



**OFFICE
OF
ATTORNEY GENERAL
TOM HORNE**

Public Service Orientation

**A Guidebook for Statewide Elected Officials
and State Agency Heads**

Revised 2010

Public Service Orientation
for Public Officials

PREVENTING LEGAL AND ETHICAL VIOLATIONS

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Dear State Official:

I am pleased to present the new, updated, and expanded Public Service Orientation Guidebook to assist you in performing your stewardship responsibilities. This Public Service Orientation Guidebook is developed to give public officers an overview of Arizona's laws concerning ethical standards. We've developed the Guidebook to comprehensively meet your needs. Please note that there may be special ethical standards that are not covered by this Guidebook. These specialized provisions, unique to each public body, may be found in the constitution, statutes, rules, and court decisions that address the operation of your office. I request that you consult with the Assistant Attorney General assigned to your agency who will assist you to locate the standards applicable to your agency and explain any specialized provisions not covered in this Guidebook.

Please be aware that although the Attorney General's Office offers this Guidebook and a training program to assist you, the Office also is responsible to investigate and prosecute violations of public service laws. Accordingly, it is important that public officers understand that they are each responsible for complying with the law. It is not possible for this Guidebook to include every legal prohibition or requirement that applies to public officers. When in doubt regarding your obligations under these laws, please consult the Assistant Attorney General assigned to your agency.

The Attorney General's Office regularly revises and updates the Guidebook. We appreciate your suggestions and comments. Please provide your comments to Mary Jo Foster, Special Counsel for Ethics and Training.

Sincerely,

Tom Horne
Attorney General

Part One:

GENERAL INFORMATION

I. State of Arizona Ethics Policy

“It is the public policy of this state that all public officers and employees of this state shall discharge their public duties in full compliance with applicable laws concerning ethics conduct. To ensure that state public officers and employees know the standards of conduct against which their actions will be measured, information shall be provided to state departments, agencies, boards, commissions and councils on compliance with laws on ethics” 1992 Ariz. Sess. Laws, ch. 134, § 1.

Comment: To take and hold your office, you have sworn an oath to uphold the Constitution of the United States and the Constitution and laws of Arizona. See Arizona Constitution, Article 6, Section 6; A.R.S. §§ 38-321 - 323. No State official is above the law, and all owe a duty to the public. See Mecham v. House of Representatives, 162 Ariz. 267, 268, 782 P.2d 1160, 1161 (1989) (State officials are guilty of high crimes, misdemeanors, or malfeasance in office when they commit acts that “involve serious abuse of official power,” such as “misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption”). Therefore, State officials in Arizona must familiarize themselves with the laws relating generally to the duties and responsibilities of all public officers, as well as those pertaining to their particular office and agency.

Your oath included a commitment to perform your duties “impartially.” To do this, you must remain independent of any special interest, being responsible only to the public, whose interest must be your primary focus. All state service employees must “[m]aintain high standards of honesty, integrity, and impartiality, free from any personal considerations, favoritism, or partisan demands” (Arizona Administrative Code (“A.A.C.”) R2-5-501(B)(1)), so no less is expected of senior State officials.

II. Procedures: Getting Started

A. Where to Seek Advice

You may obtain legal advice regarding specific conflicts of interest or other ethical issues from your regularly assigned assistant attorney general. You may request an official opinion about a possible conflict of interest that you might have and such requests will be kept confidential, although the official opinion will be a public record, as mandated by law. A.R.S. § 38-507. You also may find it useful to consult the *Arizona Agency Handbook* (2001), which the Attorney General’s Office prepared to provide guidance on a broad range of subjects. The *Agency Handbook* is available on the Attorney General’s web site at www.azag.gov.

B. What to Do If You are Uncertain

If you are in doubt about the ethics of a given situation and have not had an opportunity to clarify the issue in advance, the safest course of action is to delay a decision in the matter until you have your questions resolved. State officers and employees should avoid even the appearance of impropriety, and unless you are certain your course of conduct is consistent with your high ethical duties, a cautious approach is recommended.

C. Where to Report Improper Conduct

In the course of performing public duties, State officials may discover conduct that leads them to suspect that a crime has been or is being committed. Whether the questionable conduct is being committed by a member of the public or a State officer or employee, you should immediately contact the Attorney General's Office. The rules applicable to civil and criminal investigations are complex and ever evolving. In general, you should not attempt to investigate on your own because even innocent mistakes may prevent successful investigation and prosecution of the conduct. Early consultation with an experienced attorney is important to avoid legal problems, identify and preserve evidence, ensure a fair and thorough investigation, and protect the State's interests.

III. Accountability: Penalties and Sanctions

Violations of any law may expose a public officer to a variety of sanctions, including criminal penalties, personal financial liability, public embarrassment, and removal from office. For example, as with any person, a State official convicted of a felony may be fined up to \$150,000 for each violation and sent to a State prison. A.R.S. § 13-801(A); A.R.S. § 13-701. Illegal conduct directly related to the public official's office or employment is considered to be an aggravating circumstance that may increase the sentence imposed. A.R.S. § 13-701(D)(8). Conviction for a misdemeanor may result in a fine up to \$2,500 for each violation, and a jail sentence of not more than six months. A.R.S. §§ 13-707, 802(A). A more complete summary of potential sanctions is found at Appendix A.

Even if you are not subject to criminal sanctions, questionable ethical behavior may cost you your job. The Governor has authority to remove a member of a State board for "cause." *See, e.g.*, A.R.S. § 31-401(E) (Board of Executive Clemency). The Arizona Court of Appeals has made clear that if there is "some evidence" that a State appointee has engaged in unethical behavior, the Governor may have cause to remove the appointee. *Johnson v. Mofford*, 193 Ariz. 540, 975 P.2d 130 (App. 1998).

Transgressions, whether intentional or negligent, may have devastating professional and personal consequences and harm the integrity of the State. For these reasons, State officials must rigorously uphold the letter and spirit of Arizona's public service ethics laws to ensure that the public trust is not compromised.

IV. After Leaving State Service

Arizona law limits the ability of State officers and employees to convert their government positions and connections into private business. Both during and for twelve months following your service, you are prohibited from representing another person for compensation before a public agency for which you served in connection with any matter in which you were directly concerned and personally participated by a substantial and material exercise of administrative discretion. A.R.S. § 38-504(A). Furthermore, both during and for two years after State service, you may not disclose or use for personal profit confidential information acquired during the course of official duties. A.R.S. § 38-504(B). Violators may be guilty of a class 6 felony or a class 1 misdemeanor, depending on the circumstances. A.R.S. § 38-510(A).

Comment: These standards address concerns that public officials rotating through "revolving doors" of public and private employment may act for their own personal gain, rather than for the public good.

NOTE: The Arizona Rules of Professional Conduct, Ariz. Sup. Ct. R. 42, contain additional restrictions that apply to lawyers. Public officials who also are members of the State Bar should pay particular attention to and abide by the requirements of ER 1.11, which deals with conflicts of interest for current and former government officers and employees who are lawyers.

Part Two:

PUBLIC ACCOUNTABILITY

I. Public Records – The Written and Spoken Word

A. Overview

A.R.S. § 39-121.01(B) requires you, as a public officer, to keep records reasonably necessary to provide an accurate accounting of your official activities and of any government funded activities. This information is available to the public if they make a public records request. Thus, it is important that your records be complete, accurate, and professional. Pay particular attention to informal communications such as notes, calendars, e-mail, and voicemail records to ensure that the tone and content of such communication are appropriate.

B. Legal standards

1. Application

Because you are a public officer of the State, Arizona's Public Records Law (A.R.S. §§ 39-101 to -161) applies to all activities of your office. See A.R.S. § 39-121.01(A)(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"); A.R.S. § 39-121.01(A)(2) ("Public body" includes the State).

2. Scope

The materials encompassed by the scope of public records are very broad. The Legislature requires public officers and employees to "maintain all records [. . .] reasonably necessary or appropriate to maintain an accurate knowledge of their official activities," including records of all "activities which are supported by monies from the state or any political subdivision of the state." A.R.S. § 39-121.01(B). To qualify as a "public record," the record must relate to the official duties of the public officer or agency. *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 815 P.2d 900 (1991).

In *Matthews v. Pyle*, 75 Ariz. 76, 78-79, 251 P.2d 893, 895 (1952), the Arizona Supreme Court defined a public record as one which is:

made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference. Also a record is a "public record" which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law to serve as a memorial and

evidence of something written, said or done. It has also been held that a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not, is admissible as a public record.

The Legislature has defined “record” to mean:

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 pursuant to §41-1348, [Production and reproduction of records by agencies of the state and political subdivisions; admissibility; violation; classification] 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.

A.R.S. § 41-1350.

NOTE: The Arizona Supreme Court has clarified that emails generated or maintained on a government email system are not necessarily public records. Only those emails that relate to government business are public records under the law. *See Griffis v. Pinal County*, 215 Ariz. 1,5, 156 P.3d 418, 422 (2007).

3. Effect

Arizona Public Records Law makes “[p]ublic records and other matters . . . open to inspection by any person.” A.R.S. § 39-121; *Scottsdale Unified Sch. Dist. v. KPNX Broadcasting Co.*, 191 Ariz. 297, 300, 955 P.2d 534, 537 (1998). The public’s right to inspect public documents may be restricted if confidentiality restrictions, privacy interests, or the best interests of the State outweigh the public’s right of inspection. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). The State has the burden to overcome “the legal presumption favoring disclosure.” *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); *see also Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81, 927 P.2d 340, 347 (App. 1996) (Arizona supports an “open access” policy in regard to public records).

Under the public records statute, an agency must make a good faith effort to conduct a search for requested records, and the burden is on the agency to establish the adequacy of its search. In discharging this burden, the agency may rely on affidavits or declarations that provide reasonable detail of the scope of the search. *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 177 P.3d 275 (App. 2008).

C. Access to Public Records

Because public knowledge of government activities is the general rule, you should always assume that your records will be subject to inspection by the media. Nonetheless, courts have denied public records requests in certain situations. For example, a public records request may be denied if confidentiality, privacy, or the best interests of the State outweigh the public's right of inspection. *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245.

1. Confidentiality

A public records request may also be denied if the record requested is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 699 P.2d 387 (App. 1985); *see, e.g.*, A.R.S. §§ 38-431.03(B) (minutes of executive sessions); 41-1482 (records of civil rights investigations); 44-1525 (consumer fraud information provided to the Attorney General).

2. Privacy Interests

A public records custodian may deny public inspection when disclosure would invade an individual's privacy, and the invasion outweighs the public's right to know. *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 300, 955 P.2d at 537.

3. Best Interests of the State

Disclosure may be refused when a public body will be *seriously impaired* in the performance of its duties if the information is disclosed. *Matthews*, 75 Ariz. at 81, 251 P.2d at 896. Public officers must balance the possible adverse impact on the public body's operation if the requested information is disclosed against the public's right to be informed about its government's operation.

D. Ramifications for Refusal to Disclose

Any person who is wrongfully denied access to public records may bring an action against the officer or public body. A.R.S. § 39-121.02(C). Regardless whether you determine legal grounds exist to object to a public records request, you should always consider other factors before formally objecting. These include:

1. Negative publicity and public opinion.
2. Liability for legal costs, including legal fees (A.R.S. § 39-121.02(B)).

The courts may award legal costs and fees to the requestor if he or she has "substantially prevailed." *Id.*

E. Time Frame to Respond to Requests

The public is entitled to inspect the documents “promptly” after a request is made. A.R.S. § 39-121.01(D)(1). A member of the public also may request that a copy of the records be mailed if the public record is not available on the public body’s web site. *Id.* The requestor may be required to pay in advance for the costs of copying and postage. *Id.*

F. Charges for Copies

Charges for copies of public documents depend on whether the public documents will be used for a commercial or non-commercial purpose. The agency can set a reasonable price for the copies, including the cost of time, equipment, and personnel needed in producing the documents. The agency may not charge for time necessary to search for the records. A.R.S. § 39-121.01; Ariz. Att’y Gen. Op. I86-090.

When documents will be used for a commercial purpose, the requestor must submit a certified statement identifying the commercial purpose. A.R.S. § 39-121.03(A). A “commercial purpose” is:

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.

A.R.S. § 39-121.03(D). Gathering information from public records to include in a newspaper or other publication is not a commercial purpose. *Star Publ. Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837, 838 (App. 1993).

The charge for public documents furnished in response to a request for a commercial purpose may include:

1. A portion of the cost to the public body of obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, materials, equipment and personnel used 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 the custodian of a public record determines that the stated commercial purpose 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 an executive order prohibiting the furnishing of copies, printouts, or photographs for such commercial purpose. A.R.S. § 39-121.03(B).

G. Guidance and Resources

Arizona's Public Records Law, A.R.S. §§ 39-101 to – 161.

Arizona Agency Handbook, "Public Records," Chapter 6 (2001).

II. Open Meeting Law

A. Policy

Arizona's Open Meeting Law is driven by two core concepts that establish the base perspective from which public officers should evaluate Open Meeting Law issues. First, the Legislature mandated that "[a]ll 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). Second, the Legislature has made it clear that doubts should be resolved in favor of open meetings. Meetings of public bodies must be conducted openly, and notices and agendas must be provided for such meetings. The notices must contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. A.R.S. § 38-431.09(A).

The Open Meeting Law requires that "a person elected or appointed to a public body shall review the open meeting law materials" approved by the Attorney General "at least one day before that person takes office." A.R.S. § 38-341.01(G). The Attorney General has approved the Open Meeting Law chapter of the Agency Handbook for this purpose.

B. Notices

The Open Meeting Law requires that a minimum 24-hour advance notice of all meetings, including meetings of subcommittees and advisory committees, be given to members of the public body holding the meeting and to the public. A.R.S. § 38-431.02(C). The purpose of the notice is to expose the public body's decision-making process to public scrutiny. *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 111, 649 P.2d 985, 990 (App. 1982). The public's access to the decision-making process could be thwarted if the notice requirement is not mandated and enforced.

In addition to a physical posting location, public bodies of the State must “conspicuously post” this notice of meetings on their website. A.R.S. §38-431.02(A)(1)(b). A technological problem preventing the posting does not preclude holding the meeting if the public body complies with the other notice requirements. *Id.*

The notice must either be combined with the agenda, or give the public information about where they can get a copy of the agenda.

Three exceptions exist to the general rule of 24-hour notice. First, if there is an *actual* emergency, less than 24 hours notice may be sufficient. A.R.S. § 38-431.02(D). Second, if a public body recesses and later resumes a properly noticed meeting, less than 24 hours notice may be acceptable. A.R.S. § 38-431.02(E). Third, 72-hour notice is required to ratify legal action taken at a meeting previously held in violation of the Open Meeting Law. A.R.S. § 38-431.05(B)(4).

C. Agendas

Agendas must contain information “reasonably necessary to inform the public of the matters to be discussed or decided.” A.R.S. § 38-431.09(A). The agenda for each meeting must be available to the public at least 24 hours beforehand, and must describe “the specific matters to be discussed, considered or decided at the meeting.” A.R.S. § 38-431.02(G) and (H). Agendas for executive sessions may describe the matters to be discussed more generally than agendas for public meetings in order to preserve confidentiality or to prevent compromising the attorney-client privilege, if it is necessary. A.R.S. § 38-431.02(I). Nonetheless, the agenda must provide more than a recital of the statute that authorizes the executive session.

D. Calls to the Public

An open call to the public is an agenda item that allows the public to address the public body on topics of concern within the public body’s jurisdiction, even though the topic is not specifically included on the agenda. Ariz. Att’y Gen. Op. I99-006. Although the Open Meeting Law permits the public to attend public meetings, it does not require public participation in the public body’s discussions and deliberations and does not require a public body to include an open call to the public on the agenda. *See* Ariz. Att’y Gen. Op. No. I78-001. At properly conducted calls to the public, public officers must be cautious in three areas.

First, an individual public officer may respond to criticism, ask staff to review an item or ask that an item be placed on a future agenda, but he or she may *not* discuss the matter with the presenter, and the board may not collectively discuss, consider, or decide an item that is not listed on the agenda. A.R.S. § 38-431.01(H); Ariz. Att’y Gen. Op. I99-006. Note that individual members of the public body may respond to criticism by individuals who addressed the public body during the call to the public, but the public body may not collectively discuss or take action on the complaint unless the matter is

specifically listed on the agenda. A.R.S. § 38-431.01(H). Second, although public bodies may impose reasonable time, place, and manner restrictions on speakers, any restrictions should not be content based. Ariz. Att’y Gen. Op. I99-006. Third, a member of the public body may not knowingly direct a staff member to communicate in violation of the Open Meeting Law. A.R.S. 38-431.01(I).

E. Executive Session

Public bodies may hold private executive sessions under a few limited circumstances. In executive sessions, the public is not allowed to attend or listen to the discussions, and the public body is not permitted to take final action. A.R.S. § 38-431.03(D). It is therefore not appropriate to vote or poll a public body in executive sessions. Topics allowed in limited executive sessions are:

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 24 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 attorneys or attorneys of the public body.

4. Discussion or consultation with the attorneys of the public body 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 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 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).

NOTE: Subsections 4, 5, and 7 allow a public body to instruct its attorneys or representative (as specified by the subsection) in executive session to take action in specific areas. A public body must properly set the agenda and publicly vote on the matter before any legal action binds the public body. A.R.S. § 38-431.03(D).

If in doubt whether an item is appropriate for consideration in executive session, please consult your assigned assistant attorney general representative for guidance.

Before a public body may meet in executive session, it must conduct a vote to enter executive session. A.R.S. § 38-431.03(A). Just because a public body is *authorized* to discuss something in an executive session does not mean that the public body must meet in private. Remember, you *must* keep executive session discussions confidential. A.R.S. § 38-431.03(B).

F. Minutes

Public bodies must provide minutes of all meetings, including executive sessions, advisory committees and subcommittees. Meetings may either be recorded or written minutes may be kept, although public records law may require that the minutes be eventually transcribed. The minutes must include, but are not limited to:

1. The date, time and place of the meeting.
2. The names of the members of the public body 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 taken in an executive session must include the items listed above in addition to any other matters found to be appropriate by the public body. A.R.S. § 38-431.01(C).

The minutes or a recording must be open for public inspection no later than three working days after the meeting, except as otherwise provided in the statute. A.R.S. §

38-431.01(D). A public body of a city or town with more than 2,500 persons must post on its internet website within three days of the meeting either a statement describing the legal actions taken during the meeting or a recording of the meeting; must post approved minutes of city or town council meetings within two working days after approval of the minutes; and must post within ten working days after a subcommittee or advisory committee meeting either a statement describing legal action taken or a recording of the meeting. A.R.S. § 38-431.01(E).

Persons in attendance may record any portion of a public meeting, as long as the recording does not actively interfere with the meeting. Acceptable recording equipment includes tape recorders, cameras, or other means of reproduction. A.R.S. § 38-431.01(F).

G. General Rule: Keep Discussions Open

The Legislature has directed that if you are in doubt about whether you are in compliance with the Open Meeting Law, you should err in favor of open meetings. A.R.S. § 38-431.09. Open Meeting Law issues that may present difficulty are:

1. Related Matters Not on the Agenda.

The public body may not discuss or take action on a subject or issue that does not appear on the agenda, except in the case of an actual emergency. The Open Meeting Law restricts discussion to “only [. . .] matters listed on the agenda and other matters related thereto.” A.R.S. § 38-431.02(H). If a new, unrelated matter is introduced into a discussion, postpone discussion to another meeting and have the matter specifically included on the agenda.

Courts interpret the exceptions to the Open Meeting Law very narrowly. In *Thurston v. City of Phoenix*, the City attempted to annex three parcels of land, only two of which were described on the meeting agenda. 157 Ariz. 343, 345, 757 P.2d 619, 621 (App. 1988). Even though the third parcel significantly overlapped the other two, the court invalidated the annexation of the third undescribed parcel because the public notice was “confusing and may have actually been misleading.”

2. Rambling or Roving Discussions in Executive Sessions.

Pay strict attention to the substance of executive session discussions. It is easy (and improper) for topics to arise that are not included on the agenda or are not legally authorized for discussion. For example, when consulting your attorney to obtain legal advice, be sure that you do not initiate discussions among yourselves about outcome or options. All members should cooperatively work to maintain the discussion in strict compliance with the Open Meeting Law.

3. Splintering the Quorum.

Members of the public body may not circumvent public discussion by splintering the quorum into smaller than quorum size groups (but ultimately having discussions with a majority of the public body members). Additionally, subverting the law by meeting in person, by telephone or email, or through other means, including using an intermediary, to discuss a topic outside of a public meeting that is or may be presented to the public body for a decision or to reach an agreement on how to vote, also violates the Open Meeting Law. Communications on a particular subject between members of a public body that do not take place at the same place or time, but occur serially and ultimately involve a quorum of the members of the public body can constitute a meeting. Ariz. Att’y Gen. Op. I05-004. We recommend that members of public bodies refrain from any activities that may undermine public confidence in the public decision-making process established in the Open Meeting Law, including actions that may appear to remove discussions and decisions from public view.

NOTE: Email and online discussions constitute meetings within the Open Meeting Law if participation, including receipt of an email, makes up a quorum of the public body. Thus, public bodies **MUST** avoid deliberating in email and online discussions, unless they have a notice and agenda for such a meeting and have taken measures to facilitate the public’s access to the meeting. *See* Ariz. Att’y Gen. Op. I08-008.

H. Sanctions

The Attorney General, County Attorneys, and any interested person may file a lawsuit to enforce the Open Meeting Law. A.R.S. § 38-431.07(A). The formal relief may include civil penalties of \$500 per violation (against individuals who violate the Open Meeting Law or who knowingly aid, agree to aid, or attempt to aid another person in violating the Open Meeting Law); assessment of attorneys’ fees and costs (against public officers or anyone who aided, agreed to aid, or attempted to aid the violation); removal from office; and other equitable relief. Action taken at a meeting at which a violation occurred is null and void, unless subsequently ratified at a properly noticed public meeting held within thirty days after discovery of the violation. A.R.S. § 38-431.05(A) and (B). However, when a public body violates the Open Meeting Law by discussing, proposing, or taking legal action on a matter not properly noticed on the agenda, that violation does not nullify all other legal action taken at the meeting when the violation has no demonstrated prejudicial effect on the complaining parties. Ariz. Att’y Gen. Op. I08-001. Informal consequences may include embarrassment and loss of the public’s trust.

I. Guidance and Resources

Arizona’s Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09.
Arizona Agency Handbook, “Open Meeting Law,” Chapter 7 (2001).

Part Three:

PERSONAL ACCOUNTABILITY

I. Conflict of Interest

A. Overview

Conflict of interest laws prohibit participation by a public officer or employee in a decision or contract in which the public officer or employee has a direct or indirect pecuniary or proprietary interest. The purpose of the law is to “remove or limit the possibility of personal influence which might bear upon an official’s decision.” *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (App.1972).

B. Legal Standards

1. Statutory Standard

a. Contracting

“Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.” A.R.S. § 38-503(A).

b. Decision making

“Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.” A.R.S. § 38-503(B).

c. Supplying materials or services

“Notwithstanding the provisions of subsections A and B of this section, no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services, unless pursuant to an award or contract let after public competitive bidding.” A.R.S. § 38-503(C).

2. Elements to Evaluate

Conflicts of interest require a public officer to make fact specific assessments of the interests involved. It is important to remember that the purpose of the conflict of interest law is to strictly avoid situations where a public officer’s professional or financial

concerns conflict with the unbiased performance of the public officer's duties. *See Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985) ("one cannot serve two masters with conflicting interests").

When determining whether a conflict of interest exists, public officers should evaluate the following three questions:

1. Will the decision affect, either positively or negatively, an interest of the officer or a relative?

NOTE: In this context, "relative" is defined to mean the spouse, child, grandchild, parent, grandparent, brother or sister of whole or half blood and their spouses and the parent, brother, sister, or child of a spouse. A.R.S. § 38-502(9).

2. Is the interest a pecuniary or proprietary interest?

NOTE: Please pay special attention to the concept of "interest." It can be direct or indirect. The definition of "substantial interest" in A.R.S. § 38-502(11) refers to a "pecuniary or proprietary interest," which is something a person will gain or lose as contrasted to general sympathy, feeling or bias). *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (App. 1972).

3. Is the interest one that is not statutorily designated as a remote interest?

NOTE: The Legislature has listed ten "remote interests" that do not trigger the conflict of interest prohibition. They are listed in A.R.S. § 38-502(10) and include (i) non-salaried officer of a non-profit corporation, (ii) landlord/tenant of a contracting party, (iii) attorney of a contracting party, (iv) member of a non-profit cooperative marketing association, (v) insignificant stock ownership of less than 5% of the person's annual income, (vi) reimbursement of expenses incurred in the performance of official duties, (vii) recipient of public services generally available, (viii) relatives of School Board members, (ix) interests of other public agencies or political subdivisions, and (x) class interests. Please see A.R.S. § 38-502(10) and the *Arizona Agency Handbook*, §§ 8.4 through 8.4.11 for a thorough description of remote interests.

If the answer to all three questions is "yes," a substantial interest exists that requires both disclosure of the interest and disqualification of the public officer. *Arizona Agency Handbook*, Chapter 8.3 (2001).

C. Reasons for the Standard

"The object of conflict of interest statutes is to remove or limit the possibility of personal influence which might bear upon an official's decision." *Yetman*, 16 Ariz. App. at 317, 492 P.2d at 1255.

The United State Supreme Court explained the purpose of the federal conflict of interest law: "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961).

D. Preliminary Steps to Take Before Any Issue Arises

Consider the possible ways that a conflict of interest could occur. Consider not only your interests, but those of your spouse, and your other relatives.

Where you identify a potential conflict of interest, file initial conflict of interest forms with the person designated in your agency to maintain them.

NOTE: The law does not require "intent," so perfectly "innocent" conflicts are as damaging as intentional self-dealing. Therefore, you need to think in advance to identify any real or potential conflicts.

E. Steps to Take When a Conflict of Interest Occurs

You must file a conflict of interest form with the person designated in your agency to maintain them each time you or your relative has a substantial interest in a matter. A.R.S. §§ 38-503(B) and -502(3). These forms must be kept in a special file available for public inspection. A.R.S. § 38-509. Please remember that the Legislature requires you to fully disclose the substantial interest. A.R.S. § 38-502(3). The amount of information necessary for full disclosure will depend on the particular interest. You should disclose the information necessary to allow the public to understand the nature of the conflict.

NOTE: Public officers have an obligation to inquire into facts and inform themselves about possible conflicts.

You may not participate in the discussion or decision of the matter on which you have a conflict of interest with the other members of the public body before, during, or after the decision is made.

F. Ramifications for Violating the Conflict of Interest Prohibitions

1. Criminal Penalties:

A person who intentionally or knowingly violates any provision of A.R.S. §§ 38-503 to -505 is guilty of a class 6 felony; those who recklessly or negligently violated A.R.S. §§ 38-503 to -505 are guilty of a class 1 misdemeanor. A.R.S. § 38-510(A).

A finding of guilt in the criminal case causes forfeiture of the public office. A.R.S. 38-510(B).

2. **Civil Penalties:**

Any person affected by a decision of the public agency can file a civil action to enforce the civil provisions of the conflict of interest laws. A.R.S. § 38-506(B). The court may order equitable relief and the payment of costs including reasonable attorneys' fees to the prevailing party. A.R.S. § 38-506(C).

3. **Nullifying Contracts:**

In addition to other remedies, a contract made on behalf of a public agency in violation of conflict of interest laws is voidable at the discretion of the public agency. A.R.S. § 38-506(A). If a person who was significantly involved in negotiating or drafting a contract on behalf of the State becomes an employee or agent of another party to the contract within three years of the execution of the contract, the State may cancel the contract. A.R.S. § 38-511(A); Ariz. Att'y Gen. Op. No. I08-010.

4. **Unwanted negative publicity and public opinion.**

G. Guidance and Resources

Arizona's Conflict of Interest Law, A.R.S. §§ 38-501 to -511.

Arizona Agency Handbook, "Conflict of Interest," Chapter 8 (2001).

II. Confidential and False Information

A. Overview

During your service with the State, you will be privy to confidential information. Arizona law places restrictions on disclosing that information while you are a public officer (and for two years thereafter). A.R.S. § 38-504(B). Additionally, state law prohibits anyone from transmitting fictitious information to the legislature or to any state officer, agency, board, commission or council, or altering a public record. *See* A.R.S. §§ 41-1235 and 13-2407.

B. Legal Standards

1. Confidential Information

According to Arizona law, "[d]uring the period of [. . .] employment or service and for two years thereafter, a public officer or employee shall not disclose or use for

[. . .] personal profit, without appropriate authorization, any information acquired [. . .] in the course of the officer's or employee's official duties which has been clearly designated to the officer or employee as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business. A public officer or employee shall not disclose or use, without appropriate authorization, any information that is acquired by him in the course of his official duties and that is declared confidential by law." A.R.S. § 38-504(B).

Public officers should be aware of the various types of confidential information to which they may be privy. For example, there are hundreds of State statutes that make records of information confidential and non-disclosable. See Appendix 6.1 and 6.1.2 of the *Agency Handbook*. These matters are declared confidential by law.

In *Arizona Dep't of Economic Security v. O'Neil*, 183 Ariz. 196, 901 P.2d 1226 (App. 1995), the Arizona Court of Appeals reversed the trial court's order that ADES must disclose all information relating to a juvenile dependency proceeding, including records that might have been protected by the attorney-client privilege. The newspapers sought the records pursuant to a special statute allowing the trial court to balance the rights of the parties seeking access to and protection of certain confidential records relating to juvenile proceedings. The court of appeals held that the attorney-client privilege is not subject to a balancing test, so any such information retains its protection and should not be disclosed.

There also are matters that are made confidential by agency action. Be alert to what you hear, see, and say as a public officer to ensure that you do not inadvertently disclose confidential information.

Additionally, public officers and employees who are lawyers are bound by the Arizona Rules of Professional Conduct, Ariz. Sup. Ct. R. 42, E.R. 1.6 (Confidentiality of Information) and E.R. 1.13 (Organization as Client).

2. False Information

Having an effective government requires having reliable information. Deceiving the public by falsifying documents violates the public trust. It is a class 2 misdemeanor for any person (including State officials) to transmit to a legislator, State officer, agency, board, or commission any false, forged, counterfeit, or fictitious information materially related to any matter within the jurisdiction of the Legislature. See A.R.S. § 41-1235. If a person, with the intent to deceive or defraud, tampers with a public record (e.g., makes a false written instrument purporting to be a public record, alters or makes a false entry in a true copy of a public record, or destroys, removes, or otherwise impairs any public record), the person is guilty of a class 6 felony. See A.R.S. § 13-2407.

C. Ramifications

1. Employment discipline or termination.
2. Criminal penalties. A.R.S. §§ 38-510 (disclosure of confidential information), 41-1235 (false document), 13-2407 (tampering with a public record).
3. Disciplinary action by the Arizona State Bar (for lawyers).
4. Negative publicity and public opinion.

D. Guidance and Resources

A.R.S. §§ 13-2407, 38-504(B) and 41-1235

Ariz. Sup. Ct. R. 42, E.R. 1.6 (Confidentiality of Information) and E.R. 1.13 (Organization as Client)

III. Financial Prohibitions and Restrictions (Including Gifts)

A. Overview

As a public officer, you are paid to do the public's business. You always should bear in mind the command of the conflict of interest laws: "A public officer or employee shall not use or attempt to use [his] official position to secure any valuable thing or valuable benefit for [himself] that would not normally accrue to [him] in the performance of [his] official duties" A.R.S. § 38-504(C). Soliciting or accepting gifts, favors, or gratuities generally is prohibited. A.R.S. § 41-773(B); A.A.C. R2-5-501(C)(4). Specific restrictions govern accepting gifts from principals or lobbyists. A.R.S. § 41-1232.02(J). Food, refreshments, unsolicited advertising, or promotional materials of nominal value may only be accepted if their acceptance does not violate State law or agency policy. *Id.*

B. Legal Standards

1. Bribery

Public servants who solicit, accept, or agree to accept any benefit upon an agreement or understanding that it may influence their conduct (including their vote, opinion, judgment, exercise of discretion, or other action) as public servants are guilty of committing bribery, which is a class 4 felony. A.R.S. § 13-2602. Similarly, a public officer who knowingly asks or receives any gratuity or reward (or promise thereof) for doing any official act is guilty of a class 6 felony. A.R.S. § 38-444.

2. Campaign Contributions from Lobbyists

State law prohibits lobbyists, and those who hire lobbyists, from making or promising to make or soliciting or promising to solicit, campaign contributions for the Governor or legislators while the Legislature is in regular session, or for the Governor when regular session legislation is pending executive approval or veto. A.R.S. § 41-1234.01. This prohibition includes “qualifying contributions” under the Citizens Clean Elections Act. *See* Ariz. Att’y Gen. Op. I02-001.

3. Extortion

A State official commits theft by extortion, a class 4 felony, by knowingly obtaining or seeking to obtain property or services by means of a threat to take or withhold some future action as a public servant. A.R.S. § 13-1804(A)(7) and (C).

4. Extra Compensation

Arizona law prohibits all public officers from receiving any money, tangible thing of value, or financial benefit, whether directly or indirectly, for any service rendered or to be rendered by that public officer in connection with their duties with the State. A.R.S. § 38-505(A).

5. Gifts from Lobbyists

The acceptance of a gift in connection with your work as a State official, given with the best intentions (i.e. without the intent to influence you as a public officer), still can violate the law. Your compensation is limited strictly to the salary and fringe benefits you earn from the State plus the personal satisfaction you derive from doing a good job. It is a class 1 misdemeanor for any State officer or employee to knowingly accept gifts worth more than ten dollars or gifts designed to influence official conduct from a lobbyist or lobbyist’s principal in any calendar year. A.R.S. §§ 41-1231(9) and -1232.02(J). Although meals, travel, and flowers are exempt from this limitation, agency policy that is more restrictive trumps the legislative authorization. The lobbyist and his/her employer must disclose all such expenditures in reports filed regularly at the Secretary of State’s Office. *See* A.R.S. § 41-1232.02. The expenditure disclosures must reveal the name of the State officer or employee receiving the benefit and the date, amount, and type of benefit for all expenditures over twenty dollars.

Some public officials are considered public lobbyists and therefore must follow the lobbyist laws. These laws include the registration of the designated or authorized public lobbyist, reporting of expenditures, and prohibitions against giving legislators gifts in any calendar year worth more than ten dollars. A.R.S. § 41-1232.03.

NOTE: The Attorney General’s Office investigates and prosecutes violations of the lobbyist laws. A.R.S. § 41-1237(B).

6. Lobbyist Entertainment Ban

Pursuant to A.R.S. § 41-1232.08 and with very limited exceptions, it is unlawful for any State employee to accept tickets, expenditures, or vouchers for admission to, or participation in, any sporting or cultural event or activity from any lobbyist, any public body, any principal who has hired a lobbyist, or any person acting on that person's behalf. In short, State employees cannot accept any form of admission to any sporting or cultural event from these listed persons. One point worth noting is that law firms often register multiple attorneys as lobbyists. Therefore, it is best to be cautious and inquire whether the individual offering the ticket or admission is a registered lobbyist even though their primary responsibilities are not related to legislation.

C. Ramifications

1. Negative publicity and public opinion.
2. Employment discipline or termination.
3. Criminal sanctions. A.R.S. §§ 13-2602, 38-510, 41-1237.
4. Costs and attorneys' fees. A.R.S. § 38-506(C).

D. Guidance and Resources

A.R.S. §§ 13-1804, 13-2602, 38-444, 38-505, 38-506, 41-1232.02, 41-1234.01

A.A.C. R2-5-501.

Ariz. Att'y Gen. Op. I00-031.

IV. Incompatible Employment, Nepotism, and Whistleblowing

A. Overview

Although the State personnel rules (Arizona Administrative Code ("A.A.C.") R2-5-101 through -803) are the primary resource for employment matters, incompatible employment, nepotism, and whistleblowing deserve special mention.

1. Incompatible Employment

Outside employment might raise concerns regarding your service to the State. Potential conflicts of interest may arise, and overextending yourself with outside employment may decrease your potential utility to the State. With employment that is not expressly prohibited, State officials should remain extremely sensitive to potential conflicts of interest – both real and perceived – that might arise. Agency policies frequently require disclosure and approval of outside employment.

2. Nepotism

It is unlawful for a State official to appoint, vote for, or agree to suggest, arrange, or be a party to the appointment of a relative by affinity (marriage) or consanguinity (blood). A.R.S. § 38-481. A violation of this provision is a class 2 misdemeanor. Hiring relatives from these categories runs afoul of the standards of conduct for State employees. Because hiring a relative is a special type of conflict of interest, it must be avoided. Again, the issue, as with other conflicts, is to avoid circumstances in which there may be questions about whether you are exercising independent judgment in the best interests of the people of the State. Such questions may arise even when the appointment does not technically violate the statute, e.g., appointment of a domestic partner or fiancé.

3. Whistleblowing

Arizona law prohibits State officials with control over personnel actions from taking reprisal (such as termination, change of duties, demotion, transfer, or disciplinary action) against State employees who disclose to a public body information of public concern. A.R.S. § 38-532(A). Matters of public concern include issues that the employee reasonably believes are violations of the law, mismanagement, gross waste of public monies, or abuse of authority. A violation of this statute may subject the State official personally to civil penalties up to five thousand dollars and possible disciplinary action. A.R.S. § 38-532(C). These laws are created to (i) provide a safe avenue of reporting for employees who witness violations of laws or mismanagement of public monies or authority, and (ii) expose unethical and unlawful conduct in State government.

4. Resign to Run

Arizona's "resign-to-run" law prohibits elected State officials from offering themselves for nomination or election for another salaried local, state, or federal office except during the final year of the term being served. *See* A.R.S. § 38-296(A). Violating this law requires you to forfeit your office. A.R.S. § 38-296(E). Covered state employees are prohibited from being a candidate for nomination or election to any paid political office. A.R.S. § 41-772(B). A state service employee seeking elected public office must resign upon submitting nomination papers. *Ariz. Att'y Gen. Op. I10-005.*

C. Ramifications

1. Violations of conflict of interest laws can trigger criminal penalties (A.R.S. § 38-510(A)), forfeiture of office (A.R.S. § 38-510(B)), and civil penalties (A.R.S. § 38-506).
2. Civil penalties for violating State personnel practices. A.R.S. § 38-532(C).
3. Criminal penalties. A.R.S. § 38-481 (employment of relatives).
4. Negative publicity and public opinion.

D. Guidance and Resources

State Personnel Rules, A.A.C. R2-5-101 through -803.

A.R.S. §§ 38-296(A) (incompatible employment), 38-481 (nepotism), and 38-532 (whistleblowing).

Arizona Agency Handbook, “Personnel,” Chapter 3, and “Conflict of Interest,” Chapter 8.

V. Discrimination and Harassment

A. Overview

Both federal and State law protect many groups of individuals from discrimination and harassment. State law does not tolerate discrimination or harassment based on race, color, religion, sex, national origin, disability, genetic information or veteran status.

B. Legal Standards

Various federal laws prohibit discrimination based on race, color, gender, national origin, religion, age, physical or mental disability, genetic information or veteran status. Arizona also has numerous civil rights laws to prevent discrimination in connection with employment, fair housing, public accommodations, and voting. *See, e.g.*, A.R.S. §§ 41-1401 to -1492.11. In addition, statutes and case law prohibit workplace harassment based on race, color, gender, national origin, religion, age and disability. The legal principles prohibiting discrimination and discriminatory harassment in the workplace govern employment practices in State offices. *See, e.g.*, A.R.S. §§ 41-1461 to -1467. Equal protection rights also derive from the United States Constitution.

Although people often think of discrimination in terms of employment rights, you should recognize that it also can be wrong to discriminate in terms of providing basic services or benefits to someone because of their race, color, religion, age, handicap or national origin. You should strive to serve and protect all citizens equally and impartially.

NOTE: Be aware of your language, humor, attitude, and stereotypical beliefs. Be sensitive to the feelings, sensitivities, and attitudes of others. Exercise consideration and good judgment in the workplace.

C. Ramifications

1. Negative publicity and public opinion.
2. Employment discipline or termination.
3. Civil financial penalties, including costs and attorneys' fees.

D. Guidance and Resources

Guidance:

A.R.S. §§ 41-1401 through -1492.11 and 41-1461 to -1467.

U.S. Const. amend. XIV (equal protection), 42 U.S.C. §§ 2000a to 2000e-17 (Title VII of the Civil Rights Act of 1964), 29 U.S.C. §§ 621 to 634 (Age Discrimination in Employment Act), 42 U.S.C. §§ 12101 to 12213 (Americans with Disabilities Act), 29 U.S.C. § 794 (Rehabilitation Act of 1973), 42 U.S.C. §§ 2000ff to 2000ff-11 (Genetic Information Nondiscrimination Act of 2008).

Arizona Agency Handbook, "Personnel," Chapter 3, "Discrimination Law," Chapter 15 (2001).

Web Sites:

Employment Topics: United States Equal Employment Opportunity Commission, www.eeoc.gov

Americans with Disabilities Act, www.ada.gov/adahom1.htm

Department of Justice, www.usdoj.gov

United States Department of Labor, www.dol.gov.

General Information:

Department of Justice ADA Information Line: (800) 514-0301 (voice) or (800) 514-0383 (TDD); www.askDOJ@usdoj.gov

VI. Prohibited Political Activities

A. Overview

State employees shall neither participate in any campaign or political activities while on State time nor use State resources for campaign or political purposes.

B. Legal Standards

Arizona's laws regulating the political activity of State employees (A.R.S. §§ 41-771 to -772) do not apply to elected State officials or State officers appointed by the Governor or Legislature. Consequently, these individuals may engage in any form of political activity, provided that no State resources are used for this purpose (including that no State employee may participate in any campaign work while on State time). However, State officials may be subject to fraud and corruption laws for conduct involving the political corruption of public personnel and programs, whether their conduct is direct (their own) or indirect (their subordinates).

Other State employees (*e.g.*, covered employees subject to the State personnel system) may not engage in certain political activity, such as being a member of any national, State or local committee of a political party, a candidate for nomination or election to any paid public office, or taking any part in the management or affairs of a political party or any partisan or nonpartisan campaign or recall effort. A.R.S. § 41-772(B). However, they may express opinions, sign nomination or recall petitions, make contributions, and engage in activities to advocate the election or defeat of any candidate, including soliciting contributions. Except for expressing opinions, a state employee may not engage in any permitted political activity while on duty or at public expense. A.R.S. § 41-772(C).

Arizona law prohibits any person, including state officials and employees, from soliciting a state employee to engage or to refrain from engaging in permissible political activities by threats, intimidation or coercion, and from subjecting a state employee to reprisals or adverse consequences for engaging in or refusing to engage in permitted political activities. A.R.S. § 41-772(D) – (F).

NOTE: Illegal political activity in the public workplace detracts from the mission of public service and the effectiveness of State government.

C. Ramifications

1. Negative publicity and public opinion.
2. Criminal penalties. A.R.S. § 41-772(I).
3. Civil penalties. A.R.S. § 41-772(J).
4. Employment suspension or termination. *See* A.R.S. § 41-772(H).

D. Guidance and Resources

A.R.S. §§ 41-771 to -772.

Arizona Agency Handbook, "Personnel," Chapter 3, § 3.9.3 (2001).

Part Four:

RESOURCE ACCOUNTABILITY

I. Procurement: The State System for Purchasing Goods and Services (including travel)

A. Overview

With some limited exceptions, the Procurement Code (and supplementary rules) governs all expenditures of public monies to purchase, rent, or lease materials, services, or construction and the disposal of State materials. A.R.S. § 41-2501. Because the procurement system is complex, it is best to ensure that you have a specialist in the area to advise and answer your questions. Do not expect reimbursement if you use your own funds to purchase goods or services for use as a State employee. Please follow the procurement requirements for **all** purchases.

B. Legal Standards

The Procurement Code and procurement rules divide purchases into distinct dollar categories or service categories.¹ Each category has its own set of standards. Notwithstanding the dollar amount involved, all “procurements shall be made with such competition as is practicable under the circumstances.” A.R.S. § 41-2535(A). When practical, purchases under \$50,000 shall be restricted to small businesses. A.R.S. § 41-2535(B). Agencies are required to request at least one quotation from a small minority- or women-owned business when soliciting procurements of \$50,000 or less. A.A.C. R2-7-D303(2). Requests for quotation are not required for emergency procurements (A.R.S. § 41-2537; A.A.C. R2-7-E302); sole source procurements (A.R.S. § 41-2536; A.A.C. R2-7-E301); purchases not expected to exceed \$5,000 (A.A.C. R2-7-D305); and where competition is impractical (A.A.C. R2-7-D301).

1. Existing State Contracts

State government units² must use existing State contracts designated as mandatory to purchase materials and services covered by the contracts. A.A.C. R2-7-A301. If you believe that an existing contractor does not satisfy your needs, you may not otherwise purchase the materials or services without the written approval of the State Procurement Administrator. A.A.C. R2-7-A301(B). Keep a copy of the approval with the purchase order file.

¹ Because the dollar categories are statutory, they are subject to change, and should be verified prior to finalizing any procurement.

² “State government unit” includes “any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of the state.” A.R.S. § 41-2503(35).

NOTE: The State has a contract for travel. All travel done on behalf of the State and your office must be arranged through this agency. Be sure to check with your office's travel coordinator *before* you make travel arrangements.

2. Purchases Estimated to Cost \$5,000 or Less

Reasonable judgment should be used in awarding contracts of \$5,000 or less that are advantageous to the state. Requests for quotation are not required, but may be used. A.A.C. R2-7-D305. Use a procedure that provides for adequate and reasonable competition under the circumstances and for making records to facilitate an audit or financial review.

3. Purchases Estimated to Cost Between \$5,001 to \$50,000

A request for quotation must be issued for purchases between \$5,001 and \$50,000. A.A.C. R2-7-D302. The solicitation must contain the following information:

1. Requirements for submission of offer, including due date and time, where offers will be received, and offer acceptance period;
2. Any purchase description, specifications, delivery or performance schedule, and inspection and acceptance requirements;
3. The minimum information that the offer must contain;
4. Any evaluation factors;
5. Whether negotiations may be held;
6. Any contract options including renewal or extension;
7. The uniform terms and conditions; and
8. Any other terms, conditions, or instructions specific to the procurement.

A.A.C. R2-7-D302. The request for quotation must include a statement that only a small business, as defined in R2-7-101, shall be awarded a contract, unless the procurement has been unsuccessfully competed pursuant to A.A.C. R2-7-D303, or a written determination has been made by the Agency Chief Procurement Officer that restricting the procurement to small business is not practical under the circumstances.

A request for quotation shall be issued by the Agency Chief Procurement Officer by:

1. posting for a reasonable time on the state procurement office's centralized electronic system indicating the due date for offers; or by
2. distributing the request to at least three small businesses on a rotating basis, including at least one small minority- or small women-owned business to submit a quote.

The request for quotation may be canceled by the Agency Chief Procurement Officer by making a written determination that cancellation is advantageous to the state. A.A.C. R2-7-D303.

The contract must be awarded to the small business determined to be the most advantageous to the state in accordance with any evaluation factors identified in the request for quotation. The written basis for the award shall be placed in the procurement file. If only one responsive offer is received, a written determination of whether award of the contract is advantageous to the state should be made and placed in the procurement file. A.A.C. R2-7-D304.

4. Purchases of \$50,000 or More, Emergency Procurements, and Sole Source Procurements

Please consult your Agency Chief Procurement Officer, the *Arizona Agency Handbook*, chapter 5, and your assigned Assistant Attorney General.

C. Fiduciary Responsibilities

People conducting public procurements have a fiduciary obligation to the citizens and taxpayers of the State to conduct procurements in utmost good faith and in the best interests of the State. *Brown v. City of Phoenix*, 77 Ariz. 368, 373, 272 P.2d 358, 361-62 (1954) (“[t]he purpose of requiring competitive bidding is to prevent plundering of the taxpayers”). Competitive bidding should be employed in any procurement because lack of competition often generates abuse, results in favoritism, and usually produces higher costs. Ariz. Att’y Gen. Op. I75-11.

D. Ramifications for Violating the Procurement Code

1. Negative publicity and public perception.

NOTE: The Attorney General is responsible for enforcing the Procurement Code. A.R.S. § 41-2616(D).

2. Criminal Penalties:

A person who intentionally or knowingly contracts for or purchases any material, services or construction pursuant to a scheme or artifice to avoid the requirements of this chapter, rules adopted pursuant to this chapter, rules adopted by the state board of education pursuant to § 15-213 or rules adopted by the state board of regents, the state lottery commission or the judicial branch pursuant to A.R.S. § 41-2501 is guilty of a class 4 felony. See A.R.S. § 41-2616(B).

3. Civil Penalties:

A person who contracts for or purchases any material, services or construction in a manner contrary to the requirements of this chapter, the rules adopted pursuant to this chapter, the rules adopted by the state board of education pursuant to § 15-213 or rules adopted by the Arizona board of regents, the Arizona lottery commission or the judicial branch pursuant to § 41-2501 is personally liable for the recovery of all public monies paid plus twenty percent of such amount and legal interest from the date of payment and all costs and damages arising out of the violation. See A.R.S. § 41-2616(A).

E. Guidance and Resources

Guidance: Arizona Procurement Code, A.R.S. §§ 41-2501 to -2673.

Procurement Rules, A.A.C. R2-7-101 to R2-7-1301.

Arizona Agency Handbook, "Procurement," Chapter 5 (2001).

II. Appropriate Uses of State Resources

A. Overview

State resources (employee time, materials, equipment, etc.) may be used only to conduct the public's business. State officers may not use State facilities, equipment, personnel, or supplies for private purposes except to the extent they are lawfully available to the public. (e.g., if the general public is charged twenty cents per copy, the State officer may purchase copies for twenty cents each).

B. Legal Standards

Many State statutes prohibit the improper use of materials, services, and information available to public officers and employees. For example:

1. Theft

Personal use of State resources is theft. "Theft" is the taking or unauthorized use of another person's (including the State's) property or services. A.R.S. §§ 13-1802. Examples of theft of State property include computer fraud, A.R.S. § 13-2316 (encompasses a person who "exceed[s] authorization of use" of any computer), and unauthorized use of a State vehicle. A.R.S. § 13-1803. State officers and employees may not make personal long distance calls (interstate or intrastate) without charging the call to a personal credit card, or use the State's postage or courier service for personal business.

2. Fraud

Knowingly making false representations to obtain a benefit is fraud. *See* A.R.S. § 13-2310. Similarly, it is a felony to obtain any benefit from the State through fraud. A.R.S. § 13-2310. Examples in State employment might include filing a false timesheet, leave report, travel expense report, or per diem voucher.

NOTE: You should take steps to ensure that office supplies, equipment and personnel used only for State work and not personal gain.

3. Tampering With a Public Record

Stealing, destroying, altering, concealing or falsifying a public record is tampering with a public record, which is a class six felony, punishable by one year in prison. A.R.S. §§ 13-2407, 38-421.

4. Unauthorized Expenditure of Public Funds

Personal liability accrues for financial expenditures made without authorization. To protect taxpayers, Arizona law strictly regulates the receipt, custody, control and expenditure of "public monies," which are defined by A.R.S. § 35-302 as "money belonging to, received or held by state . . . officers in their official capacity." For example, an expenditure made without authorization is an illegal act resulting in joint and several liability to the state official approving the payment and the person receiving the payment. A.R.S. § 35-154. "Any state officer or employee who illegally withholds, expends or otherwise converts any state money to an unauthorized purpose [is individually liable] for the amount of such money, plus a penal sum of twenty percent thereof." A.R.S. § 35-196.

NOTE: You should be careful whenever approving expenditures, or you may be liable personally. See *Valley Bank & Trust Co. v. Proctor*, 47 Ariz. 77, 53 P.2d 857 (1936) (holding that Governor's approval of expenditures of State money for items for his personal use rather than a governmental purpose was improper and the funds were recoverable from his estate).

5. Solicitation on State Property

Solicitation is any activity "which can be interpreted as being for the promotion, sale, or transfer of products, services, memberships, or causes. Distribution or posting of advertising, circulars, flyers, handbills, leaflets, posters, or other printed information for these purposes is solicitation." Soliciting (directly or indirectly) on State property without first obtaining a permit from the Director of the Department of Administration or his designee is prohibited. A.A.C. R2-11-302.

6. Travel

Public officials may travel at State expense if the expenses are incurred while "traveling on necessary public business away from his designated post of duty and when issued a proper travel order." A.R.S. § 38-621(A). The unauthorized use of a State vehicle is theft and the falsification of an expense report is fraud, both class 6 felonies. A.R.S. § 13-1803 and -2407.

Ethical questions may arise when travel expenses are paid by third parties, such as lobbyists. Additionally, all statewide elected officials must disclose the cost of a trip if the accumulated value is more than \$500 (A.R.S. § 38-542(A)(8)), and lobbyists must disclose all travel-related expenditures that benefit any State official. See A.R.S. § 41-1232.02(A) and (D).

Public officers may not accept, use a pass, or purchase transportation from a common carrier other than in the manner that transportation may be purchased by the general public. A.R.S. § 38-445. A violation is a class 2 misdemeanor.

State officials recruiting others to State service should know that the Legislature has forbidden expending any appropriations for transportation or other travel expenses, for moving expenses, or for bringing any person who is not an Arizona resident to interview for prospective employment unless such monies are appropriated for such specific purposes. A.R.S. § 35-196.01(A).

Current State employees may be reimbursed for reasonable relocation expenses related to management initiated geographical reassignments of more than 50 miles from an employee's current work site. A.R.S. § 35-196.01(B).

In cases where a State official accepts travel expenses from a third party, the State official must be aware of the potential appearance of impropriety as well as any conflict of interest.

Use of State Vehicles – A.R.S. § 13-1803 expands the definition of “unlawful use of means of transportation” to include persons who are passengers in the vehicle who knew or should have known that the vehicle was unlawfully obtained by the driver.

General Policy – The State’s travel policy is set forth in the *State of Arizona Accounting Manual*, Section II(D) (2000), available on the Arizona GAO web site at <http://www.gao.state.az.us> If you have questions regarding this policy, please contact your agency’s travel coordinator.

7. Use of State Computers

State employees may not use agency computers to “access, download, print or store any information infrastructure files or serves that depict nudity, sexual activity, sexual excitement or ultimate sexual acts.” A.R.S. § 38-448. Employees who have a business reason to access such materials must receive written permission from the agency, which shall be public record. *Id.*

C. Ramifications

1. Negative publicity and public opinion.
2. Criminal penalties.
3. Employment discipline or termination. A.R.S. § 41-770.
4. Personal financial liability. A.R.S. § 35-196.

D. Guidance and Resources

A.R.S. §§ 13-105, -1802, -2310, -2316, -2407, 38-421, 38-448, 41-770.

A.A.C. R2-11-302.

State of Arizona Accounting Manual, <http://www.gao.state.az.us>

PERSONAL CONSEQUENCES CHART
A Sample of Sanctions Against Violators

Civil	Criminal	Other
<p><u>Financial Liability</u></p> <ul style="list-style-type: none"> No Indemnification for Discrimination; Sexual Harassment (<i>State v. Schallock</i>) Restitution, twenty percent penalty: Unauthorized Expenditures of Public Monies (A.R.S. § 35-196) Felony Fines: Up to \$150,000/violation (A.R.S. 13-801) Misdemeanor Fines: Up to \$2,500/violation (A.R.S. 13-802) Penalty up to \$5,000 for Prohibited Personnel Practice (A.R.S. § 38-532 (C)) False Financial Disclosure: \$50/day (A.R.S. § 38-544 (B)) Penalty up to \$500 for each violation of the Open Meeting Law. A.R.S. § 38-431.07 <p><u>Financial Liability, with Penalties</u></p> <ul style="list-style-type: none"> Procurement Code Violations: Amount, plus twenty percent (A.R.S. § 41-2616(A)) Open Meeting Law Violations (A.R.S. § 38-431.07) Improper Political Activity: Three times campaign contribution (A.R.S. § 41-772(J)) Illegal Expenditures of State Monies: Amount, plus twenty percent (A.R.S. § 35-196) Prohibited Personnel Practice: Up to \$5,000 in civil penalties, plus disciplinary action (A.R.S. § 38-532(C)) <p><u>Attorneys' Fees, Interest, Costs</u></p> <ul style="list-style-type: none"> Prohibited Personnel Practice (A.R.S. § 38-532(D)) Open Meeting Law Violations (A.R.S. § 38-431.07) Improper Political Activity (A.R.S. § 41-772(J)) Procurement Code Violations (A.R.S. §§ 38-506(C), -41-2616) 	<p><u>Felony</u></p> <p><u>Class 2</u></p> <ul style="list-style-type: none"> Fraudulent Schemes (A.R.S. § 13-2310) Theft \$25,000 or more (A.R.S. § 13-1802(G)) <p><u>Class 4</u></p> <ul style="list-style-type: none"> Bribery (A.R.S. § 13-2602) Perjury (A.R.S. § 13-2702) Procurement Code Violation (A.R.S. § 41-2616(B)) Extortion (A.R.S. § 13-1804 (A)(7)) Theft: \$3,000-\$4,000 (A.R.S. § 13-1802(G)) <p><u>Class 6</u></p> <ul style="list-style-type: none"> False Swearing (A.R.S. § 13-2703) Illegal Gratuity or Reward (A.R.S. § 38-444) Tampering with a Public Record (A.R.S. § 13-2407) Intentional or Knowing Disclosure of Confidential Information (A.R.S. § 38-510) Intentional or Knowing Conflict of Interest (A.R.S. § 38-510) Intentional or Knowing Improper Representation After leaving Office (A.R.S. § 38-510) Intentional or Knowing Improper Compensation For Services (A.R.S. § 38-510) Theft: \$1,000- \$2,000 (A.R.S. § 13-1802(G)) Improper Political Activity (A.R.S. § 41-772(I)(1)) Trading in Public Office (A.R.S. § 13-2603) 	<p><u>Embarrassment</u></p> <p><u>Media coverage/scrutiny</u></p> <ul style="list-style-type: none"> Family/friends <p><u>Removal from Office</u></p> <ul style="list-style-type: none"> Misfeasance In Office (A.R.S. § 38-296) Open Meeting Law (A.R.S. § 38-431.07) Disclosure of Confidential Information (A.R.S. §§ 38-504, -510 (B)) Conflict of Interest (A.R.S. §§ 38-503, -510(B)) Improper Representation After Leaving Office (A.R.S. § 38-510(B)) Improper Compensation for Services (A.R.S. §§38-505, -510 (B)) <p><u>Civil Action</u></p> <p><u>Arrest Record</u></p> <p><u>Disciplinary Action</u></p> <ul style="list-style-type: none"> Prohibited Personnel Practice (A.R.S. § 38-532 (C)) E-mail Violations Improper Political Activity (A.R.S. § 41-772 (H)) <p><u>Criminal Conviction</u></p> <p><u>Impeachment</u></p> <p><u>Recall</u></p> <p><u>Bar from Office</u></p> <p><u>Not Re-elected/Re-appointed</u></p>

PERSONAL CONSEQUENCES CHART
A Sample of Sanctions Against Violators

<p><u>Cancellation of Contracts</u></p> <ul style="list-style-type: none"> • Procurement Code Violations (A.R.S. §§ 38-506(A) and -511) 	<p><u>Misdemeanor</u></p> <p><u>Class 1</u></p> <ul style="list-style-type: none"> • Lobbying Violations (A.R.S. § 41-1237(A)) • Disclosure of Confidential Information (A.R.S. § 38-510) • False Financial Disclosure (A.R.S. § 38-544) • Conflict of Interest (A.R.S. § 38-510) • Theft <\$1,000 (A.R.S. § 13-1802(G)) • Improper Political Activity (A.R.S. § 41-772(I)(2)) • Improper Representation After Leaving Office (A.R.S. § 38-510) • Gift Limits (A.R.S. § 41-1237(A)) <p><u>Class 2</u></p> <ul style="list-style-type: none"> • Nepotism (A.R.S. § 38-481(B)) • Improper Travel Claims (A.R.S. § 38-445) • Spurious Communications with the Legislature (A.R.S. § 41-1235) • Unsworn Falsification (A.R.S. §13-2704(B)) 	
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