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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JAMES E MARNER | CASE NO. C20134963

DATE: June 14, 2016

ENERGY & ENVIRONMENTAL LEGAL INSTITUTE
Plaintiff,

vs.

ARIZONA BOARD OF REGENTS, ET AL.
Defendant(s)

UNDER ADVISEMENT RULING

IN CHAMBERS UNDER ADVISEMENT RULING

This matter returns to the Court on remand. The Court of Appeals ruled that this Court erred in its March 24, 2015 ruling when it applied the arbitrary and capricious standard of Rule 3(c) of the Arizona Rules of Procedure for Special Actions to Defendant Arizona Board of Regents' (hereinafter AzBOR) decision to withhold certain emails from Plaintiff Energy and Environmental Legal Institute (hereinafter E&E) in response to request made pursuant to ARS §39 – 121.

The procedural history of this case was summarized in the March 24, 2015 ruling. Rather than restate it here, the Court incorporates the summary (along with the portions of a ruling that were affirmed by the Court of Appeals) by this reference.

ARS §39 – 121 provides that public records "shall be open to inspection by any person". The legislative intent behind the statute reflects "a clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). "The 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 Newspapers, Inc .v. Keegan*, 201 Ariz. 344, 351, 35 P.2d 105, 112 (App. 2001).

A public official has the discretion to deny a request, initially, in order to prevent substantial and irreparable private or public harm. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). This burden remains constant, and absent a showing that release of the information would have an important harmful effect on the official duties of the person or agency, disclosure must be made. *Church of Scientology v. City of Phoenix Police Department,* 122 Ariz. 338, 339, 594 P 1034, 1035 (App. 1979). While a public official

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may deny in the first instance the right of inspection if the official thinks that it would be detrimental to the interests of the state to disclose the records, the court must be the final arbiter on the question of disclosure. *Matthews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 896 (1952).

Previously, the Court erred by applying a deferential standard to AzBOR's decision to withhold the selected emails and held that it could not find the decision by AzBOR to withhold the emails to be arbitrary and capricious. Having been put on the right course by the Court of Appeals, the Court has reread the emails, the privilege logs, the pleadings, the affidavits and the supporting exhibits. To that end, the Court supplements findings 1 through 5 in the March 24, 2015 ruling as follows:

6. The exemplars produced by Dr. Hughes are emails that were sent anywhere from about 11 to 16 years ago.

7. The exemplars produced by Dr. Overpeck are emails that were sent anywhere from about 7 to 11 years ago.

8. The articles that are referenced, revised and/or supplemented in the emails were subsequently published and have been in circulation for many years.

9. Many of the emails include recipients who work for the federal government (NASA, NOAA, National Science Foundation) and would be subject to requests under the Freedom of Information Act.[1]

10. Many of the emails include recipients who worked for scientific journals and discuss edits/revisions to articles that were subsequently published.

11. Many of emails include data that was used to support subsequent publications.

12. Many of emails include references to data which has been publicly available for decades.

13. Many of the emails include discussions and analysis of publicly funded papers and studies.

14. The emails do not contain ongoing research, peer-review material or any identifiable prepublication materials.

15. Generally, the content of the emails address and concern the public debate over climate change and refer to data, publications, etc. that either support or contest the claim that the changes are the result of human activity.

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[1] Additionally, one of the email chains included a recipient who worked in the office of former United States Sen. Joe Lieberman.

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16. More specifically, many of the emails include references to work done by the Intergovernmental Panel on Climate Change (IPCC) "to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socioeconomic impacts."[2]

17. At the time the emails were generated, Professors Hughes and Overpeck were aware that, because they were state employees using their employee email addresses, the emails were subject to public records requests.

18. The emails relate to research work that was done by Professor Hughes and Overpeck in their respective capacities as employees of the University of Arizona.

19. Per policy of the University of Arizona, all research (which includes creative endeavors) conducted at the University is the property of the University.[3]

20. AzBOR presented several affidavits from prestigious academic professionals and scientists (including Professors Hughes and Overpeck) suggesting the release of the requested emails would set a dangerous precedent that would seriously and negatively impact higher education in Arizona and throughout the country.

21. E&E presented several affidavits from prestigious academic professionals and scientists, as well as affidavits from legal scholars and a delegate from the Virginia state legislature suggesting the release of the requested emails would not seriously and negatively impact higher education in Arizona and throughout the country.

22. AzBOR did not object to the release of all emails and did in fact release some emails that were responsive to the records request.

23. AzBOR has acknowledged that the emails are public records.

24. Alternative methods of communication have been and remain available to Professors Hughes and Overpeck and any other similarly situated person should they desire to correspond in confidence regarding research projects and like endevours.

25. AzBOR did not specifically identify any substantial and/or irreparable private or public harm that will result from disclosure of the subject emails.

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[2] Exhibit D

[3] Exhibit S – U of A Policy Number 2.13.09 (B)(3) and (C)(11)

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Here, upon *de novo* review, the Court finds that AzBOR has not met its burden justifying its decision to withhold the subject emails. In making this finding, the Court does not ignore the repeated "chilling effect" concerns raised in the affidavits and in the pleadings. However, the Court concludes that this potential harm is speculative at best,[4] and does not overcome the presumption favoring disclosure of public records containing information about a topic as important and far-reaching as global warming and its potential causes.

As noted in the previous ruling, the affidavits/arguments of AzBOR are compelling. However, they go beyond championing academic freedom and, in effect, promote the creation of an academic privilege exception to ARS §39 – 121. This is a proposition more properly made to the legislature rather than the courts.

Accordingly,

IT IS ORDERED that Plaintiff's motion requesting disclosure of the withheld emails which were identified in the initial and supplemental logs as prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff shall submit a request for attorney's fees and costs pursuant to ARS §39 – 121.02(B) by July 8, 2016. The request shall include an affidavit and itemized billing statement in compliance with *Schweiger v. China Doll Rest., Inc*., 138 Ariz. 183, 673 P.2d 927 (App. 1983). Defendant shall file any objection/response by no later than July 22, 2016. Plaintiff may file a reply, if desired, by no later than August 3, 2015.

IT IS FURTHER ORDERED that Plaintiff shall submit a proposed form of judgment by July 8, 2016. The form of judgment shall have a blank space for the Court to write in any attorney's fees and costs it deems are warranted.

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[4] In contrast, see *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.,* 167 Ariz. 254, 258, 806 P.2d 348, 352 (1991) where the Arizona Supreme Court noted "[i]n some cases the publicity attendant to the search has proven detrimental . . . . " Emphasis added.

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