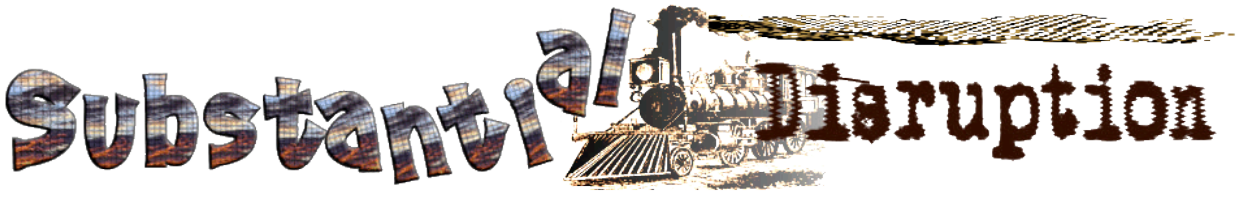

I've Got A Secret

By Mike Tully

> *The liberties of people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.*
>
> - Patrick Henry

Ally Miller, a local County Supervisor with a penchant for sluicing her official email through a personal email account, has a powerful new friend in high places. Arizona Attorney General Mark Brnovich has declared, in a Legal Opinion, that messages sent or received through a private email account, messenger service, or social network are not public records. Brnovich did not mention his ongoing investigation into Miller's emails. Nonetheless, if the investigation reflects his Legal Opinion, then Miller is largely off the hook – along with every public employee in Arizona who wants to hide his or her official communications. Brnovich has given every unscrupulous public official a blank check to draw on the Bank of Chicanery and knee-capped Arizona's Public Records Law.

State Senator Steve Farley, who originally requested the opinion, said he was looking for "clear guidance in what was public record and what wasn't." He said the Opinion didn't provide it, even though Brnovich framed the issue this way: "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?" That seems to address Farley's question: are these documents, by definition, public records, regardless how they were sent or what form they are in? You look at the content, not the medium. That's what the Arizona Supreme Court did when stating, "It is the nature and purpose of the document, not the place where it is kept, which determines its status."

Brnovich violated that precedent by creating an exception to public records laws based *entirely* on the place where documents are kept. "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," he wrote. Then he added, "communications conducted on private devices or accounts" were not disclosable public records because "private devices or accounts do not themselves harbor public records." Brnovich ignored judicial precedent and created a new test out of whole cloth: the "public versus private" test. How does he justify such a radical departure from settled law?

"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," wrote Brnovich. The language he refers to is in Arizona Revised Statute §39-121.01, which states in part, "All officers and public bodies shall maintain all records, including records as defined in section 41-151.18," which defines public records as those "*made or received by any governmental agency*" in the furtherance of lawful business. Brnovich argues that phrase, as well as a statute allowing state agencies to store documents in electronic format, confines public records laws to agency-maintained systems – carving out an exception for records maintained on private systems. The Attorney General's analysis is flawed.

Section 41-151.18 opens with the language, "in this article," which means it is limited to Article 2.1 of Title 41, entitled, "Arizona State Library, Archives and Public Records Established in the Office of the Secretary of State." That Article established a State Library of Records and addresses the handling and disposition of public records. Brnovich's argument that State Library laws govern Public Records laws is incorrect. The statute he relies on, by its own language, is limited to the article establishing the State Library. Furthermore, the Public Records law says State officers must maintain all records, "*including* records as defined in section 41-151.18," not *exclusively* those defined by that statute. The legislature clearly intended the definition of public records to extend beyond the records specified in §41-151.18.

The Attorney General's position is further undermined by §41-151.15, "Preservation of public records," which states, "All records made or received by public officials … in the course of their public duties are the property of this state." That is a broad definition that is not restricted to publicly maintained systems. The defining (and limiting) language in §41-151.15 is the "course of their public duties" wording – legislative endorsement of the Supreme Court's "nature and purpose" test. That is how you define a public record: by its content and purpose, not its location.

Brnovich concludes his Legal Opinion stating, "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." Yet, he is acting as a Legislature of One by amending the statutes to create an exception to public records laws that defies clear statutory language and the intent of lawmakers. Fortunately, statutes are subject to judicial review, as are Attorney General Opinions. The sooner courts invalidate Brnovich's flawed Opinion the better for the sake of open government.