GRIFFIS V. PINAL COUNTY: ESTABLISHING WHEN A PUBLIC OFFICIAL'S PERSONAL EMAILS ARE PUBLIC RECORDS SUBJECT TO DISCLOSURE

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INTRODUCTION

Email has become a prevalent form of workplace communication. When the workplace in question is a public agency or organization, employee emails may be subject to disclosure under public records law. In *Griffis v. Pinal County*,[1] the Arizona Supreme Court addressed whether "purely personal" emails created and maintained on government-owned computer systems are public records within the scope of Arizona's public records law.[2] In a 5–0 decision, the court held that such emails are not public records per se.[3] Noting, however, the strong public policy favoring disclosure of public documents, the court held that if, after an in camera review, an email is found to be a public record, there is a presumption in favor of its disclosure, though privacy, confidentiality, or the best interests of the state may outweigh this presumption.[4] The court then vacated the opinion of the court of appeals and remanded the case to the superior court for an in camera inspection of the emails at issue to determine whether they constituted public records.[5]

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2005, the Pinal County Sheriff's Office began investigating then-County Manager Stanley Griffis, based on allegations that Griffis used county funds to purchase sniper rifles and other hunting equipment without obtaining appropriate authorization.[6] Phoenix Newspapers, Inc. ("PNI") sought the release of all emails sent or received by Griffis on Pinal County's email system between October 1 and December 2, 2005.[7] While the county gave PNI access to over 700

1. 156 P.3d 418 (Ariz. 2007).
2. ARIZ. REV. STAT. ANN. §§ 39-121 to -121.03 (2007).
3. *Griffis*, 156 P.3d at 421–23.
4. *Id.* at 422–23.
5. *Id.* at 423.
6. *Id.* at 420.
7. *Id.*

emails, it refused to release several emails it and Griffis deemed personal or confidential.[8] The county agreed to disclose the remaining emails after PNI threatened to sue.[9] Griffis, however, obtained a preliminary injunction blocking their disclosure.[10] PNI filed a motion to intervene and dissolve the injunction, which the county joined.[11] Although the trial court granted the motion and ordered the release of the emails, it allowed Griffis to redact any personal information from the records.[12]

In granting the motion to dissolve the injunction, the superior court concluded that all records contained on a county-owned computer are presumptively public records and thus "presumptively open to public inspection."[13] Griffis declined the judge's offer to perform an in camera review to determine whether his privacy expectations in the emails outweighed this presumption, opting instead to appeal the decision.[14]

The court of appeals reversed the trial court's order, relying primarily on the Arizona Supreme Court's decision in *Salt River Pima-Maricopa Indian Community v. Rogers*.[15] In *Salt River*, PNI sought the release of a document that was created by a private company but located in the state treasurer's office.[16] PNI argued that the document was a public record because it was located in a government office and was in the possession of a government agency.[17] The court, however, disagreed with this broad view[18] and provided three definitions of "public record," all requiring some relation between the document and official government duties.[19]

Griffis, noting the definitions provided by the *Salt River* court, argued that the trial court did not apply the proper test to determine whether a document is a public record—that is, the court did not address "whether the information sought was created or received in furtherance of some public duty or business."[20] The court of appeals agreed with this position.[21] Although it did not review the content

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* This information included social security numbers, credit card numbers, and bank account numbers. Griffis v. Pinal County, 141 P.3d 780, 783 (Ariz. Ct. App. 2006).
13. *Griffis*, 141 P.3d at 783.
14. *Id.*
15. 815 P.2d 900 (Ariz. 1991). Opposing the court's reliance on *Salt River*, PNI argued that the Griffis emails were distinguishable because the document in question in *Salt River* was created by a private company and contained information belonging to a sovereign Indian nation, which was not subject to public records law. *Griffis*, 141 P.3d at 788 n.7. The court of appeals, however, noted that *Salt River*'s holding did not rely on those distinguishing characteristics. *Id.*
16. *Griffis*, 815 P.2d at 902.
17. *Id.* at 907.
18. *Id.* at 911.
19. For further discussion, see *infra* Part II.
20. *Griffis*, 141 P.3d at 788.
21. *Id.* at 790.

of the emails, the court found no relation between Griffis' personal emails and his official duties.[22] Thus, the emails did not fall within the common law definition of public records.[23]

As email is becoming a widely accepted, if not primary, form of communication between public employees, many states are beginning to address the question of whether such emails are public records. Accordingly, this Case Note will briefly examine how Arizona defines "public record" and how its definition compares with the law of other jurisdictions.

II. DIFFERING DEFINITIONS OF PUBLIC RECORDS AMONG THE STATES

Arizona's public records law is unique in that it does not provide a statutory definition of "public record."[24] The statute simply states that "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."[25] Thus, case law from both Arizona and other jurisdictions has aided in developing a test for determining what documents constitute public records.[26]

The nature and purpose of a document determine whether that document is considered a public record.[27] In *Mathews v. Pyle*,[28] the Arizona Supreme Court articulated three types of documents whose nature and purpose render them public records: (1) a record created by a public official acting in the pursuit of his or her duties, where the primary purpose is either to relate information to the public or to "memorialize official transactions for public reference"; (2) a record required to be kept "in the discharge of duty imposed by law or directed by law to serve as . . . evidence of something written, said, or done";[29] or (3) a written record of

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22. *Id.*

23. *Id.* at 785. For the common law definitions of the term "public record," see *infra* Part II.

24. Many other states do provide a statutory definition for "public record." *See, e.g.*, Washington's public records law, which states that a public record is a document containing "information relating to the conduct of government or the performance of any governmental or proprietary function." WASH. REV. CODE. ANN. § 42.17.020(41) (West 2006).

25. ARIZ. REV. STAT. ANN. § 39-121 (2007). "Other matters" have been held to include "documents which are not required by law to be filed as public records, but which relate to matters essential to the general welfare of taxpayers." Mathews v. Pyle, 251 P.2d 893, 896 (Ariz. 1952) (internal quotations omitted). However, these "other matters" must nevertheless be public matters. Salt River Pima-Maricopa Indian Community v. Rogers, 815 P.2d 900, 908 (Ariz. 1991).

26. *See Mathews*, 251 P.2d at 895 (using case law from several jurisdictions to formulate a definition for the term "public record").

27. *See Griffis*, 156 P.3d at 421.

28. 251 P.2d 893.

29. In *Carlson v. Pima County*, the Arizona Supreme Court held that these types of records—those which are required to be kept under section 39-121.01(B) of the Arizona Revised Statutes—are presumed to be open to the public for inspection. 687 P.2d 1242, 1246 (Ariz. 1984).

transactions made by a public official, if it is kept as a "convenient and appropriate method of discharging . . . duties," regardless of whether it is required by law.[30]

These definitions do not encompass all records created by public officials.[31] The *Griffis* court noted that only documents that have a "substantial nexus" to the official duties of a government agency will qualify as public records.[32] The court did not provide either a definition of the term "substantial nexus" or examples of such a link.[33] However, the standard appears quite stringent in comparison to the relationship required by other states.[34] Florida and Tennessee, for example, only require that the document be made or received "in connection with" official business.[35] Idaho arguably has the most relaxed standard, requiring only that the document contain "information relating to the conduct or administration of the public's business."[36] Idaho courts also construe this requirement broadly, holding that a government employee's job performance constitutes "the public's business."[37] Under this standard, *Griffis* may have had a different outcome.

III. THE ARIZONA SUPREME COURT'S HOLDING

The Arizona Supreme Court explicitly refused to hold that emails created and maintained on a government-owned computer system are public records as a

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30. 251 P.3d at 895. In *Phoenix Newspapers Inc. v. Ellis*, the only case to consider a public records issue since *Griffis*, the court held that a notice of claim for damages filed with a school district by a minor student who was allegedly sexually assaulted by a school janitor was a public record. 159 P.3d 578 (Ariz. Ct. App. 2007). Interestingly, the court wrote that the document's "nature and purpose" clearly qualified it as a public record, but it did not attempt to fit the document into one of the three definitions. Rather, the court found that (1) the school district's potential liability was "of concern to the public," (2) whether the claim was paid, settled, or disputed was "valuable to the public," (3) whether the claim was "timely and sufficiently detailed" is a matter "of public concern," and (4) "the amount that a claimant would have settled for may be of great interest to the public." *Id.* at 582. These reasons for finding the notice to be a public record focus on the document's value to the public, and not on the definitions expressed in *Mathews*. To be sure, the notice of claim does not fit into any of the categories offered by the court.

31. *Griffis*, 156 P.3d at 421.

32. *Id.*

33. The only other Arizona cases to discuss the "substantial nexus" requirement also do not provide definitions or examples of the term. *See* Salt River Pima-Maricopa Indian Community v. Rogers, 815 P.2d 900 (Ariz. 1991); *Phoenix Newspapers, Inc.*, 159 P.3d at 578.

34. Colorado is one state with conditions arguably as strict as Arizona's, requiring that a document be "demonstrably connected" to the official's duties or to the receipt or expenditure of public funds. Denver Publ'g Co. v. Bd. of County Comm'rs, 121 P.3d 190, 199 (Colo. 2005). However, if *Griffis* were decided in Colorado, the emails may very well have been considered public records under this definition, as the underlying issue in *Griffis* was the alleged unauthorized expenditure of public money.

35. *See* FLA. CONST. art. I, § 24(a); TENN. CODE ANN. § 10-7-301(6) (West 2007).

36. IDAHO CODE ANN. § 9-337(13) (2006).

37. *See* Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs, 159 P.3d 896 (Idaho 2007).

matter of law.[38] Specifically, neither the expenditure of public funds, nor the mere possession of a document by a government official or agency will transform an otherwise private document into a public record.[39] Although emails are sent and received on public computers, some may relate "solely to personal matters, and will not, therefore, reflect the requisite substantial nexus with government activities."[40] The court acknowledged the strong public policy favoring the release of government records, but contended that the disclosure of "purely private" documents does not advance the purpose behind the policy.[41]

Thus, the court articulated a two-step process to determine whether a document must be disclosed under Arizona public records law. First, the party requesting the documents must "raise a substantial question" as to whether the document is a public record.[42] Because Arizona has a strong policy in favor of public access and public disclosure, the preliminary showing needed "must be relatively low."[43] For instance, a party can raise a substantial question "by showing that a government agency or public official withheld documents generated or maintained on a government-owned computer on the grounds that those documents are personal or private."[44] Second, once the requesting party makes this initial showing, it may ask the court to perform an in camera review of the disputed documents to determine whether they constitute public records.[45] The party seeking to prevent disclosure has the burden of proving that such documents are not public records.[46] If the document is found to be a public record, there is a presumption in favor of disclosure;[47] however, a court may nevertheless consider

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38. *Griffis*, 156 P.3d at 422. Other jurisdictions faced with this question have also held that emails sent or received on publicly-owned computers are not per se public records. *See, e.g.*, State v. City of Clearwater, 863 So. 2d 149, 155 (Fla. 2003).

39. *Griffis*, 156 P.3d at 421.

40. *Id.* at 422. The Arizona Supreme Court used this "substantial nexus" language throughout *Griffis*. *Id.* at 421-22. However, it also noted that some emails created on a publicly funded system will be public records simply "because they relate to government business." *Id.* at 422. At other points in the opinion, the court suggested that emails that might otherwise qualify as public records will only be exempt if they are "purely private." *Id.* Not surprisingly, the *Salt River* court also used different standards in its opinion. There, the court first noted that "a public record must also have *some relation* to the official duties of the public officer that holds the record." Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900, 907 (Ariz. 1991) (emphasis added). Later in the opinion, after discussing relevant case law, the court wrote, "The above cases establish that the public does not have a right to demand access unless the record has a *substantial nexus* to the agency's activities." *Id.* at 910 (emphasis added). Thus, it is unclear just how strong the relation between the document in question and government activities must be in order for that document to qualify as a public record.

41. *Griffis*, 156 P.3d at 422 ("[P]urely private documents shed no light on how the government is conducting its business or spending taxpayer money.").

42. *Id.*

43. *Id.* at 423.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 422.

countervailing interests such as privacy, confidentiality, or the best interests of the state.[48]

Because neither the superior court nor the court of appeals had examined the emails in question, the Arizona Supreme Court had no record to review. Thus, it remanded the case to the superior court, asking it to conduct an in camera inspection of the emails to determine whether they could be properly characterized as public records.[49]

CONCLUSION

In *Griffis v. Pinal County*, the Arizona Supreme Court held that a public official's personal emails will not be considered public records solely by virtue of having been created and maintained on a government-owned computer system. Rather, courts must engage in a two-part analysis to determine whether the public has a right to inspect such emails. First, the party seeking disclosure must raise a "substantial question" as to whether the document is a public record under the common law definition. Such documents must have a substantial nexus to government activities, and purely private documents will not meet this requirement. Second, if, after the court performs an in camera review, the document is found to be a public record, the court may consider countervailing interests that may outweigh the policy favoring disclosure. The *Griffis* court remanded the case to the trial court to make these determinations, but it failed to define or provide examples of a "substantial nexus." Thus, it is unclear how lower courts will interpret this term, and just how strong the relationship must be between the document and the government duties.

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48. *Id.* at 423.

49. *Id.* After the case was remanded back to the trial court, the judge released about sixty of Griffis' emails, which provided evidence that a Phoenix land investment firm funded one of Griffis' hunting excursions, allegedly in return for favorable county treatment of the firm's development projects. J. Craig Anderson, *E-mails Detail Griffis' $50,000 African Safari*, EAST VALLEY TRIBUNE, October 7, 2007, *available at* http://www.eastvalleytribune.com/story/99109. In addition to these allegations of bribery, Griffis was accused of stealing county funds to purchase hunting rifles. He subsequently pleaded guilty to this charge and is currently serving three-and-one-half years in prison. *Id.*