IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ENERGY & ENVIRONMENT LEGAL INSTITUTE,
Plaintiff/Appellee,

v.

ARIZONA BOARD OF REGENTS,
AN EDUCATIONAL, NON-PROFIT CORPORATION;
AND TERI MOORE, IN HER OFFICIAL CAPACITY AS
CUSTODIAN OF PUBLIC RECORDS FOR THE UNIVERSITY OF ARIZONA,
Defendants/Appellants.

No. 2 CA-CV 2017-0002
Filed September 14, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20134963
The Honorable James E. Marner, Judge

REVERSED AND REMANDED

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E C K E R S T R O M, Chief Judge:

¶1 The facts of this case are as described in this court's prior memorandum decision, *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. 2 CA-CV 2015-0086, ¶¶ 2-3 (Ariz. App. Dec. 3, 2015) (mem. decision). After remand, the trial court determined the e-mails sought by Energy & Environment Legal Institute (E&E) that had been characterized as "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary," were subject to release under A.R.S. § 39-121, concluding that Arizona Board of Regents (Board) had "not met its burden justifying its decision to withhold the subject emails." The trial court also awarded E&E its costs and attorney fees.

¶2 The Board now appeals, claiming the trial court failed to apply A.R.S. § 15-1640. It also claims that, for any emails that are not covered by § 15-1640, the court erred in its application of the balancing test articulated in *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952). For the following reasons, we reverse the judgment of the trial court and remand for further proceedings consistent with this decision.

¶3 The trial court's decision did not refer to § 15-1640. E&E argues the court must nonetheless have considered the statute, given that the parties argued extensively about its meaning and application to this case. E&E also claims the court's findings demonstrate that it considered this statute, even if it did not refer to it specifically.

¶4 We note, however, that the trial court's decision concludes that "the creation of an academic privilege exception . . . is a proposition more properly made to the legislature rather than the courts." Section 15-1640, although it is not titled as an "academic privilege," grants an exemption from Arizona public records law for

certain "records of a university." The trial court's comment seems to demonstrate that the court did not consider the application of § 15-1640 and was not aware the legislature had already created an academic privilege.

¶5 Moreover, the court identified the documents at issue as "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary." Section 15-1640(A)(1)(d) excludes from public disclosure "unpublished research data" and "drafts of scientific papers." Section 15-1640(A)(1)(b) exempts from disclosure information "[d]eveloped by persons employed by a university . . . if the disclosure of this data or material would be contrary to the best interests of this state." Neither of these exemptions apply "if the subject matter of the records becomes available to the general public." A.R.S. § 15-1640(C). The court's ruling does not explain if it decided that the documents in question did not fall within either subsection (b) or (d), or if it decided that the exemptions were inapplicable because of the limitations expressed in section (C).

¶6 Because the trial court's ruling makes no findings concerning the application of § 15-1640, we decline to do so in the first instance. Accordingly, we reverse the judgment of the trial court, including the award of attorney fees,[1] and remand this case for further proceedings in accordance with this decision.

[1]E&E has asserted a claim of attorney fees pursuant to A.R.S. § 39-121.02. Because E&E has not "substantially prevailed," we deny the claim. A.R.S. § 39-121.02(B).