this restriction would include mayors, council members, appointed officials, and department heads.

As mentioned above, the law prohibits the appointment of relatives by blood or marriage "within the third degree." To apply this law accurately, there is a method to compute whether a person is related within what is legally defined as the "third degree." In summary, this method of computation would prohibit a public officer from appointing or participating in the appointment of the following in-laws or blood relatives: a husband or wife, brother or sister, parent or child, great grandparents, grandparents, grandchildren, great grandchildren, uncles or aunts, and nephews or nieces.[101] To illustrate, the Attorney General found that the wife of a justice of the peace could be appointed by her husband to perform the function of setting bail.[102] This Opinion was based in part on the fact that the public official's wife was not compensated for these duties. In another Attorney General's Opinion a justice of the peace could not appoint his wife's sister to a compensated position of clerk without violating this law.[103]

One important question is whether a city or town employee can continue employment after a relative within the third degree has assumed a position on the city or town council or some other position with appointment authority. In addressing a situation of this nature, the General Counsel of the League was of the opinion that an employee could continue employment even though a relative was elected to the city or town council.[104] However, if a situation arises where the employee's appointment or reappointment is placed before the council, the relative on the council should not participate in any way in that decision.[105]

The council/manager form of government or the existence of a merit system also affect the application of the anti-nepotism law because the law does not prohibit the appointment or employment of a relative, but rather governs the participation of the related public official in the decision-making process. If there are questions that relate to nepotism, we suggest that you discuss these with your local city or town attorney. In most instances, questions of nepotism can be clarified quickly due to the precise nature of this law.

FINANCIAL DISCLOSURE

State law requires elected officials, including those appointed to elective office, to file an annual financial disclosure statement.[106] Since 1984, cities and towns have been required to adopt standards of financial disclosure consistent with the standards imposed for state elected officials.[107]

The annual financial disclosure statement is due each year on January 31 covering the immediately preceding calendar year. The city or town clerk should make the forms available to meet this filing requirement.[108] Candidates for city or town office must file the financial disclosure statement covering the preceding twelve-month period when nomination papers are filed.[109]

The law requires elected public officials to disclose personal financial data including information on members of the "household" (defined as the public official's spouse and any minor child of whom the official has legal custody). Information on business holdings is required under certain circumstances. Property owned by the official or a member of the official's household must also be reported (with certain exceptions).

The report must be filed with the city or town clerk and is available for public inspection. Failure to file or filing a false or incomplete financial disclosure statement, if done knowingly, is a class 1 misdemeanor.[110]

LIMITS ON ENTERTAINMENT

In 2000, the Legislature extended part of the state's lobbying laws to prohibit certain entertainment for local officials if paid by compensated lobbyists. The new law provides that it is illegal for a compensated lobbyist to offer and for a member of a city or town council (as well as other local governing bodies) to accept "an expenditure or single expenditure for entertainment." [111]

Careful attention to these three parts – the giver, the recipient, and the outlawed gift – is important because violations may result in criminal and civil penalties.[112] As for the giver, the law applies to "a person who for compensation attempts to influence the passage or defeat of legislation, ordinances, rules, regulations, nominations and other matters that are pending or proposed or that are subject to formal approval by the corporation commission, a county board of supervisors, a city or town governing body or a school district governing board or any person acting on that person's behalf." So even if the people offering entertainment do not call themselves "lobbyists," the law still applies if they are compensated to do any of the things listed. Next, as for the receiver, the law applies in the city and town context to members of the council (whether elected or appointed), but not directly to city or town staff (although local ordinances or policies might).[113]

Third, the law prohibits giving or receiving "entertainment," which is defined to mean "the amount of any expenditure paid or incurred for admission to any sporting or cultural event or for participation in any sporting or cultural activity."[114] As written, the ban prohibits not only receiving tickets to attend a sporting or cultural event, but also having a compensated lobbyist pay for your participation in any cultural or sporting event. In other words, a compensated lobbyist may not offer – and council members cannot accept – tickets to sporting or cultural events (such as baseball, basketball, football, hockey, or soccer, or any other sports at any level – professional, college, or local – or art gallery, ballet, movie, opera, theatre, or anything else). Nor may they offer to pay or you allow or accept their payment for your "participation" in "sporting or cultural" activities such as golf, fishing, hunting, bowling, yoga, painting, ballet, or any other activity.

CONCLUSION

Accepting a position as a public official may introduce a number of complex and confusing legal situations into an individual's life. This report has tried to shed some light on selected areas of law that place restrictions on the activities of public officials in Arizona cities and towns. If the report has raised questions, please do not hesitate to contact the League office. However, we emphasize the importance of consultation with your personal attorney or the city or town attorney on specific questions regarding all of the subjects discussed in this report.

ENDNOTES

1. The information about the Open Meeting Law (A.R.S. § 38-431 through 38-431.09) presented in this section is taken largely from a summary prepared by the Attorney General's Office. The League prepared these endnotes.

2. A.R.S. § 38-431.09.

3. A.R.S. § 38-431.01(A). The Open Meeting Law grants the public the right to attend and listen to a public body's deliberations and proceedings. See Attorney General Opinions I83-049 and I84-133. This includes the right to know exactly how each individual council member votes on an issue. A superior court has ruled that a secret ballot procedure used to select the mayor from the common council violates the Open Meeting Law. *See Mohave County Attorney v. Common Council of the City of Kingman* (No. SA-140, June 14, 1983).

4. A.R.S. § 38-431(4).

5. A.R.S. § 38-431(6).

6. For a discussion of the applicability of the Open Meeting Law to advisory committees, see Attorney General Opinion I92-007.

7. A.R.S. § 38-431.02 (A).

8. A.R.S. § 38-431.02(A)(1).

9. A.R.S. § 38-431.02(F).

10. A.R.S. § 38-431.02(C).

11. A.R.S. § 38-431.02 (B).

12. A.R.S. § 38-431.02(E).

13. A.R.S. § 38-431.02(D),(J).

14. A.R.S. § 38-431.05 (B)(4).

15. A.R.S. § 38-431.02(H).

16. A.R.S. § 38-431.09. The Open Meeting Law does not specifically prohibit a public body from considering agenda items in an order different from that appearing on the agenda. However, when changing the order of discussion, it must be done in a way that is not designed to deny any member of the public the opportunity to listen to the discussion of any agenda item. See Attorney General Opinion I83-56.

17. A.R.S. § 38-431.02(I).

18. A.R.S. § 38-431.02 (H).

19. A.R.S. § 38-431.02(K). This subsection was amended in 2002 to allow any member of the council to make current event announcements. Previously, this authority was limited to the mayor and chief administrator.

20. A.R.S. § 38-431.01(G).

21. A.R.S. § 38-431(2).

22. A.R.S. § 38-431.03(C).

23. A.R.S. § 38-431.03 (D). See also *Johnson v. Tempe Elementary School Dist. Governing Board*, 199 Ariz. 567, 20 P.3d 1148 (App. 2000) (court of appeals dismissed a public body's appeal as improper when the public body instructed its attorney in an executive session to file an appeal but then failed to confirm that instruction in public with a proper formal vote).

24. A.R.S. § 38-431.03(A)(1). The other exceptions are also set forth in Section 38-431.03(A).

25. See *City of Prescott v. Town of Chino Valley*, 66 Ariz. 480, 803 P.2d 891(1990).

26. See *Tanque Verde Unified School Dist. v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003) (affirming that a public body violated the Open Meeting Law by conducting a site selection process in an executive session).

27. A.R.S. § 38-431.01(B).

28. A.R.S. § 38-431.01(C).

29. A.R.S. § 38-431.01(D).

30. A.R.S. § 38-431.03(B).

31. A.R.S. § 38-431.01(E).

32. A.R.S. § 38-431(4).

33. *Id*.

34. Ariz. Att'y Gen. Op. No. I05-004 at 2 ("Board members must ensure that the board's business is conducted at public meetings and may not use e-mail to circumvent the OML requirements. … While some one-way communications from one board member to enough members to constitute a quorum would not violate the OML, an e-mail by a member of a public body to other members of the public body that proposes legal action would constitute a violation of the OML.").

35. *Id.* at 4 ("Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions…. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss the topic that is or may be presented to the public body for a decision.")(quoting *Arizona Agency Handbook* § 7.5.2; Ariz. Att'y Gen. 2001).

36. A.R.S. § 38-431.05(A).

37. A.R.S. § 38-431.07(A).

38. A.R.S. § 38-431.01(H).

39. A.R.S. § 38-502(9).

40. Compare A.R.S. § 38-502(11) ("substantial interest") and 38-502(10)("remote interest"); see also Attorney General Opinion I85-052.

41. A.R.S. § 38-502(11).

42. A.R.S. § 38-503(C). See also Attorney General Opinions 70-5, 79-067, 79-133, and General Counsel Opinion May 17, 1979, and letter dated October 23, 1984 from Attorney General to Town of Parker.

43. A.R.S. § 38-503(C)(2).

44. A sample resolution establishing a policy to govern such purchases from members of the council without going to public bid is available from the League office.

45. Attorney General Opinion I85-067.

46. A.R.S. § 38-504(A).

47. A.R.S. § 38-504(B).

48. A.R.S. § 38-505.

49. A.R.S. § 38-504(C).

50. State Bar Ethics Opinion No. 74-28.

51. See *Gomez v. Superior Court,* 149 Ariz. 223, 717 P.2d 902 (1986).

52. A.R.S. § 38-503(A), (B).

53. A.R.S. § 38-508.

54. A.R.S. § 38-507.

55. A.R.S. § 38-506 and A.R.S. § 38-511.

56. A.R.S. § 39-121.

57. A.R.S. § 39-121.01(A).

58. A.R.S. § 41-1350.

59. *See, e.g., Carlson v. Pima County*, 687 P.2d 1242, 1246 (Ariz. 1984).

60. *Id.*

61. *See, e.g.,* A.R.S. § 39-126.

62. *See, e.g.,* A.R.S. §§ 11-483, 16-153, 39-123(A).

63. *See, e.g.*, 42 U.S.C. § 405(c)(ii), (vii)(I), and A.R.S. §§ 44-1373, -1373.03.

64. *Moorehead v. Arnold*, 637 P.2d 1242 (Ariz. App. 1981).

65. *Scottsdale Unified School Dist. v. KPNX Broadcasting*, 955 P.2d 534, 537 (Ariz. 1998).

66. *Star Publishing Co. v. Pima County Attorney's Office*, 891 P.2d 899, 901 (Ariz. App. 1994).

67. A.R.S. § 39-121.01(B).

68. A.R.S. § 39-121.01(C).

69. A.R.S. § 39-121.01 (D)(1), (E).

70. A.R.S. § 39-121.01(D)(1).

71. A.R.S. § 39-121.01(D)(2).

72. *See, e.g., Carlson*, 687 P.2d at 1243-1246 ("a practical alternative to the complete denial of access would be deleting specific personal identifying information, such as names"); *see also Cox Arizona Publications v. Collins*, 852 P.2d 1194, 1198 (Ariz. 1993) (finding that the County Attorney violated the Public Records Law by withholding public records without offering to redact portions and producing the rest for inspection).

73. A.R.S. § 39-121.03 (explaining what may be charged for commercial copies).

74. A.R.S. § 39-121.01(D)(1).

75. *Star Publishing Co. v. Pima County Attorney's Office*, 891 P.2d 899 (Ariz. App. 1994).

76. *Hanania v. City of Tucson*, 624 P.2d 332 (Ariz. App. 1980).

77. A.R.S. § 39-121.02(A),(B).

78. A.R.S. § 39-121.02(C).

79. *See, e.g.,* A.R.S. §§ 39-124, 13-2401.

80. *See, e.g.,* A.R.S. § 38-421.

81. *See, e.g.,* A.R.S. §§ 13-2407.

82. Ariz. Att'y Gen. Op. No. I05-04 at 10 ("E-mails that board members or staff generate pertaining to the business of the public body are public records. [citations omitted] Therefore, the e-mails must be preserved according to a records retention program and generally be made available for public inspection.").

83. McQuillin on Municipal Corporations Volume 3, Section 12.67. See also Attorney General Opinion 76-41.

84. Arizona Constitution, Article IV, Part 2, Section 5; Attorney General Opinion 77-221.

85. Arizona Constitution, Article XXII, Section 18. See also A.R.S. § 38-296 and Attorney General Opinion 82-001.

86. Arizona Constitution, Article VI, Section 32. Justice of the peace and magistrate courts are not courts of record and would not be subject to the restriction of Article VI, Section 28 of the Constitution.

87. A.R.S. § 38-296.

88. A.R.S. § 9-304.

89. General Counsel Opinion August 17, 1988.

90. A.R.S. § 11-585.

91. A.R.S. § 41-772.

92. A.R.S. § 38-296.01.

93. Attorney General Opinion 71-32-L. The Attorney General further opined that the State Personnel Commission's jurisdiction extends to all state offices and positions except those specifically exempted by law. See also A.R.S.§ 41-772.

94. Attorney General Opinions 72-20-L and 80-061.

95. Attorney General Opinion 77-221.

96. Attorney General Opinion 80-019; see also Attorney General Opinions 59-30, 75-2-L, and 77-216.

97. General Counsel Opinion December 10, 1965.

98. General Counsel Opinion November 2, 1966.

99. General Counsel Opinion May 26, 1970.

100. A.R.S. § 38-481.

101. See *Graham County v. Buhl,* 76 Ariz. 275, 263 P.2d. 537 (1953), and Attorney General Opinion 77-115.

102. Attorney General Opinion 63-75-L.

103. Attorney General Opinion 63-9. See also Attorney General Opinions 54-26, 65-6-L.

104. General Counsel Opinions June 24, 1968 and January 19, 1977. See also Attorney General Opinion 78-71.

105. See Attorney General Opinion 77-138.

106. A.R.S. Title 38, Chapter 3.1, Article 1.

107. A.R.S. § 38-545.

108. See League Municipal Election Manual for forms.

109. A.R.S. § 38-543.

110. A.R.S. § 38-544.

111. A.R.S. § 41-1232.08(B).

112. Attorney General Opinion I00-031.

113. League General Counsel Opinion January 15, 2001.

114. A.R.S. § 41-1231(5).