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January 4, 2017

Hon. J.D. Mesnard
Arizona House of Representatives
1700 West Washington, Suite H
Phoenix, AZ 85007

Re: I17-001 / R17-001
Meaning of "By Mail" in A.R.S. § 16-824

Dear Speaker-Elect Mesnard:

You requested an opinion from this Office on the following question: "Under A.R.S. § 16-824, does 'by mail' allow for delivery by email?" As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. We understand time is of the essence regarding your request. For this reason, we offer the following informal opinion regarding the question presented.

Under A.R.S. § 16-824, "[t]he chairman of the county committee shall give notice of the time and place of such meeting *by mail* to each precinct committeeman at least ten days prior to the date of such meeting." (Emphasis added). At issue in this informal opinion is the meaning of the term "by mail" in this statute.

While judicial authority interpreting the phrase "by mail" under Arizona law is limited, the U.S. District Court for the District of Arizona recently interpreted the word "mail" as used in Arizona Rule of Civil Procedure 4.2(c). *Cachet Residential Builders, Inc. v. Gemini Ins. Co.*, 547 F. Supp. 2d 1028 (D. Ariz. 2007). The court, relying on an established dictionary definition, held that mail is "defined as 'letters, packets, etc. that are sent or delivered by means of the post office.'" *Id.* at 1030 (citing Webster's Encyclopedic Unabridged Dictionary of the English Language 864 (1989)).

This definition, which focuses on whether the item is "sent or delivered by means of the post office," is consistent with how the term "mail" is used elsewhere under Arizona law. For example, Rule 35(c)(1) of the Arizona Rules of Protective Order Procedure distinguishes between communications by mail and email. Ariz. R. Protect. Ord. P. 35(c)(1) ("A limited jurisdiction court may allow contact by mail *or e-mail* to arrange

parenting time”) (emphasis added). Likewise, the Arizona Rules of Civil Appellate Procedure specify that “[a] party that serves documents on another party *by mail* in an expedited election appeal *also must deliver the documents by electronic means*, including email or facsimile, or as agreed to by the parties.” Ariz. R. Civ. App. P. 10(h); *see also* Ariz. R. Civ. P. 5(c)(2)(C), (D) (distinguishing service by “mailing it” from service “by any other means, including electronic means”). Further, in the Code of Judicial Administration, the term “notify” is defined to mean “written communication by mail, fax *or* email.” Ariz. Code of Jud. Admin. § 6-211 (emphasis added). The distinction between “mail” and “email” in the above rules would be superfluous if “mail” already encompassed email. These authorities also show that, when delivery by email is permitted under Arizona law, Arizona authorities have expressly authorized it.

For purposes of the present question, our preliminary conclusion is that notice requirements elsewhere in Arizona law provide the best analogue to the requirement in A.R.S. § 16-824. Those provisions illustrate that, where email notice is permitted, it is listed separately from “mail.” This interpretation is also consistent with dictionary definitions and common usage as explained in *Cachet Residential Builders*. For these reasons, notice by email appears insufficient to satisfy A.R.S. § 16-824.

Sincerely,

Dominic E. Draye
Solicitor General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>April 26, 2017</p> | <p>No. I17-002 (R16-019)</p> <p>Re: whether Arizona Administrative Code Rule 4-19-508(B)(3) authorizes a registered nurse practitioner to order and interpret radiographic tests</p> |
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To: Joey Ridenour
Arizona State Board of Nursing

Questions Presented

Is Arizona Administrative Code (A.A.C.) Rule 4-19-508(B)(3), in which the Arizona State Board of Nursing authorized registered nurse practitioners to order and interpret radiographic tests (x-rays), consistent with Arizona law?

Summary Answer

Yes. A.A.C. R4-19-508(B)(3) is consistent with Arizona law because (1) the “use” of x-rays does not include “ordering” or “interpreting” x-ray images and (2) the Nursing Board has licensed RNPs to order and interpret x-ray images.

Background

The Arizona Radiation Regulatory Agency (ARRA) “regulate[s] the use, storage and disposal of sources of radiation” in the State. A.R.S. § 30-654. Under this regulatory authority, the Medical Radiologic Technology Board of Examiners (MRTB), a division of ARRA,

administers the radiologic technologist (RT) certification process. A.R.S. § 322803(A). RT certificate holders are allowed “to apply ionizing radiation to individuals at the direction of a licensed practitioner for general diagnostic or therapeutic purposes.” A.R.S. § 32-2801(18). In lay terms, this means that ARRA licenses the use of x-ray machines in the health care context. However, Arizona law also contains a broad exception to this licensing authority: dentists, physician assistants, chiropodists, veterinarians and those “licensed in this state to practice medicine, surgery, osteopathy, chiropractic or naturopathic medicine” do not need “to obtain any other license for the use of a diagnostic X-ray machine, but these persons are governed by their own licensing acts.” A.R.S. § 30-672(D).

Responsible for regulating the practice of nursing in Arizona, the Arizona State Board of Nursing (Nursing Board) is authorized to “adopt rules establishing those acts that may be performed by a registered nurse practitioner in collaboration with a licensed physician.” A.R.S. § 32-1606(B)(12). Pursuant to this authority, a rule adopted in 1987 by the Nursing Board authorizes a registered nurse practitioner (RNP) to “[o]rder and interpret laboratory, radiographic, and other diagnostic tests.” A.A.C. R4-19-508(B)(3). RNPs are registered nurses who have completed an advanced nurse practitioner education program and have “an expanded scope of practice within a specialty area that includes . . . diagnosing, performing diagnostic and therapeutic procedures, and prescribing, administering and dispensing therapeutic measures, including legend drugs, medical devices and controlled substances.” A.R.S. § 32-1601(20)(d) and (v).

Arizona law provides that “[n]o person may use ionizing radiation on a human being unless the person is a licensed practitioner or the holder of a certificate as provided in this chapter.” A.R.S. § 32-2811(A). ARRA believes that the administrative rule’s authorization for

RNPs to “[o]rder and interpret . . . radiographic . . . tests” without obtaining an RT certificate is contrary to Arizona law for two reasons. First, ARRA contends that persons prohibited to “use ionizing radiation” under Arizona law are necessarily prohibited from ordering and interpreting x-ray images. Second, ARRA contends that only those professions explicitly named in Section 30-672(D) qualify as exempt “licensed providers” and RNPs are not expressly listed.

Analysis

A. “Use,” In A.R.S. § 32-2811(A), Does Not Include “Order” or “Interpret”

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). Words and phrases should be given their commonly accepted meanings unless a special definition is given or the context requires otherwise. *State v. Cox*, 217 Ariz. 353, 356 ¶ 20 (2016); *see also* A.R.S. § 1-213 (“Words and phrases shall be construed according to the common and approved use of the language.”). Courts “seek to harmonize statutory provisions and avoid interpretations that result in contradictory provisions”. *Navarro*, 240 Ariz. at 195 ¶ 9.

The primary text at issue is the statutory limitation on who may “use” x-ray equipment. *See* A.R.S. § 32-2811(A) (no “person may *use ionizing radiation on a human being*.”). In general, the word “use” primarily signifies a direct physical manipulation of an object (“use a hammer”), but it can also indicate a more nebulous benefit derived from an object (“use a surrogate”). The statutory context indicates that the text refers to a direct form of “use,” specifically the physical act of applying ionizing radiation to a human being with an x-ray device.

Context affirms the adoption of the primary—direct-physical-manipulation—meaning of “use” for at least three reasons. First, a conflict between the administrative rule and the statute

exists only if “use” includes “order” and “interpret.” This serves the Legislature’s intent to keep radiation regulations from inappropriately or unnecessarily interfering with the use of x-ray technology in the practice of medicine. *See* A.R.S. § 32-2811(C) (“Nothing in this chapter relating to technologists shall be construed to limit, enlarge or affect in any respect the practice of their respective professions by duly licensed practitioners.”) The Legislature empowered both the Nursing Board and ARRA to effectively regulate their respective fields without either board encroaching on the other.

Second, it would be absurd to read the statute to say no person (other than a licensed practitioner) may “interpret” an x-ray image without ARRA approval given the fact that ARRA provides no certification entitling *anyone* to interpret an x-ray image. Indeed, radiologist assistants—advanced RTs who possess additional training beyond what is required to obtain an RT certificate—are specifically prohibited from interpreting x-ray images. A.R.S. § 32 2819(E).

Third, including “order” in the meaning of “use” would also be unworkable. Subsection B of § 32-2811 says that an RT can only apply radiation “while operating in each particular case at the direction of a licensed practitioner.” In other words, an RT who may “use” x-ray equipment must be ordered to take an x-ray image before doing so. But if “use” includes “order” then the holder of a certificate under § 32-2811(A) would already be authorized to order an x-ray. It would be absurd to conclude that the legislature would authorize the holder of a certificate to “order” x-rays but to take x-rays only when ordered by someone else to do so.

B. RNPs are Licensed Practitioners Under A.R.S. § 32-2811(A)

Under Arizona law, a RNP is a licensed registered nurse who is certified, has completed an approved nurse practitioner education program, and has an expanded scope of practice. A.R.S. §§ 32-1601(19–20). RNP’s broad scope of practice is circumscribed by a Nursing Board

empowered to “establish[] those acts that may be performed by a registered nurse practitioner in collaboration with a licensed physician.” A.R.S. § 32-1606(B)(12).

ARRA’s authority to regulate radiation does not reach so far as to interfere with the use of x-ray technology in the provision of health care. *See* A.R.S. § 32-2811(C) (“Nothing in this chapter relating to technologists shall be construed to limit, enlarge or affect in any respect the practice of their respective professions by duly licensed practitioners.”) Dentists, physician assistants, chiropodists, veterinarians and those “licensed in this state to practice medicine, surgery, osteopathy, chiropractic or naturopathic medicine” do not need “to obtain any other license for the use of an X-ray machine, but these persons are governed by their own licensing acts.” A.R.S. § 30-672(D). ARRA is neither competent nor authorized to dictate to a licensed medical professional when it may be necessary to order an x-ray examination or how to interpret an x-ray image. Instead, licensed medical professionals, including RNPs, are “governed by their own licensing acts.” *Id.* Here, the Nursing Board’s rule allowing licensed RNPs to order and interpret x-rays exempts RNPs from ARRA’s regulatory purview.

ARRA points to a 1982 attorney general opinion that concluded that a RNP’s authority to administer medications and treatment was not sufficient to authorize RNPs to order and interpret x-rays. *Op. Ariz. Att’y Gen. I82-034 (1982)*. After analyzing the governing statutes for the nursing profession, Attorney General Corbin concluded that “the ability to administer medications and treatment” was not “sufficient authorization to order and interpret radiographs.”

Id. at 3. However, the next sentence turns the applicability of this conclusion on its head:

Further, inasmuch as the Board has not promulgated any rules that would otherwise permit professional nurse practitioners to order or interpret radiography examinations, they may not engage in these activities.

Id. In 1987 the Nursing Board promulgated A.A.C. R4-19-508(B)(3) and “otherwise permit[ed]” RNPs to order and interpret x-rays. RNPs, governed as they are by their own licensing acts, are

now permitted to order and interpret radiographic tests. Nothing in the previous opinion of this office conflicts with this conclusion.

Conclusion

For the reasons stated above, the Nursing Board's regulation R4-19-508(B)(3), authorizing RNPs to order and interpret x-rays, is consistent with Arizona law.

Mark Brnovich
Attorney General



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May 4, 2017

Matthew J. Smith
Mohave County Attorney
Post Office Box 7000
315 North 4th Street
Kingman, AZ 86402-7000

Re: R17-008 / I17-003
Application of Arizona Revised Statutes § 38-296 to an elected salaried official applying to the Governor for appointment to the Bench (Superior Court)

Dear Mr. Smith:

You requested an opinion on the following questions: (1) "Would an elected salaried official, such as a county supervisor, who is not in his or her final year of office, have to resign from office, pursuant to Arizona's resign-to-run law found at A.R.S. § 38-296, if the official submits an application to the Governor to fill an open vacancy in the Superior court?;" and (2) "does the elected official 'offer himself for nomination or election to any salaried local, state or federal office', as contemplated by A.R.S. § 38-296 and A.R.S. § 16-311(A), if he submits an application to the Governor to fill an open vacancy in the Superior Court?" As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. We understand time is of the essence regarding your request. For this reason, we offer the following informal opinion regarding the questions presented.

Arizona's resign-to-run law prohibits an incumbent not in the final year of his term from "offer[ing] himself for nomination or election to any salaried local, state or federal office" without first resigning. A.R.S. § 38-296(A). The mere submission of an application for a gubernatorial appointment to the State bench is not a prohibited "offer . . . for nomination or election," as defined in A.R.S. § 38-296(B). Accordingly, the elected salaried official may legally submit an application to the Governor without resigning from office.

This conclusion flows from two statutory details in A.R.S. § 38-296. First, seeking an *appointment* to a salaried state office is not the same thing as seeking *nomination or election* to a salaried state office. This distinction is consistent with this Office's previous

Matthew J. Smith
Mohave County Attorney
May 4, 2017
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observation that Arizona's resign-to-run law is designed to assure that an incumbent's attention is not diverted by campaigning. *See* Ariz. Att'y Gen. Op. I82-001 at 2.

Second, the resign-to-run law explicitly states that an incumbent "shall be deemed to have offered himself for nomination or election" only upon "the filing of a nomination paper pursuant to § 16-311, subsection A." A.R.S. § 38-296(B). This subsection further clarifies that an "incumbent of a salaried elected office is not deemed to have offered himself for nomination or election to an office by making a formal declaration of candidacy for the office." *Id.* Thus the restrictions of the resign-to-run law adhere only upon the formal filing of papers, without regard to earlier indicia of a potential candidate's subjective intentions.

Applying this construction to the question presented is straightforward. Vacancies on the Superior Court are filled by the governor "appointing a person to serve until the election and qualification of a successor." Ariz. Const. art. VI, § 12(B). An elected salaried official submitting an application to be considered for such a gubernatorial appointment has not filed a nomination paper pursuant to A.R.S. § 16-311(A). Therefore, the restrictions of A.R.S. § 38-296(A) do not apply.

Sincerely,

Dominic E. Draye
Solicitor General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 21, 2017</p> | <p>No. I17-005 (R15-014)</p> <p>Re: Revised Statute 2477 rights-of-way</p> |
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To: Representative Mark Finchem
Arizona House of Representatives

Questions Presented

Does Arizona Revised Statutes § 37-931 authorize officers and employees of the State of Arizona and its political subdivisions to use, access, maintain, and guarantee access to valid Revised Statute (R.S.) 2477 rights-of-way across federal lands?

If so, what is the extent of that authority?

Summary Answer

Yes. The newly-enacted Arizona Revised Statutes § 37-931 authorizes officers and employees of the State of Arizona and its political subdivisions to use, access, maintain and guarantee access to valid R.S. 2477 rights-of-way across federal lands.

Where a valid R.S. 2477 right-of-way exists, Arizona state and local officials have broad authority over those lands. While federal agencies may exercise regulatory oversight over rights-

of-way that cross federal lands, no federal agency may unreasonably interfere with the right-of-way possessed by the State of Arizona.

Background

The Mining Act of 1866 provided a broad grant of rights-of-way over federal lands. This federal enactment, commonly referred to as Revised Statute (R.S. 2477), states that “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932). This standing offer of a free right-of-way over the public domain continued for over a century, before its repeal in 1976. Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, § 706(a), 90 Stat. 2743. Yet while FLPMA repealed the offer to create new rights-of-way, “[t]he law repealing R.S. 2477 expressly preserved any valid, existing right-of-way.” *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1076 (9th Cir. 2010) (citations omitted), *see* 43 U.S.C. 1769(a). Thus, FLPMA “had the effect of ‘freezing’ R.S. 2477 rights as they were in 1976.” *Id.* at 741 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988)).

Various federal agencies, but primarily the Bureau of Land Management, have closed roads and trails across federal lands, sometimes without regard to R.S. 2477 rights-of-way. For instance, pursuant to the preliminary 2013 Lake Havasu Travel Management Plan, the BLM proposed to close over 150 miles of roads and trails and limit access to another 100 miles of roads and trails without first adjudicating whether any of the affected roads and trails are R.S. 2477 rights-of-way. Lake Havasu Field Office, U.S. Department of Interior, *Havasu Travel Management Plan* 6 (2013). Constituents appealed to their legislators for assistance in preserving access to these purported rights-of-way over federal lands. In response, the Arizona

Legislature enacted Chapter 277 to re-assert the rights-of-way possessed by the State of Arizona. 2015 Ariz. Sess. Laws ch. 277.

Newly enacted Arizona Revised Statute § 37-931(a) provides that the “state, on behalf of itself and its political subdivisions, asserts and claims rights-of-way across public lands under ... Revised Statute 2477.” The next three sections of the statute disclaim any prior implicit or unintentional waiver of any R.S. 2477 rights-of-way that existed in Arizona.

- B. This state does not recognize or consent, and has not consented, to the exchange, waiver or abandonment of any Revised Statute 2477 right-of-way across public lands unless by formal, written official action that was taken by the state, county or municipal agency or instrumentality that held the right-of-way across public lands and that was recorded in the office of the county recorder or the county in which the public lands are located. No officer, employee or agent of this state or a county, city or town of this state has or had authority to exchange, waive, or abandon a Revised Statute 2477 right-of-way across public lands in violation of this subsection, and any such purported action was void when taken unless later ratified by official action in compliance with this subsection.
- C. The failure to conduct mechanical maintenance of a Revised Statute 2477 right-of-way across public roads does not affect the status of the right-of-way across public lands as a highway for any purpose of Revised Statute 2477.
- D. The omission of a Revised Statute 2477 right-of-way across public lands from any plat, description or map of public roads does not waive or constitute a failure to acquire a right-of-way across public lands under Revised Statute 2477.

A.R.S. § 37-931 (B-D).

Finally, the statute turns to its primary concern: the conditions of access for valid R.S. 2477 rights-of-way. Section E sets forth scope, maintenance and use provisions.

- E. For the purposes of this section:
 - 1. The extent of a Revised Statute 2477 right-of-way across public lands is the dimension that is reasonable under the circumstance.
 - 2. A Revised Statute 2477 right-of-way across public lands includes the right to:

- (a) Widen the highway as necessary to accommodate increased public travel and traffic associated with all accepted uses.
 - (b) Change or modify the horizontal alignment or vertical profiles as required for public safety and contemporary design standards.
3. The public has the right to use a Revised Statute 2477 right-of-way across public lands to access public lands.
4. If privately owned land is completely surrounded by or adjacent to public lands, the landowner has the right to use a Revised Statute 2477 right-of-way across public lands to access that land.
5. A Revised Statute 2477 right-of-way across public lands shall be closed only by order of a court of competent jurisdiction or the proper completion of an administrative process established for the abandonment, maintenance, construction or vacation of a public right-of-way otherwise allowed by law.

A.R.S. § 37-931(E). The crucial implication of this final section is that Arizona R.S. 2477 rights-of-way may not be closed by a federal agency’s regulatory fiat. We analyze the impact of this newly enacted statute below.

Analysis

This Opinion examines the impact of A.R.S. § 37-931 in guaranteeing that all valid Arizona R.S. 2477 rights-of-way over federal land shall remain open unless closed under certain specified circumstances¹. The central question for this analysis is whether officers and

¹ This Opinion does not address what constitutes a “valid” R.S. 2477 right of way. That question is slightly obscured by two factors: nuanced choice of law issues, and a specious precedent from the Arizona Territorial Court. R.S. 2477 was a federal statute and federal law governs its interpretation. *E.g., S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 768 (10th Cir. 2005), *as amended on denial of reh’g* (Jan. 6, 2006)(“SUWA”). But R.S. 2477 was enacted against a backdrop of common law principles governing land use and, for that reason, courts can “borrow” state law to aid in interpretation of the federal statute,” *id.* at 762, specifically in the determination of “how the public can accept” the right of way. *San Juan County v. U.S.* 754 F. 3d 787, 798 (10th Cir. 2014). State law that thwarts the intent of R.S. 2477 is not considered. *Id.* Such was a 1909 Arizona Territorial Court ruling that, mistakenly concluding that common law land use rights had been abrogated, restricted R.S. 2477 routes to those meeting the state statutory definition of “public highway” (a standard requiring

employees of the State of Arizona and its political subdivisions may use, access, maintain, and guarantee access to the right-of-way in the event that a federal agency effects a closure of a valid R.S. 2477 right-of-way without complying with the procedures set forth in A.R.S. 37-931(E).

All easements over public land, including the R.S. 2477 rights-of-way at issue here, are subject to reasonable regulation. The federal government,

in its capacity as the owner of the servient tenement, has the right to reasonable use of its land, and its rights and the rights of easement owners are mutually limiting, though of course easements are burdensome by their very nature, and the fact that a given use imposes a hardship upon the servient owner does not, in itself, render that use unreasonable or unnecessary.

McFarland v. Norton, 425 F.3d 724, 727 (9th Cir. 2005) (internal quotation marks omitted); *see also* Restatement (Third) of Property (Servitudes) § 4.9 (2000). In short, any holder of an easement is subject to some amount of reasonable interference due to the property owner's use of the land over which the easement runs.

The question focuses on whether the officers and employees of the State of Arizona and its political subdivisions possess three related powers:

the state's formal imprimatur). *See Tucson Consol. Copper v. Reese*, 12 Ariz. 226, 228 (1909) ("The **sole question** presented is whether or not the road alleged to cross the land described in the complaint was a [statutory] **public highway at the time suit was brought.**" (emphasis added)). R.S. 2477 had no such limitation and its grant far surpassed the lines drawn on any state-managed roadway map. The R.S. 2477 "highways" referred to any trail, road, or route "over which the public at large have a right of passage." *SUWA*, 425 F.3d at 765 (quotation and citation omitted). Moreover, the grant was "a standing offer of a free right of way over the public domain" that could be accepted "without formal action by public authorities." *Id.* at 741 (quotation and citation omitted). *Reese*, largely bereft of progeny anyway, is of dubious authority because its undue restrictions thwarted the Congressional intent of R.S. 2477 to ensure that routes remained open to the public at large. Moreover, *Reese* was implicitly overruled in 2004 by *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421 (2004). In *Pleak*, the Arizona Supreme Court flatly rejected the notion that "there are only two categories of roads—public and private—and the former can only be created pursuant to statute." *Id.* Rather, the court affirmed the uninterrupted vitality of the doctrine of common law dedication, i.e., "the dedication of roadway easements for public use," noting that the doctrine had never been abrogated by statute. *Id.* at 421-423 (specifically referencing the public highways statute), citing *Thorpe v. Clanton*, 10 Ariz. 94, 99-100 (1906).

a. Are they authorized “to use [and] access . . . Revised Statute (R.S.) 2477 rights-of-way across federal lands”?

Yes. If a valid R.S. 2477 right-of-way across federal lands exists, officers and employees of the State of Arizona and its political subdivisions may use and access that easement.

b. Are they authorized to “maintain . . . Revised Statute (R.S.) 2477 rights-of-way across federal lands”?

Yes. It should be noted, however, that the rights and power of the State of Arizona and the rights and powers of the federal government are “correlative rather than plenary, absolute, or exclusive.” *United States v. Garfield Cnty.*, 122 F. Supp. 2d 1201, 1263 (D. Utah 2000). When it comes to the upkeep of R.S. 2477 rights-of-way “[t]he law expects [both parties] to speak to each other about work to be done on lands to which they both have important correlative rights.” *Id.* For this reason, any officer, employee, or political subdivision that wants to significantly alter a right-of-way or make changes beyond “routine maintenance” should consult with the federal land management agency before it acts. *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 745 (10th Cir. 2005) (“SUWA”); see also *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1998). In SUWA, the Tenth Circuit explained, “[t]o convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use, affects the servient estate, and may go beyond the scope of the right of way.” 425 F.3d at 747 (citing *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)). While State officials have authority to maintain R.S. 2477 rights-of-way to “preserv[e] the status quo,” because federal regulations could be at issue and any significant changes could extend outside the State’s authority, the best course is for the State’s officials

to work in conjunction with the relevant agency when contemplating changes to an R.S. 2477 right-of-way over federal land. *See generally* SUWA, 425 F.3d at 749.

c. Are they allowed to “guarantee access to Revised Statute (R.S.) 2477 rights-of-way across federal lands?”

Yes, in most cases. Under limited circumstances (e.g., emergencies), the owner of the servient estate may temporarily bar an easement owner from accessing a right-of-way. Still, the validity of certain emergency interventions does not legitimize either closures in the absence of an emergency or closures of such extended duration that the use of the easement is completely frustrated. In cases of unreasonable interference with the public’s access, the officials and employees of the State and its political subdivisions should seek injunctive relief in court and may perform such self-help remedies as may be available and would not breach the peace. 25 Am.Jur.2d Easements and Licenses § 92 (1966) (“the person having the right to use an easement has the right to remove obstructions unlawfully placed thereon . . . so long as there is no breach of the peace.”); *see also, e.g., State ex rel Herman v. Cardon*, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976) (one injured by “interference with the right of access, may abate it without resort to legal proceedings provided he can do so without bringing about a breach of the peace.”). For example, a county sheriff may cut a lock off of a gate barring access to a valid right-of-way that has been closed without good cause.

Conclusion

Section 37-931 reasserts the right of Arizona officers, employees, and political subdivisions to use, access, maintain, and guarantee access to R.S. 2477 rights-of-way. While the State’s authority over R.S. 2477 rights-of-way is broad, it is not exclusive. To

operate R.S. 2477 rights-of-way, Arizona's officers, employees, and political subdivisions must work in coordination with the federal agencies tasked with administering these lands.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>November 13, 2017</p> | <p>No. I17-006 (R17-005)</p> <p>Re: Voter Registration Database Requirements</p> |
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To: Michele Reagan
Arizona Secretary of State

Questions Presented

1. Does federal or State law prohibit Arizona counties from maintaining separate, county-based voter registration databases?
2. If counties may legally maintain separate voter registration databases, what information is the county required to provide the statewide voter registration database? For example, must that include information on cancelled or rejected registrations and/or provisional voting information?
3. Is it lawful for the Secretary of State to refer proper public records requests to other agencies if the Secretary also has access to that information? Does the answer depend on what statute is cited by the requesting party?

4. Is the Secretary permitted to refer a request for production in litigation or subpoena to the county?

Summary Answer

1. No. Neither State nor federal law prohibits counties from maintaining their own voter registration databases so long as counties comply with the additional statutory requirements pertaining to independent databases. Nonetheless, the official voter registration database for all elections is the statewide database created and maintained by the Arizona Secretary of State's Office.

2. Under federal and State law, each county must provide all voter registration information it receives to the statewide voter registration database contemporaneously or as near as contemporaneously as possible. This information must include, among other things, an applicant or registered voter's name, address, correspondence with the counties, cancelled and rejected registrations, early and provisional ballot information, and records demonstrating when and how a change to a voter's or applicant's record was made.

3. No. The Secretary may not refer proper requests for public records of voter registration information to another agency if the Secretary has access to or control over that information, regardless of what statute (if any) the requesting party cites. The Secretary may, nevertheless, object to a records request or assert any applicable privilege.

4. No. The Secretary may not refer proper litigation requests for information to another agency if the Secretary has access to or control over those records. The Secretary may object to such discovery requests or assert any applicable privilege.

Background

Voter registration and election administration are primarily governed by State law. U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations[.]”). State legislatures retain broad authority to prescribe voter registration requirements and administer voter registration and elections processes. *Wesberry v. Sanders*, 376 U.S. 1, 23 (1964) (States have “plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress”).

Two federal laws have helped standardize state voter registration practices: the National Voter Registration Act of 1993 (“NVRA”) and the Help America Vote Act of 2002 (“HAVA”). NVRA requires each State to produce certain voter registration information as public records and provides a private cause of action if the State fails to meet any of NVRA’s requirements. 52 U.S.C. §§ 20507(i), 20510. NVRA also requires States to maintain and produce “all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1).

HAVA, enacted in response to voter-registration and other elections-administration problems in the 2000 Presidential election, requires each State to maintain a “single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.” 52 U.S.C. § 21083(a)(1)(A). This statewide database “shall serve as the official voter registration list for the conduct of all elections for Federal office in the State” and must include, at a minimum, the name, registration information, and a unique identifier for each voter. 52 U.S.C. § 21803(a)(1)(A)(viii). Additionally, HAVA

mandates that the voter registration database capture sufficient information to ensure compliance with NVRA, including *inter alia*, notices sent to notify voters of potential cancellation and steps they can take to avoid cancellation, as well as any response to voter provided. 52 U.S.C. § 21083(a)(2)(A). The voter registration database must be accessible to local election officials and must also cross-reference with other applicable databases, such as motor vehicle and death records, to allow for maintenance of the voter rolls. 52 U.S.C. § 21083(a)(1)(A)(iv)-(vii). These are minimum requirements; States are explicitly authorized to require voter registration databases to track additional information. 52 U.S.C. § 21084.

Nonetheless, HAVA expressly contemplates that a county may choose to maintain its own database. If it does, HAVA requires that the county transmit “[a]ll voter registration information” it maintains to the official statewide database. 52 U.S.C. § 21083(a)(1)(A)(vi) (requiring the statewide database to include “[a]ll voter registration information obtained by any local election official in the State”). Any information that is not transferred to the statewide voter registration database is not part of the official voter record. 52 U.S.C. § 21083(a)(1)(A)(viii).

Arizona law requires the Secretary of State, as Arizona’s chief elections officer for HAVA and NVRA purposes, A.R.S. § 16-142(a)(1); 52 U.S.C. § 21003(e), to “develop and administer a statewide database of voter registration information that contains the name and registration information of every registered voter in this state.” A.R.S. § 16-168(J). And like federal law, State law contemplates that counties may maintain their own voter registration databases. Maricopa and Pima counties maintain their own databases, while Arizona’s thirteen rural, “PowerProfile” counties use the statewide database as their own. State law authorizes the Secretary to certify county databases to ensure the seamless transfer of information. *Id.*

County recorders, in turn, must “provide for the electronic transmittal of [voter registration] information to the Secretary of State on a real-time basis” and in a standardized format. A.R.S. § 16-168(J). County recorders remain the primary point of contact for individuals registering to vote. Arizona counties are responsible for (1) providing voter registration forms and information to voters, A.R.S. §§ 16-131, -141, -151(A); (2) rejecting applications that do not include sufficient proof of citizenship, A.R.S. § 16-166(F); (3) entering voter information, A.R.S. §§ 16-112(A), -120, -134(C) (noting a voter is registered when a complete application is received by a county recorder); (4) contacting voters regarding issues with their applications and voting status, A.R.S. § 16-134(B), -166; and (5) canceling voters, A.R.S. § 16-165. Only county recorders may change individual voter records, such as by updating a voter’s address. *See* A.R.S. § 16-166(B) (requiring the county recorder to change the voter registration record when the voter provides new information).]

Analysis

A. Neither Federal Nor State Law Prohibits Counties From Maintaining Their Own Voter Registration Databases.

As explained above, federal and state law not only permit counties to maintain voter registration databases, they expressly contemplate it. *E.g.*, 52 U.S.C. § 21083(a)(iv); A.R.S. § 16-168(J). To ensure compliance with HAVA, “each county voter registration system is subject to approval by the Secretary of State for compatibility with the statewide voter registration database system,” A.R.S. § 16-168(J), which is the State’s sole official voter registration list, 52 U.S.C. § 21803(a)(1)(A)(viii).

B. Counties Must Provide the Statewide Database All the Voter Registration Information That They Maintain.

Both federal and state law impose requirements on the kinds of information counties must provide to the statewide database, which must include, at minimum:

- Official communications by and between a voter or applicant and elections officials (52 U.S.C. § 20507(i), A.R.S. § 16-168(10));
- The voter’s voting history (52 U.S.C. §§ 20507(b)-(d), 21083(a)(1)(A), (a)(2), and (a)(4); A.R.S. § 16-168(C));
- Permanent early voter list (“PEVL”) and other vote-by-mail activities, including ballot requests, date that a ballot was sent, date the ballot was received, and the reason an early ballot was rejected (as applicable) (A.R.S. § 16-168(C)(11));
- Provisional voting history, including reason for provisional ballot and an image of the provisional ballot affidavit (52 U.S.C. § 21083(a)(1)(A)(vi); A.R.S. § 16-168(C)(10));
- The voters’ precinct (A.R.S. § 16-168(C));
- The voter or applicant’s status and information tracking back-end changes made to an applicant or voter’s record (*e.g.* the date of party change and the user who made the change) (52 U.S.C. § 20507(i); A.R.S. § 16-168(D)(10)).

Federal law. As noted above, federal law requires any county that chooses to maintain its own database to transmit “[a]ll voter registration information” it maintains to the official statewide database, 52 U.S.C. § 21083(a)(1)(A)(vi). HAVA requires that the database “contain[] the name and registration information of every legally registered voter in the State and assign[] a unique identifier to each legally registered voter in the State[.]” 52 U.S.C. § 21803(a)(1)(A)(ii)-(iii). It further requires the Secretary to “provide such support as may be required so that local election officials are able to enter” into the statewide database “[a]ll voter registration information obtained by any local official in the State[.]” 52 U.S.C. § 21803(a)(1)(A)(vi)–(vii).

NVRA requires the State to maintain data used to process voter registration or “maintain the accuracy and currency” of the voter rolls. 52 U.S.C. § 20507(i). This includes not only the voter registration information on the face of the form and official correspondence with voters, but also a record of each change that was made to a registrant’s information—such as a move to inactive status or cancellation—in order to ensure that elections officials are complying with NVRA. *See, e.g., Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1341–43 (N.D. Ga. 2016) (NVRA required, *inter alia*, the reason an applicant was rejected, each change in a voter’s status, and whether the change was made mechanically or by staff, in addition to the definition of tables and data fields, with a schematic explaining their relationship).

State Law. State law requires “county recorders [to] provide for the electronic transmittal of [voter registration] information to the Secretary of State on a real-time basis.” A.R.S. § 16-168(J). This information includes each voter’s (1) full name, including title; (2) party preference; (3) date of registration; (4) residence address; (5) mailing address, if different from residence address; (6) zip code; (7) telephone number, if given; (8) birth year; (9) occupation, if given; (10) voting history for all elections in the prior four years, as well as any other information regarding registered voters that the county recorder or city or town clerk maintains electronically that is public information; and (11) all data relating to permanent early voters and nonpermanent early voters, including ballot requests and returns. A.R.S. § 16-168(C)(1)-(11). “Any other information regarding registered voters that the county recorder or city or town clerk maintains electronically” and “all data relating to . . . early voters” includes provisional voting history and the database also must include images of original voter registration forms, all cancelled registration forms, and applications to cancel registration. A.R.S. § 16-163(D).

In other words, state law requires Arizona’s voter registration database to include a number of different types of data not present on the basic voter registration form, including voting history, PEVL participation, precinct number, and any other record associated with a voter’s individual voting history. *Id.*

The statewide voter registration system is “the heart of our elections system,” and the sole “official voter registration for the conduct of all elections for Federal office in the State.” 148 Cong. Rec. H7837 (statement of Rep. Ney) (Oct. 10, 2002). If a county chooses to maintain its own database, it must transmit all the voter registration information it maintains to the official statewide database in the manner prescribed by the Secretary “to ensure that the submissions are uniform from all counties in this state, that all submissions are identical in format, including the level of detail for voting history, and that information may readily be combined from two or more counties.” A.R.S. § 16-168(C). This requirement includes a continuing duty to provide an explanation of the county database system and any revision to the Secretary, A.R.S. § 16-173, so she can properly integrate that data into the statewide voter registration database as required by federal and state law.

C. The Secretary May Not Refer Public Records Requests to Another Agency if She Has Access to or Control Over the Information Requested.

State Law. Under Arizona law, “[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state.” A.R.S. § 39-121.01(B). “Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during officer hours.” A.R.S. §39-121. So, as a general rule, “all records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records.”

Carlson v. Pima Cnty., 141 Ariz. 487, 491 (1984). And a record that is “required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done,” generally is a public record. *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538 (1991) (quoting *Mathews v. Pyle*, 75 Ariz. 76, 78 (1952)).

State law specifically identifies voter registration information as “an official public record,” A.R.S. § 16-161, and requires that non-confidential voter information be produced by the Secretary or other elections official upon the receipt of a proper request and payment of a fee, A.R.S. § 16-168(E). The Secretary is legally required to maintain such voter registration information in the “statewide database” that she must “develop and administer.” A.R.S. § 16-168(J). It is therefore likely a public record in her “custody,” and she should respond to any proper request to produce it. *See* A.R.S. § 39-121; *Rogers*, 168 Ariz. at 538; *Carlson*, 141 Ariz. at 491 (hold[ing] that A.R.S. § 39-121.01(B) “requires the keeping of records sufficient to provide the public with ‘knowledge’ of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty”).

Nothing prevents the Secretary from interposing objections or asserting applicable privileges in response to any records request. And by law the Secretary may *not* provide sensitive information such as social security numbers, mother’s maiden name, and other information exempted from disclosure by A.R.S. § 16-168(F). The Secretary also may not provide information on voters protected from disclosure pursuant to A.R.S. §§ 16-153(A) and 41-165(A).

Federal Law. NVRA requires “[t]he State to produce all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy

and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i). This includes voter registration information. *See, e.g., Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (“the phrase ‘all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters’ unmistakably encompasses completed voter registration applications”).

In Arizona, the Secretary (or her designee) is “[t]he chief state election officer who is responsible for coordination of state responsibilities under [NVRA].” A.R.S. § 16-142(A)(1); *see* 52 U.S.C. § 20509 (requiring “[e]ach State [to] designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this chapter”). The Secretary therefore may not delegate the State’s NVRA obligations to local officials. *See Harkless v. Brunner*, 545 F.3d 445, 452–53 (6th Cir. 2008) (“[T]he Secretary, as [the state’s] chief election officer, is responsible for . . . implementation and enforcement of [NVRA].”); *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (“Under the NVRA’s plain language, [the State] may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted.”). The Secretary may, however, redact certain sensitive information before producing records properly requested under NVRA. *See, e.g., True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 736–39 (S.D. Miss. 2014) (redaction of social security numbers and full birth dates does not violate NVRA).

Similar to state law, nothing prevents the Secretary from interposing proper objections or asserting applicable privileges in response to any records request under federal law. If the State wrongfully fails to produce public records, a court may award the requesting party its attorney’s fees and costs. 52 U.S.C. § 20510(c), A.R.S. § 39-121.02.

D. The Secretary May Not Refer Proper Litigation Requests to Another Agency If She Has Access to or Control Over Those Records.

The Federal Rules of Civil Procedure require a party to disclose “all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(ii). The Arizona Rules of Civil Procedure require disclosure of even more information, including a description of the factual basis of a party’s claims or defenses, the legal theory on which the claim or defense is based, and documents or electronically stored information that the disclosing party plans to use at trial, for impeachment or “that is relevant to the subject matter of the action.” Ariz. R. Civ. P. 26.1(a). Each party is required to serve its disclosures promptly and update or supplement a disclosure as new information is discovered throughout the course of litigation. *See* Fed. R. Civ. P. 26(c), (e); Ariz. R. Civ. P. 26.1(d).

Additionally, a party may “obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1)(A). One party may request that another produce “any designated documents or electronically stored information” in “the responding party’s possession, custody, or control.” Fed. R. Civ. P. 34(a)(1); Ariz. R. Civ. P. 34(a)(1). Additionally, “a nonparty may be compelled to produce documents and tangible things” pursuant to a subpoena. Fed. R. Civ. P. 34(c); Ariz. R. Civ. P. 34(c).

Documents are “within [a party’s] ‘possession, custody or control’ . . . if the party has actual possession, custody or control, or has the right to obtain the documents on demand.” *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *see also United States v. Int’l Union of Petrol. & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989) (citing *Searock v.*

Stripling, 736 F.2d 650, 653 (11th Cir. 1984) (“Control is defined as the legal right to obtain documents upon demand.”)).

The Secretary has possession, custody, or control over the information in the statewide database that she must “develop and administer.” A.R.S. § 16-168(J). HAVA makes clear that such information is “defined, maintained, and administered at the State level[.]” 52 U.S.C. § 21083(A). And under NVRA, “[e]ach State shall maintain for at least 2 years and shall make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i).

Accordingly, the Secretary may be required to disclose or produce information in the statewide database in both state and federal court. Indeed, in 2016, the Secretary was required to produce the voter registration database in two federal lawsuits, *Feldman v. Reagan*, 2:16-CV-01065 (D. Ariz. Apr. 15, 2016), and *Project Vote v. Reagan*, 2:16-CV-01253 (D. Ariz. Apr. 27, 2016). In *Feldman*, the Court specifically ordered that the Secretary (rather than co-defendant Maricopa County) produce voter registration information from the database. 2:16-CV-01065, ECF No. 44. Thus, although the Secretary may seek protective orders and take other steps, as appropriate, to protect certain information in response to a discovery request in litigation, she may not broadly refuse to disclose or produce information within her possession, custody, or control without legal justification.

Conclusion

The Arizona statewide voter registration database must contain complete information on the voter, official correspondence with state, county, and local elections officers, early voting information, provisional voting information, and any other records maintained by elections

officials, as explained in sections A and B of this opinion. Furthermore, the Secretary is responsible for responding or objecting to proper public records requests or litigation-related discovery requests, as explained in sections C and D of this opinion.

Dominic Draye
Solicitor General
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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 7, 2017</p> | <p>No. I17-007 (R17-013)</p> <p>Re: The Legislature's Authority to Define the Powers and Duties of the Arizona Board of Regents</p> |
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To: Mark Finchem
State Representative, District 11
Arizona House of Representatives

Vince Leach
State Representative, District 11
Arizona House of Representatives

Questions Presented

1. What are the limits, if any, on the Legislature's authority to further define in statute the powers and duties of the Arizona Board of Regents?
2. What is the extent of the liability—personal, several, or otherwise—that the Arizona Board of Regents or its members would be subject to for actions of the Board that violate enforceable state or federal laws?

Summary Answer

1. The ability of the Legislature to define in statute the powers and duties of the Board of Regents is unrestricted unless an express or implied constitutional limitation exists. The Arizona Constitution contains two provisions specifically related to the Arizona Board of Regents. It identifies where the general conduct and supervision of the public school system must be vested, Ariz. Const. art. XI, § 2, and sets forth requirements for appointments to governing boards of state educational institutions (including the Board of Regents), *id.* § 5.

Courts have held that the Legislature cannot transfer administration of university and board personnel to bodies not provided for under Article XI, Section 2 of the Arizona Constitution. Except for violations of this section, Arizona courts have repeatedly recognized the authority of the Legislature to expand, restrict, and resolve policy disputes concerning the authority of the Board of Regents.

2. The Attorney General declines to answer this question. This question could implicate ongoing litigation between the Arizona Attorney General and the Board of Regents. *See* Complaint for Declaratory, Injunctive, and Special Action Relief, Case No. CV2017-012115, Maricopa County Superior Court (Sep. 8, 2017). Additionally, in other matters, the Attorney General’s Office could be asked to defend risk management cases involving the Board of Regents. *See* A.R.S. §41-621 *et seq.*

Background

The Arizona Constitution charges the Legislature with providing “for the establishment and maintenance of a general and uniform public school system,” including universities. Ariz. Const. art. XI, § 1(A)(6). The Legislature also is constitutionally authorized to establish governing boards vested with “[t]he general conduct and supervision of public schools.” *Id.* § 2. Through these provisions, the Arizona Constitution makes state institutions of higher learning, including universities, “objects for the special care and consideration of the Legislature.” *Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 256 (1935).

The Legislature has exercised this prerogative since its territorial days. In 1885, the Thirteenth Arizona Territorial Legislature authorized the establishment of the “University of Arizona” in Tucson, Arizona. Laws of the Territory of Arizona Thirteenth Legislative Assembly 272 (1885) (Act No. 99 § 1). The same body vested the government of the University of Arizona “in a Board of Regents.” *Id.* at 273 (Act No. 99 § 3).

The Thirteenth Arizona Territorial Legislature also authorized the establishment of a Territorial Normal School in Tempe, Arizona. *Id.* at 247 (Act. No. 94 § 1). The government of this school was placed under the direction of a “Board of Education,” later named the “Board of Education of the Normal School of Arizona.” *Id.* at 248 (Act. No. 94 § 1); Acts, Resolutions and Memorials passed by the Eighteenth Legislative Assembly of the Territory of Arizona 75 (1895) (Act No. § 4) (naming the board of education).

A few years later, in 1899, the Territorial Legislature authorized a normal school in Flagstaff, Arizona, called the “Northern Arizona Normal School.” Session Laws of the Twentieth Legislative Assembly of the Territory of Arizona 30 (1899) (Act. No. 24 § 1). This school was also placed under the control of the Board of Education of the Normal School of Arizona. *Id.* (Act No. 24 § 5).

In 1901, the Territorial Legislature divided governance and control of the normal schools in Tempe and Flagstaff into two separate boards of education. The Revised Statutes of Arizona Territory 919, § 3671 (1901). After Arizona became a State, the State Legislature in 1925

allowed both the Tempe and Flagstaff schools to grant bachelor degrees. 1925 Ariz. Sess. Laws 54 (Ch. 23, § 4).

In 1945, the Legislature transferred the “jurisdiction, authority, and duties” of the board of regents of the University of Arizona, and the governing boards of education of the Tempe and Flagstaff colleges to “the board of regents of the university and state colleges of Arizona,” thereby uniting the governing boards of the three schools for the first time. 1945 Ariz. Sess. Laws 196 (Ch. 80, H.B. No. 136, § 4).

The colleges in Tempe and Flagstaff were later renamed, respectively, Arizona State University (in 1958) and Northern Arizona University (in 1966). The name of the governing board with “jurisdiction and control over” the three state universities was also changed to the Arizona Board of Regents. *See* Ariz. Rev. Stat. § 15-1625(A). The Legislature has long defined the powers and duties of the Arizona Board of Regents in statute. *See, e.g., id.* §§ 15-1625 to -1626.

Analysis

Although the Arizona Constitution makes the State’s universities “objects for the special care and consideration of the Legislature,” *Sullivan*, 45 Ariz. at 256, the Legislature does not need to trace its authority to a particular constitutional provision in order to enact legislation about State universities. It is well-established that “[t]he Constitution of Arizona is not, as is the Constitution of the United States, to be considered a grant of power or enabling act to the Legislature, but rather is a limitation upon the power of that body.” *Earhart v. Frohmler*, 65 Ariz. 221, 224 (1947). This is because:

[t]he Legislature is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution, and the presumption that the Legislature is acting within the Constitution holds good until it is made to appear in what particular it is violating constitutional limitations.

Id. (quotes omitted); *Sullivan*, 45 Ariz. at 255 (same). Of course, the legislative power may be restricted through an express constitutional provision. *E.g.*, Ariz. Const. art. II, § 6 (freedom of speech and press), and art. III (separation of powers). A limitation on legislative power also may “be implied by the text of the constitution or its structure taken as a whole.” *Citizens Clean Elections Comm’n v. Myers*, 196 Ariz. 516, 521, ¶ 14 (2000). In determining whether an implied prohibition exists, courts consider “the constitution itself and the effect that particular legislation has on the constitution.” *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 113, ¶ 34 (Ct. App. 2012). In the absence of an express or implied constitutional limitation, “the legislature of this state may in the exercise of the sovereign powers of the state, enact any law its discretion may dictate.” *E.g., Roberts v. Spray*, 71 Ariz. 60, 69 (1950).

The Arizona Constitution contains two provisions directly related to the Arizona Board of Regents. First, Article XI, Section 2 of the Arizona Constitution identifies where “the

government and supervision of the public school system” must be vested. This section provides that “[t]he general conduct and supervision of the public school system shall be vested in a state board of education, a state superintendent of public instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law.” Second, Article XI, Section 5 of the Constitution specifies how state educational boards are appointed. This section provides: “The regents of the university, and the governing boards of other state educational institutions, shall be appointed by the governor with the consent of the senate in the manner prescribed by law, except that the governor shall be, ex-officio, a member of the board of regents of the university.”

While neither provision expressly limits the Legislature’s authority to define the powers and duties of the Board of Regents, courts have held that the Legislature is prohibited from transferring “the general conduct and supervision” of the State’s universities to bodies outside the scope of Article XI, Section 2. In *Hernandez v. Frohmler*, 68 Ariz. 242, 251 (1949), the Arizona Supreme Court held that Article XI, Section 2 prohibited voters, through an initiative, from transferring the supervision of all employees at state universities, other than teachers, from the board of regents to a civil service board. The court had “no hesitation in holding” that this enactment was contrary to Article XI, Section 2, which places “[t]he general conduct and supervision” of educational institutions in special governing boards. *Hernandez*, 68 Ariz. at 251. The court reasoned: “To permit legislation to throw the employment and supervision of all personnel under the civil service law, except the teaching staff, would necessarily deprive the board of regents of a large portion of its constitutional supervisory power.” *Id.*

The court of appeals has similarly held that the Legislature does not have authority to include staff of the Board of Regents within the state’s merit system, declaring that Article XI, Section 2 “provides the board with plenary power over its employees.” *Arizona Bd. of Regents v. State Dept. of Admin.*, 151 Ariz. 450, 451 (Ct. App. 1986); *see also* Ariz. Att’y Gen. Op. I89-100 (The State Board of Directors for Community Colleges “has plenary power over its employees pursuant to Article XI, § 2 of the Arizona Constitution,” including “authority to provide employment benefits through reduced community college district tuition and fees to its employees and the employees’ spouses and dependents.”).

While educational governing boards have plenary power over personnel administration, the Arizona Supreme Court has long rejected the view that the Board of Regents is “an autonomous body, freed of all [legislative] shackles.” *Bd. of Regents of Univ. & State Colleges v. Frohmler*, 69 Ariz. 50, 60 (1949). From its territorial days, the Supreme Court of the Territory of Arizona announced that “[t]he university is a public institution, placed under the control of the board of regents, with full powers to manage the same, *subject only to the will of the legislature.*” *Devol v. Bd. of Regents of Univ. of Ariz.*, 6 Ariz. 259, 261 (1899) (emphasis added).

After Arizona became a State, the Arizona Supreme Court again affirmed that the Arizona Constitution only “directs the establishment of [a university], leaving the legislature free in determining as to particulars.” *Sullivan*, 45 Ariz. at 256. In *Sullivan*, for example, the Arizona Supreme Court affirmed the Legislature’s ability to expand the powers of the Board of

Regents. *Id.* at 255. It held that the Legislature could confer on the Board of Regents certain corporate powers and privileges, such as borrowing money and accepting federal grants. *Id.*

The Arizona Supreme Court also has affirmed the authority of the Legislature to reduce the powers of the Board of Regents. In *State v. Miser*, 50 Ariz. 244, 252 (1937), the court explained that there was no question that the Legislature had power to make minimum wage laws applicable to employees of the Board of Regents, and “could in fact, have placed any restriction it saw fit upon the expenditure of the funds appropriated to the university.” The court reasoned that “[i]t was just as much within the province of the legislature to lessen the power of the board of regents” through a minimum wage law as it was to add to the powers of the Board of Regents. *Id.* at 255. The Arizona Supreme Court also has rejected the argument that the Board of Regents’ constitutional powers preclude legislation permitting the state auditor to disapprove claims from payments arising from university contracts. *Frohmler*, 69 Ariz. at 59-60. The Attorney General has likewise opined that “[t]he constitutional powers of the [Board of Regents] are not so broad as to allow universities to enter contracts or expend public monies without regard to statutory limits imposed by the Legislature.” Ariz. Atty. Gen. Op. I99-015. As such, the Legislature could require the Board of Regents to comply with procurement code requirements. *Id.* (“[T]he Legislature acted within its authority by directing in A.R.S. § 41-2501(E) that the [Board of Regents] adopt procurement rules that are ‘substantially equivalent’ to the procurement code.”).

Finally, the Arizona Supreme Court has recognized the ultimate authority of the Legislature to settle policy disputes about the scope of the Board of Regents’ authority. In *Board of Regents of the Universities and State College of Arizona v. City of Tempe*, 88 Ariz. 299, 312, (1960), the court held that the City of Tempe could not apply its building codes and regulations to Arizona State University. Yet, in holding that the Board of Regents’ responsibilities must be exercised free of control or supervision by municipalities, the court also acknowledged that “the ultimate power to resolve this controversy rests in the Legislature which concededly may assign exclusive jurisdiction to the Board or to the City.” *Id.* at 305; *see also id.* at 311 (“The ultimate responsibility for higher education is reposed by our Constitution in the State. The legislature has empowered the Board of Regents to fulfill that responsibility *subject only to the supervision of the legislature and the governor.*”) (emphasis added). Similarly, in *Kromko v. Arizona Bd. of Regents*—which concerned “whether the 2003–04 tuition increase [ran] afoul of the ‘as nearly free as possible’ provision”—the Arizona Supreme Court emphasized that its decision did not “mean that the Board is free from constitutional constraints in setting tuition.” 216 Ariz. 190, 195, ¶¶ 23, 25 (2007). Instead, the court recognized that the Legislature “is free to enact a different policy or to set tuition itself” if it believed that tuition should be lower. *Id.* ¶ 23.

Thus, the Arizona Constitution (1) identifies where the general conduct and supervision of the public school system must be vested, Ariz. Const. art. XI, § 2, and (2) sets forth requirements for appointments to governing boards of state educational institutions, *id.* § 5. Except when legislation has violated the Constitution—by transferring authority for the general

conduct and supervision of state universities in violation of Ariz. Const. art. XI, § 2—Arizona courts have repeatedly recognized the authority of the Legislature to expand, restrict, and resolve policy disputes concerning the authority of the Board of Regents.

Conclusion

The authority of the Legislature to define the powers and duties of the Board of Regents is unconstrained unless expressly or impliedly restricted by the Arizona Constitution. Except when legislation has violated Article XI, Section 2, Arizona courts have repeatedly reaffirmed the Legislature's authority to determine the particulars of the Board of Regents' powers and duties.

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