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STATE CAPITOL
PHOENIX, ARIZONA

November 21, 1969

DEPARTMENT OF LAW OPINION NO. 70-1 (R-33)

REQUESTED BY: THE HONORABLE BURTON S. BARR
House Majority Leader
House of Representatives

- QUESTIONS:
1. What is the public's right in inspecting the records of an institution such as the University of Arizona?
 2. Are there any records that would not be available to the Budget Analyst of the House of Representatives?
 3. Is there any information possessed by the Budget Analyst that can be withheld from the public?
 4. Is there any special format required in obtaining records from an institution that is tax supported with state money?
 5. What constitutes a public record, as outlined in A.R.S. § 39-121?

- ANSWERS:
1. See body of opinion.
 2. No, as qualified.
 3. See body of opinion.
 4. No.
 5. See body of opinion.

In answering your proposed questions relating to what records of institutions of higher learning are subject to examination by the public, no absolute yardstick can be formulated to apply to all records. In certain instances the

Legislature, by statute, has prohibited disclosure of information. See, e.g., A.R.S. § 43-145 dealing with income tax returns. It is necessary to determine in each instance whether the particular record is subject to inspection or disclosure.

The Board of Regents of the Universities and State Colleges of Arizona is the governing body with jurisdiction and control over the state Universities. A.R.S. §§ 15-721 through 15-729, inclusive. A.R.S. § 39-121 provides:

"Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."

There are a number of judicial decisions that have interpreted the foregoing statutory provision.

The Supreme Court of Arizona in the case of Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), made the following pertinent comments regarding public records in an action brought against the Governor of Arizona seeking the right to inspect documents relating to an investigation conducted by the Attorney General:

"A public record is defined as follows:

"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."

"State ex rel. Romsa v. Grace, 43 Wyo. 454, 5 P.2d 301-303; People ex rel. Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y.S. 338-341; People v. Purcell, 22 Cal.App.2d 126, 70 P.2d 706. 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 or directed by law to serve as a memorial and evidence of something written, said or done. Robison v. Fishback, 175 Ind. 132,

93 N.E. 666-669, L.R.A. 1917 B, 1179; Amos v. Gunn, 84 Fla. 285, 94 So. 615-634; Steiner v. McMillan, 59 Mont. 30, 195 P. 836-837. It has also been held that a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not, is admissible as a public record. People v. Purcell, supra, and State v. Ewert, 52 S.D. 619, 219 N.W. 817-826.

"It will be observed that section 4-102, supra, [A.R.S. § 41-102] provides that the Governor shall keep a record of his official acts and certain other things. Under the definition above given that a record which the law requires to be made is a public record, the official acts of the Governor and accounting of his official expenses and disbursements including incidental expenses of his department, and a register of appointments made by him, etc., are public records. This section also says that the Governor 'shall keep in his office all documents received by him in his official capacity.' It is said in People ex rel. Simons v. Dowling, 84 Misc. 201, 146 N.Y.S. 919, at page 921, that:

""* * * A record implies an actual transcription by the official. The object is not only to give the instrument perpetuity but publicity.'

"It is also a well-established rule of law that any instrument which the statute requires to be filed in a public office is admissible in evidence as a public record but where the law requires such filing it also usually requires that the material portions thereof as to identity of persons involved, property transferred, purchase price, liens, etc., be transcribed in a record book kept for that purpose.

"We believe the first part of section 4-102, supra, [A.R.S. § 41-102] clearly requires transcription to a permanent record of the expense account, appointments, etc., of the Governor, while the latter part of the section relating to documents does not even require that such documents be filed. It merely provides that they shall be kept in the office without prescribing in what manner they shall be kept.

"It seems to us that the legislature intended to make a distinction between those acts recited in the first part of the section--'The governor shall keep a record * * *'--and those in the second part of the section concerning the 'documents received by him in his official capacity' which are required to be kept in his office. We are of the opinion that the latter were not intended by the legislature to be classified as public records.

* * *

"It is our view that we may reasonably conclude that the documents received by the Governor in his official capacity were not intended to be classified by the legislature as public records, but they may fall within the classification of 'other matters', in section 12-412, supra, [A.R.S. § 39-121] and therefore subject to inspection by an interested citizen unless they are confidential or of such a nature that it would be against the best interests of the state to permit a disclosure of their contents."

In Industrial Commission v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964), it was held that records of Industrial Commission proceedings, orders and awards are public records. The court did say that:

". . . But information which is not collected to serve as a memorial of an official transaction or for the dissemination of information is private except as to a claimant or parties within the meaning of A.R.S. § 23-961 A, 1 and 2."

Since A.R.S. § 32-121 was adopted from California, California judicial decisions are of assistance in interpreting our statute. In City Council of City of Santa Monica v. Superior Court, 21 Cal.Rptr. 896 (1962), the court said:

"In order that an entry or record of the official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' Cyclopedic Law Dictionary, p. 776. [Citation omitted.] On the other hand, the mere fact that a writing is in the custody of a public agency does not make it a public record.

* * *

"There is no precise formula by which it can be determined whether a writing is such 'other matter'; it depends in each instance upon the facts of the particular case. It is obvious that not every piece of correspondence or written statement lodged in the office of a public officer partakes of such a public interest as to be open to general inspection."

In People v. Pussel, 29 Cal.Rptr. 562 (1963), a criminal case, the court indicated that not all records that are not specifically rendered confidential by statute are public. The court said: "There remains a category of records in which the public as a whole has no interest."

See Attorney General's Opinion No. 65-44-L, which contains an excellent analysis of inspection of public records with numerous legal citations and references to prior Attorney General Opinions covering the subject matter.

Answering Question 1, the public has a right to examine public records which are executed by a public officer in pursuance of a duty which has as its immediate purpose or intent the dissemination of information to the public or which would serve as a memorial of official transactions for public reference. Mathews v. Pyle, supra. Information which is not collected to serve as a memorial of an official transaction or for the dissemination of information may be private except as to a claimant or parties to an action, as held in Industrial Commission v. Holohan, supra.

As an example of a record or information which is subject to disclosure as a matter of right to the public is a record of the actual expenditure of public monies. Information as to discussions prior to actual expenditure may not fall within the category definition of "public records" and "other matters" as stated in A.R.S. § 39-121.

As to "other matters" as stated in A.R.S. § 39-121, the Board of Regents has authority to determine in the first instance whether a right of inspection exists as to any particular document not categorized as a public record and subject to a determination by our courts as to whether or not such a document is confidential or is of such a nature that an inspection by the public would be detrimental to the best interest of the state. Mathews v. Pyle, supra.

Answering Question 2, all records that have a relationship to the formulation of legislation or appropriations must be made available to the Joint Legislative Budget Committee and its Budget Analyst. The Joint Legislative Budget Committee has power to investigate, hold hearings and conduct inquiries, which may enable it to obtain all documents bearing upon the proper exercise of its duties. A.R.S. §§ 41-1271, et seq.

Answering Question 3, it is our opinion that documents possessed by the Budget Analyst are subject to the same test and analysis as for other public officers with respect to what matters are considered available for public inspection.

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Answering Question 4, there is no statutory format in reference to examining public records and other matters open to inspection. Unless specific legislation provides otherwise, a public officer need not make or furnish copies of records in his office to the public. The right of inspection is merely that, and is confined to times during office hours. There is some authority in other jurisdictions to the effect that the right of inspection cannot be exercised at such times and in such a manner as to cause disruption of public business. Bruce v. Gregory, 56 Cal.Rptr. 265, 423 P.2d 193 (1967); Republican Party of Ark. v. State ex rel. Hall, 400 S.W.2d 660 (1966); Holcombe v. State ex rel. Chandler, 240 Ala. 590, 200 So. 739 (1941); State ex rel. Wogan v. Clements, 194 La. 812, 192 So. 126 (1939), affirmed 195 So. 1 (1940); State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.2d 28 (1939); State ex rel. Sullivan v. Wilson, 5 OhioSupp. 399 (1937).

Answering Question 5, a public record is, as indicated above, a record made by a public officer in pursuance of a duty with the immediate purpose to disseminate information to the public or to serve as a memorial of official transactions for public reference. Mathews v. Pyle, *supra*.

Respectfully submitted,


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The Attorney General

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