

Notice Required by ARS § 41-1091(B):

"This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under A.R.S. §41-1033 for a review of the statement."

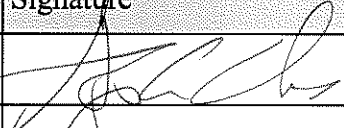
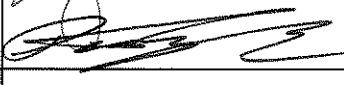





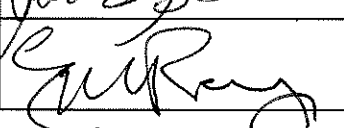
Records Management - Confidential and Privileged Records	Document No.	0206.002
	Revision No.	002
	Effective Date	

1.0 Revision History

1.1 Revision Table

Date	Rev. No.	Change	Ref. Section
August 30, 2005	002	Revision	0032.001
May 1, 1998	001	Review	0032.000
May 26, 1995	000	New Policy Drafted	n/a

1.2 Approval Signatures

Title	Name	Signature	Date
Director	Stephen A. Owens		1/19/06
Deputy Director	Patrick J. Cunningham		1/19/06
Air Quality Division	Nancy C. Wrona		11/10/05
Administrative Services Division	Robert Rocha		1/17/06
Tank Programs Division	Philip McNeely		11-9-05
Water Quality Division	Joan Card		11-18-05
Waste Programs Division	Shannon Davis Amanda Store		11/10/05
CBPO	Edward M. Ranger		1/13/06

CBPO	Rebecca Reed	Rebecca@Reed	1/13/06
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2.0 Purpose

This substantive policy statement informs the general public of ADEQ's current approach to, or opinion of, the requirements of A.R.S. §§ 39-121 through 39-161; §§ 41-1330 through 41-1353; A.R.S. Title 49 and other provisions of law, insofar as these provisions relate to ADEQ's responsibilities regarding confidential or privileged records and denying access to public records.

3.0 Persons Affected

- 3.1 ADEQ Division management and staff
- 3.2 ADEQ Records Officers
- 3.3 ADEQ Records Coordinators
- 3.4 Custodian of ADEQ Records
- 3.5 ADEQ Records Management Center staff
- 3.6 ADEQ Administrative Counsel
- 3.7 Members of the public who request access to, or disclosure of, public records

4.0 Policy

The policy of ADEQ is to:

- 4.1 Responsibly administer its obligations to withhold from disclosure to the public records that are confidential or privileged.
- 4.2 Manage its records so as to facilitate prompt disclosure of those records and prompt acknowledgement that records have been withheld.
- 4.3 Ensure records created or received on or after the effective date of this policy be managed for confidentiality purposes from the earliest possible point of record creation or receipt, according to the procedures established in this policy.
- 4.4 Ensure that records created or received before the effective date of this policy be managed for confidentiality purposes according to the procedures established in this policy. This policy shall be complied with before access to these records is permitted.
- 4.5 Handle documents determined to be privileged according to the same procedures as for confidential documents.

5.0 Definitions

- 5.1 "ADEQ Records Coordinator" means a person designated as having the responsibilities described in Section 6.6 of the Records Management - Access to Public Records policy.
- 5.2 "ADEQ Records Officer" means the Manager of an ADEQ Records Management Center, having the responsibilities described in Section 6.5 of the Records Management - Access to Public Records policy.

- 5.3 “CBPO” or “core business process owner” means Division staff, as determined by each Division, primarily responsible for initiating new policies and the review of old policies under their respective core business processes, as designated by the Director.
- 5.4 “Confidential” means that a record is or may be withheld from disclosure to the public on the basis of law.
- 5.5 “Confidential Record Worksheet” means a tool designed to assist ADEQ management and staff to determine whether there is a legal basis for withholding a record from disclosure to the public.
- 5.6 “Custodian of ADEQ Records” means the person designated by the Director as the Manager of the ADEQ Records Management Center at the Phoenix Main Campus.
- 5.7 “Privileged” means any record of, or actual, communication made within a certain protected relationship and legally protected from compelled disclosure in a legal proceeding.
- 5.8 “Records” has the meaning found in ARS § 41-1350 and 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 section 41-1348, 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. Library or museum material made or acquired solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference and stocks of publications or documents intended for sale or distribution to interested persons are not included within the definition of records as used in this [policy].”

6.0 Responsibilities

- 6.1 Each ADEQ employee is responsible for complying with this policy and its procedures.
- 6.2 A Records Coordinator is responsible for assisting the division, office, section, or unit staff for which the Records Coordinator has been assigned in complying with this policy and its procedures.
- 6.3 A Records Coordinator, in consultation with a Records Officer and the Administrative Counsel, is responsible for adapting a Confidential Record Worksheet for the division, office, section, or unit staff for which the Records Coordinator has been assigned. The Records Coordinator, in consultation with the Records Officer and the Administrative Counsel, shall regularly update the Confidential Records Worksheet according to current legal principles.
- 6.4 A Records Officer is responsible for consulting with and otherwise assisting Records Coordinators and ADEQ employees in complying with this policy and its procedures.
- 6.5 The Administrative Counsel is responsible for consulting with and otherwise assisting Records Officers, Records Coordinators and ADEQ employees in complying with this policy and its procedures.

7.0 Procedures

- 7.1 Designation of records as confidential: Each potential confidential or privileged record shall be evaluated using a Confidential Record Worksheet.
- 7.2 When a record is first requested after the implementation of this policy, the respective program shall be informed of the records request so that the confidentiality/ privileged information review, as required in Section 4.4 of this policy, can be performed.
- 7.3 Each confidential record shall be segregated from other related records and maintained in a red file folder or other red file management device.
- 7.4 In accordance with A.R.S. § 39-121.01(D)(2) (effective August 25, 2004):
 - 7.4.1 If requested, the custodian of ADEQ records shall also furnish an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person,
 - 7.4.2 The index shall not include information expressly made privileged or confidential by statute or court order.
 - 7.4.3 For records created or received after the effective date of this policy, the reasons the records may be withheld shall be tracked and maintained from the earliest point of record creation or receipt.

8.0 Additional Documentation

- 8.1 Confidential & Privileged Records Worksheet (attached)
- 8.2 Index of Confidential Documents Form (attached)

Confidential & Privileged Records Worksheet

I. Introduction

The purpose of this worksheet is to help ADEQ staff regarding: What is a confidential or privileged document?

This worksheet is in the form of a checklist for evaluating what legal bases apply to withholding documents as confidential or privileged.

All ADEQ staff are encouraged to inquire with the Office of Administrative Counsel for further guidance on specific documents or claims of confidentiality or privilege.

II. Summary of Arizona Laws Applicable to Records

1. ADEQ is a "public body"¹ under Arizona law.
2. Each public body shall be responsible for the preservation, maintenance and care of that body's public records and each officer shall be responsible for the preservation, maintenance and care of that officer's public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to sections 41-1347 and 41-1351.²
3. "Public records"³ relate to the official duties of a public officer or public agency.⁴
4. Few records⁵ in the possession or control of a public body or public officer will not be "public records."
5. Records, including public records, cannot be destroyed by any agency or officer without specific authority from the Arizona State Library, Archives and Public Records.⁶

¹ "Public body" means the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from the state or any political subdivision of the state, or expending monies provided by the state or any political subdivision of the state. A.R.S. § 39-121.01

² A.R.S. § 39-121.01(C).

³ A "public record," strictly speaking, is one 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. (Citations omitted). 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. (Citations omitted). It has also been held that a written record of transactions of a public officer in his office, which is 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. (Citations omitted). *Mathews v. Pyle*, 75 Ariz. 76, 78-79, 251 P.2d 893, 895 (1953); see also Ariz. Att'y Gen. Ops. R75-495, R75-781.

⁴ *Salt River Pima-Maricopa Indian Community v. Rogers*, 161 Ariz. 531, 815 P.2d 900 (1991).

⁵ In this chapter, unless the context otherwise requires, "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 section 41-1348, 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. Library or museum material made or acquired solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference and stocks of publications or documents intended for sale or distribution to interested persons are not included within the definition of records as used in this chapter. A.R.S. § 41-1350.

⁶ A.R.S. § 41-1347(B); see also A.R.S. §§ 38-421 (class 4 felony provision for destruction or alteration of a public record) and 13-2407 (class 6 felony provision for destruction of public records).

6. Public inspection of government records may be denied when the interests of confidentiality, privilege, privacy or the best interests of the State outweigh the public's right of inspection, but the State has the burden of overcoming the legal presumption favoring disclosure.⁷

III. Confidential & Privileged Document Evaluation

Familiarize yourself with Chapter 6 of the Arizona Agency Handbook, at http://www.ag.state.az.us/Agency_Handbook/CHAPTER_6.pdf, before beginning the evaluation.

➤ Arizona Statutes Generally

- ARS 38-431.03 Public Body Executive Sessions
- ARS 41-1505.06(D) Commerce and Economic Commission Confidential Information
- ARS 41-1750 Criminal History Record Information
- ARS 41-2533 Sealed Bids
- ARS 44-1373 Restricted use of social security numbers; definition
- ARS 44-401 Generally Protected Trade Secrets
- Appendix 6.1 of the AZ Agency Handbook
- Appendix 6.2 of the AZ Agency Handbook

➤ Title 49

- ARS 49-111 Permit applications
- ARS 49-201(38) Environmental Title Definition of Trade Secret
- ARS 49-205(A) Water quality; availability of information to the public
- ARS 49-243(N) Aquifer protection permits; financial information
- ARS 49-288(B) Remedial actions; information gathering and access
- ARS 49-292.01(B) Remedial action
- ARS 49-292.02(B) Remedial actions; financial hardship settlements
- ARS 49-432(C)-(F) State air pollution control; classification and reporting; confidential records
- ARS 49-487(C) County air pollution control; classification and reporting; confidential
- ARS 49-802(E) Management of Used Oil
- ARS 49-928 Hazardous waste management

⁷ *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broadcasting Co.*, 191 Ariz. 297, 301, 955 P.2d 534, 538 (1998).

- ARS 49-967 Pollution Prevention; availability of information to the public
- ARS 49-1012 UST regulation; confidentiality of records
- ARS 49-1017.01(D) UST regulation; financial information

➤ **Arizona Rules**

- AAC R2-5-105 Limiting access to information in state employee personnel files
- Other Arizona rules:
 - _____
 - _____
 - _____

➤ **Federal statutes and regulations that may be applicable**

- 42 USC 405 Prohibition on the disclosure of social security numbers to unauthorized persons
- _____
- _____
- _____

➤ **Other Legal Principles Supporting Confidentiality or Privilege**

- Is the record created or received DRAFT? Handwritten notes, preliminary drafts not normally retained in the ordinary course of business.
- Is the record created or received executive/deliberative?
 - The chief decision-maker and his subordinates enjoy a qualified privilege with respect to their deliberations and decision-making, and all records generated with respect to the deliberative privilege.
- Does a record created or received involve privacy interests?
 - Is the information intended for, or restricted to, the use of a particular person, or group or class of persons?
 - Is the information freely available to the public?
 - Disclosure of personal information should, as a general rule, be severely restricted. Examples of personal information include:
 - Medical records and health information
 - Tax information

- Arrest and disciplinary proceedings not resulting in convictions or adverse dispositions
 - Names of children and minors
 - Adoption records
 - Employment records
 - Social Security Numbers and other personally identifying numbers
 - Similar information whose disclosure would constitute a clearly unwarranted invasion of privacy and be of no legitimate public concern
- Is the record created or received such that disclosure of it would be detrimental to the best interests of the state?
- Catch-all provision: deprivation of fair trial, invasion of privacy, confidential informant, destruction of evidence, physical danger, harm future enforcement efforts.
 - Is the harm to the state's interest specifically demonstrable?
- Is the information in the record protected by a common law privilege?
- Informant's privilege?
 - Deliberative process privilege?
- Is the material sought or the person making the request a party to litigation?
- Attorney-Client privilege? Applies to written or oral communications, made in confidence, and which has not lost its privilege through waiver.
 - Attorney/consultant privilege?
 - Criminal or Investigative privilege? Although, facts are public information
 - Settlement negotiations: written offers to settle or compromise contemplated or pending administrative or judicial actions are confidential during the negotiations. However, the executed, final settlement document becomes public upon final execution, and all previous negotiations likewise become public upon final execution of the settlement.

