STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL July 7, 2017	No. I17-004 (R15-026) Re: Whether Arizona's Public Records Law Extends Beyond its Terms and Applies to Privately Sent Messages

To: Senator Steve Farley
Arizona State Legislature

Questions Presented

Are messages sent and received via texting and social media sites by officers or public bodies that have a substantial nexus to the job public records, even if the employee uses a private cell phone or electronic device?[1]

Summary Answer

Electronic messages sent or received by a government-issued electronic device or through a social media account provided by a government agency for conducting government business are public records. With respect to communications conducted on private devices or accounts, although private devices or accounts do not themselves harbor public records, public officials have an affirmative duty to reasonably account for official activity. This duty

[1] This opinion addresses only the specific request made, relating to electronic messages sent via "texting and social media sites," and does not evaluate the applicability of the Arizona Public Records Law, A.R.S. § 39-121 *et seq*, to any other types of potential public records.

encompasses official activity engaged in through private devices or accounts. In other words, public officials cannot use private devices and accounts for the purpose of concealing official conduct.

Analysis

I. Electronic Messages Sent or Received Using Electronic Devices or Social Media Accounts Provided by A Government Agency for Conducting Government Business.

Public officers and bodies in Arizona are legally obligated to "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 this state or any political subdivision of this state." A.R.S. § 39-121.01(B). Public records are generally open to inspection by any member of the public during office hours. A.R.S. § 39-121. "[T]he core purpose of the public records law . . . is to . . . allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees." *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 541 ¶ 27 (App. 2008) (internal quotation marks and citation omitted).

An electronic message sent or received using a device or a social media account provided by a government agency for conducting government business is a public record unless it is of a "purely private or personal nature." *See Griffis v. Pinal Cnty.*, 215 Ariz. 1, 4 ¶10 (2007) ("only those documents having a 'substantial nexus' with a government agency's activities qualify as public records" even when created and located on government systems or devices); *see also Lake v. City of Phoenix*, 222 Ariz. 547 (2009) (where government agency maintains public record in electronic format, document metadata associated with record was also public record); *ACLU v. DCS*, 240 Ariz. 142 (App. 2016) (CHILDS database was public record), *review denied* (Apr. 18, 2017). Thus, where a government agency provides a device or social media account as a means

of conducting government business and generating public records, messages sent or received by any such device or account are public records unless of a purely private or personal nature.

II. Electronic Messages Sent and Received Using Private Electronic Devices or Social Media Accounts Not Established As Systems For Conducting Government Business.

If the electronic message is solely on a private electronic device or through a social media account that an agency has not established as a system for conducting government business, then, as explained below, the electronic message is not a public record.

This is a question of first impression in Arizona, as no Arizona appellate decision has addressed the applicability of the public records law to electronic messages on non-government electronic devices or messages on non-government social media accounts.[2] Courts interpret statutes by looking first to the plain language of the law as the best indicator of the legislature's intent. *Premier Physicians Grp, PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016). When an ambiguity exists in a statute, courts "determine its meaning by considering secondary factors, such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Id.* "[G]enerally 'the legislature does not include in statutes provisions which are redundant, void, inert, trivial, superfluous, or contradictory.'" *Vega v. Morris*, 184 Ariz. 461, 463 (1996).

[2] Courts in other states have recently issued opinions on public-records related disclosure questions in their own states, interpreting their own state statues and constitutional provisions in light of judicial precedent. *E.g.*, *Nissen v. Pierce Cty.*, 357 P.3d 45 (Wash. 2015); *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017). While these opinions may identify many of the same conflicting policy issues identified herein, the policy choices reached in those opinions do not provide a basis for going beyond the plain language of the pertinent Arizona provisions in answering the question presented: what electronic systems the Arizona Legislature *has determined* can contain public records under Arizona law. This is especially true given that, as noted below, it would be improper for this opinion to supplant the legislature's role as the arbiter of the policy balancing on this important question. Making private devices *per se* subject to government review should not be done without authorization in the law, flowing from a proper legislative balancing of constitutional and policy considerations.

Since 2000, the Arizona Public Records Law has covered electronic records as a result of legislative action, which expanded the statutory definition of public records to include records regardless of physical form or characteristics. Specifically, the Legislature amended § 39-121.01(B) as follows (additions are noted by underlines and deletions by strike-through):

> All officers and public bodies shall maintain all records, including records as defined in section 41-1350, reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision ~~thereof~~ of the state.

2000 Ariz. Sess. Laws ch. 88, § 54 (2d Reg. Sess.).

The first change is relevant to the present analysis. It incorporated by reference the definition of the term "records," which (as reflected in the current version of § 39-121.01(B)) has been renumbered to § 41-151.18. That definition provides in relevant part that "records" means:

> 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 § 41-151.16, 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 . . . .

A.R.S. § 41-151.18.

The effect of this change was to make clear that materials "regardless of physical form or characteristics" count as records. The 2000 amendment of § 39-121.01(B) is therefore critical to understanding the scope of the public records law as it applies to electronic records. The Arizona Supreme Court's most recent opinion on the public records law held that when an agency maintains a public record document in electronic form, the document's metadata is itself subject to disclosure if requested. *Lake*, 222 Ariz. at 551 ¶ 13. In reaching its holding, the Court noted multiple times the significance of the 2000 legislative amendment. *See id.* at 549 ¶9 & n.3

(quoting the definition of "records" in § 41-1350); *id.* at 550 n.4 (noting 2000 amendment and the addition of the reference to § 41-1350 when discussing that "the 1975 adoption of § 39–121.01(B) 'define[d] those matters to which the public right of inspection applies more broadly.'").

The text of § 41-151.18 requires that the materials be "*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" (emphasis added). Similarly, § 41-151.16(A) permits "[e]ach agency of this state" to maintain records using electronic media. The statutes' plain language makes clear that when the Legislature expanded the scope of public records to include electronic records, it did so only with respect to agency-maintained systems. Concluding otherwise would require going beyond the language of the relevant statutes and would make the 2000 amendment to § 39-121.01(B) superfluous. For the same reason, the language "public records *and other matters*" in § 39-121 does not itself cover electronic communications. If "other matters" itself covered electronic communications, then the 2000 changes to § 39-121.01 would be superfluous. Moreover, the Arizona Supreme Court said long before the 2000 legislative amendments that the breadth of § 39-121.01 "obviate[ed] the need for any technical distinction between 'public records' or 'other matters,' insofar as the right to inspection by the public is concerned." *Carlson v. Pima Cty.*, 141 Ariz. 487, 490 (1984).

The Court's language in *Griffis* that "the nature and purpose of a document determine whether it is a public record," 215 Ariz. at 4 ¶10 (quoting *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538 (1991)), is not to the contrary. That language, like similarly broad language in other cases, was used in the context of *limiting* what documents on a government-issued electronic device or in the possession of an agency count as public records,

not *expanding* it beyond those contours. Absent direction from the Legislature otherwise, it is improper to pull language out of its context in *Griffis* limiting the reach of the public records law in order to expand that statute's application.

The plain text of the relevant statutes contemplates government management of *government* systems alone. Several policy arguments bolster this conclusion. First, an agency does not have control of private electronic devices or social media accounts. Deeming all communications on such electronic devices or services to be public records subject to mandatory retention requirements under Arizona law would impose a duty on an agency that may be impossible to meet. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980) (Department of State did not improperly withhold documents that had been lawfully taken by Secretary of State and were housed outside of the State Department's control).

Second, public employees have a strong privacy interest in their personal electronic devices and social media accounts, which contain significant personal, private information. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (noting special privacy concerns implicated by modern cell phones: "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate"; "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house"); *see also* Ariz. Const. art. II, § 8, providing "broad protection" of "individual privacy." Mobilisa, Inc. v. Doe, 217 Ariz., 103, 112 (App. 2007). Classifying messages on personal electronic devices and social media accounts as public records would potentially expose the entire contents of employees' personal electronic devices and social media accounts to agency access and perusal as part of the public records response process.

Third, officers and public bodies are under independent obligations to record their work and otherwise maintain records. *See, e.g.*, A.R.S. § 39-121.01(B), (C) (Officers and public bodies are obliged to keep records that are "reasonably necessary or appropriate to maintain an accurate knowledge of their official activities."). This record-keeping obligation precludes public officials from using private devices or accounts for the purpose of concealing official activities. While nothing herein should be read as encouraging the use of private electronic devices or social media accounts to conduct official activities, if such activity does occur it is the duty of the public official to record the activity in accordance with A.R.S. § 39-121.01.[3] Government agents are presumed to meet this obligation. *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("Ordinarily, we presume that public officials have 'properly discharged their official duties.'") (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

Fourth, other statutes provide for criminal penalties for destroying or tampering with public records. *See, e.g.*, A.R.S. § 38-421 (providing for class 4 felony for officer who "knowingly and without lawful authority destroys" any record). If the scope of public records is expanded to include potentially all messages on private electronic devices and social media accounts, then this could create criminal liability for public employees without the notice provided by affirmative legislative action. Long-standing legal principals counsel against this type of extra-legislative expansion of criminal liability. *See, e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990) (Rule of lenity is a "time-honored guideline" that "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.")

Conclusion

[3] The precise contours of this duty are not the subject of this Opinion and likely involve fact-intensive analyses.

Electronic messages sent or received by a government-issued electronic device or through a social media account provided by a government agency for conducting government business are public records. Messages sent or received by a private electronic device or through a private social media account implicate the public official's duty to provide a reasonable account of official conduct, but do not themselves harbor public records. Interpreting the statute in this manner is consistent with the statutory text and is mindful of the separation of powers. It is the province of the Legislature, not of this office or the courts, to weigh considerations such as balancing public employee privacy rights with the need for government transparency and accountability.

Mark Brnovich
Attorney General