

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JAMES E MARNER

CASE NO. C20134963

DATE: March 24, 2015

ENERGY & ENVIRONMENTAL LEGAL INSTITUTE
Plaintiff

VS.

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

R U L I N G

IN CHAMBERS

Plaintiff Energy and Environmental Legal Institute (hereinafter E&E) appeals the denial of access to records controlled by the Arizona Board of Regents (hereinafter AzBOR) pursuant to ARS §39–121.02 (A). Specifically, E&E contends that AzBOR failed to properly exercise its discretion and/or abused its discretion by withholding approximately 1700+ emails that were requested pursuant to ARS §39 – 121. AzBOR asserts that its decision to withhold the targeted emails was not arbitrary and capricious nor an abuse of discretion but rather was reached by weighing the interests of the state of Arizona against the general policy of open access to public records.

The volume and complexity of the records at issue is daunting. Initially, AzBOR provided the Court a CD with approximately 90 emails described as representative of all those requested. While reviewing 90 emails may seem like a relatively easy task, such was not the case here. The emails ranged from one or two pages to multiple pages to at least one exceeding 800 pages in length. Further, to describe the content of the emails as technical and esoteric is an understatement. Many hours were spent reviewing the emails and, by no stretch, was the Court able to fully comprehend the substance of the emails. The Court brought this situation to the attention of counsel and also ruled that, per *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421(2007), each one of the remaining 1700+ emails would have to be individually reviewed and a special master was necessary.¹ The parties subsequently agreed the 90+ emails on the CD that was submitted to the Court, plus hardcopies

¹ This is more fully discussed in the Court's October 21, 2014 In Chambers ruling. The Court incorporates this ruling by this reference.

Nancy Beatty
Judicial Administrative Assistant

RULING

submitted by counsel for E&E, adequately represented all of the emails for the purposes of the inquiry presented, i.e., did AzBOR abuse its discretion by withholding the emails.²

ARS §39.121 provides 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.” “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.3d 105, 112 (App.2001). The public records statutes, “evinced a clear policy favoring disclosure.” *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). *See also, Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009); *Primary Consultants, LLC v. Maricopa County Recorder*, 210 Ariz. 393, 111 P.3d 435 (App. 2005), review denied.

Nonetheless, the strong public policy of disclosure has its limitations. As noted in *Carlson, supra*,

“ . . . , the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection.” 141 Ariz. at 491.

AzBOR acknowledges that the emails are “public records”, at least in terms of the statute at issue. Consequently, the inquiry of this Court turns to AzBOR’s claim that substantial and irreparable private or public harm would occur if the emails are released or “if release of the information would have an important and harmful effect upon the official duties of the official or agency.” *Church of Scientology v. City of Phoenix Police Department*, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (Ct. App. 1979). The burden of making such a showing and thereby justifying an exception to the rule of full disclosure rests with AzBOR. *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

In recognition of the above, the Court has reviewed the numerous exhibits and affidavits attached to the pleadings of both parties. Additionally, given the aforementioned complexity of the content of the emails examined, the Court relied heavily on the privilege logs initially provided, the supplemental log for Dr. Hughes’s exemplars (Exhibit PP) and the supplemental log for Dr. Overpeck’s exemplars (Exhibit QQ). Based on this review, the Court finds as follows:

² This is more fully discussed in the Court’s November 6, 2014 In Chambers ruling. The Court incorporates this ruling by this reference.

R U L I N G

1. The documents labeled Bates numbers JTO-018684, JTO-081858, JTO-020006 and the two additional unnumbered documents on page 12 of Dr. Overpeck's initial privilege log identified as "Correspondence" and "Attorney Work Product" were properly withheld.
2. The documents labeled "Folder #1 ABOR/MH/Priv-00000 1 through 35 on page one of Dr. Hughes's initial privilege log were properly withheld per *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258, 806 P.2d 348, 352 (1991).
3. The documents labeled ABOR/MH/Priv-000467, 000497 and 000747 in Dr. Hughes's supplemental log, exemplar numbers JO 2 and JO 4 in Dr. Overpeck's supplemental log and any other document in the remaining 1700+ emails that were not produced that contain information that could be fairly designated as containing ongoing research were properly withheld.
4. The documents labeled ABOR/MH/Priv-000005, 000006 and 000029 in Dr. Hughes's supplemental log, exemplar numbers JO1, JO 3 and JO 4 in Dr. Overpeck's supplemental log and any other document in the remaining 1700+ emails that were not produced that contain information that could be fairly designated as containing student information or personal information were properly withheld.
5. The documents labeled ABOR/MH/Priv-006709, 006819, 006820 and 007275 in Dr. Hughes's supplemental log, exemplar numbers JO 2 and JO 10 in Dr. Overpeck's supplemental log and any other document in the remaining 1700+ emails that were not produced that contain information that could be fairly designated as containing prepublication peer review were properly withheld.

The remaining documents are identified in the initial and supplemental logs as prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary. The primary reason AzBOR claims as the basis for not producing these documents is that to do so would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information. AzBOR enlisted the help of an impressive array of scholars, academic administrators, professors, etc., who, by way of affidavits, provide compelling support of its position.

Nancy Beatty

Judicial Administrative Assistant

RULING

E&E counters that the chilling effect cited by AzBOR is contrary to fundamental scientific principles of openness and transparency which promote public confidence in scientific research. E&E argues that, given the importance of the climate change question and the potential magnitude of the debate surrounding it, the interest in the content of the contested emails to the public at large greatly exceeds any potential reduction in collaboration between some scientists and professors at public universities, including the University of Arizona. E&E also asserts that the claimed chilling effect is speculative and AzBOR has presented no real evidence to support its claim that any harm to the state will actually manifest if the emails are released. Like AzBOR, E&E has provided several affidavits from the well-credentialed professionals to support its position.

In sum, both E&E and AzBOR have presented well-reasoned and persuasive arguments to support their contrary positions about disclosure of the emails. The Court now turns to ARS §39–121.02 (A) to put the arguments into the proper procedural context. The statute provides E&E with an avenue to appeal AzBOR’s denial of the request to release the emails “pursuant to the rules of procedure for special actions against the officer or public body.” Consequently, the question before this Court is not whether E&E was more persuasive than AzBOR or vice versa. Instead, the question to be considered is – in denying E&E’s records request, did AzBOR abuse its discretion or act arbitrarily or capriciously? See, e.g. *Stant v. City of Maricopa Employee Board*, 234 Ariz. 196, 201, 319 P.3d 1002, 1007 (App. 2014).

When considering this question, this Court is mindful of the observation made in *Church of Scientology*, *supra* at 340, to wit:

“We are not persuaded that our statutory policy in favor of disclosure should be so easily, and permanently, thwarted by the unilateral and potentially self-serving inclination of government officials to classify files as confidential.”

However, given the abundance of supporting evidence presented by AzBOR, the Court concludes that here, the exception has not swallowed the rule.

When the release of information would have an important and harmful effect on the duties of a State agency or officer, there is discretion not to release the requested documents. *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257-58, 806 P.2d 348, 351-52 (1991). After weighing the evidence presented in this matter, the Court cannot conclude that by withholding the remaining emails for the reasons stated, AzBOR abused its discretion or acted arbitrarily or capriciously.³

Accordingly,

³The Court recognizes that this standard of review also applies to requests for attorney’s fees pursuant to A.R.S. § 39-121.02(B) which, given the conclusion reached, it not at issue here.

Nancy Beatty
Judicial Administrative Assistant

RULING

IT IS ORDERED that Plaintiff's request for relief is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Petition for Special Action is **DISMISSED**.

IT IS FURTHER ORDERED that each party will bear its own attorney's fees.

As no further matters remain pending,

IT IS FURTHER ORDERED that judgment is entered pursuant to Rule 54(c), Arizona Rules of Civil Procedure.


HON. JAMES MARNIER
(ID: 63383aaa-85c0-434a-94e3-1ce4fc9af030)

cc: Corey B Larson, Esq.
D. Michael Mandig, Esq.
David W Schnare, Esq.
Jonathan Riches, Esq.
Clerk of Court - Under Advisement Clerk

Nancy Beatty
Judicial Administrative Assistant