IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ARIZONA BOARD OF REGENTS, and **TERI MOORE**, in her official capacity as Custodian of Public Records for the University of Arizona,

Appellants,

vs.

ENERGY & ENVIRONMENT LEGAL INSTITUTE,

Appellee.

2CACV-2017-0002

Pima County Superior Court
Cause No. C2013-4963

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION, STATEMENT OF THE CASE AND FACTS

This case is about the occasional tension between two principles – the right of the people to know how government works and protecting the best interests of the state. The context in this case is the tension of these principles within the academy. In this memorandum, The Energy & Environment Legal Institute ("E&E") replies to the Arizona Board of Regents' ("the Board") arguments. Pursuant to ARCAP Rule 13(b), E&E waives restatement of the case and the facts in this matter, relying on the Board's statement, but for one exception.

The Board suggests E&E's purposes are nefarious. They are not. E&E's purposes are irrelevant under the law, but because others often use filings such as these to make political points, it becomes necessary to explain some purposes. We direct those readers to the final section of this brief which cites to studies showing only 8% of people trust scientific information on the basis that it is peer reviewed and studies now show that "most published research findings are false." Transparency in the Academy is essential to formation of sound public policy and the Arizona Public Records Act provides for such transparence. Adjudication of this case will help the civil bar and Arizona's universities understand the government's duty under the law.

STATEMENT OF THE ALLOWABLE ISSUES

The Board raises the question as to whether the trial court properly cited to,

considered and applied A.R.S. § 15-1640, the Arizona research exemption to the Public Records Act.

Secondly, the Board raises the question as to whether the trial court's *Mathews*[1] balancing on the subset of documents this Court remanded for review to the trial court was clearly erroneous.

Notably, although the Board briefly discussed Constitutional notions of academic freedom, it did not include the constitutionality of A.R.S. § 39-121 among the questions it presents to this Court. Nor did the trial court rule on that issue. Thus, the Constitutionality of A.R.S. §39-121 is not before this Court.

STANDARDS OF APPELLATE REVIEW

In this matter, this Court has already described the standard of review it uses on issues of law. "We review the court's legal conclusions, such as the correct standard of review, de novo." (*Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, 2015 Ariz. App. Unpub. LEXIS 1468 *5 (*citing to Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, P20; 955 P.2d 534, 539 (1998)).)

With regard to review of the lower court's fact finding when conducting a *Mathews* balancing, the Board is incorrect, claiming the appellate court may "draw

[1] *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (Az. 1952).

[its] own conclusions" regarding the factual finding that constitutes a *Mathews* balancing.[2] This is a misstatement of the law. Rather, the Court is bound by "a trial court's findings of fact unless they are clearly erroneous" but is "not bound by the trial court's conclusions of law and [the appellate court is] free to draw [its] own conclusions of law *from the facts found by the trial court*." *Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991) (*emphasis added* to highlight the failure of the Board to properly quote the case). We expand on the standard of review of factual findings *infra*, including correcting the Board's additional misstatements of the law under *Meyer v. Warner* in additional text below.

ARGUMENT

I. The Failure of the Trial Court to cite to A.R.S. § 15-1640 is not reversible error.

The trial court had no duty to specifically cite to A.R.S. § 15-1640 where its analysis and findings were consonant with application of the statute. Federal and Arizona courts have a penchant for citing Shakespeare when a court's or a party's showings are equivalent to citation to a specific authority, arguing: "What's in a

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[2] Appellants' Opening Brief at EP 20-21.

name? That which we call a rose/By any other name would smell as sweet."[3] Paraphrasing the decision in *RHJ Med. Center*, “the trial court’s analysis takes the form of a per se inquiry, even if the court did not cite specifically to the statute. An analysis by any other name would smell just as sweet. Reliance on the same factors as offered in a statutory provision per se is the key to the case *sub judice*.” *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 759 (W.D. Pa. 2010).

As discussed in the following section, the trial court’s analysis of the documents mirrored an analysis under A.R.S. § 15-1640. Indeed, the U.S. Supreme Court has held that it is only sufficient for a court or a party to “substantially make the basic showings” required by law. *Lee v. Kemna*, 534 U.S. 362, 366-367 (2002). Justices Kennedy, Scalia and Thomas further explained that failure to cite to a rule relied upon by a trial court does not deprive the appellate court from assessing the trial court’s application of the rule where judgment is supported by the record. *Id*. at 391.

The parties cited to A.R.S. § 15-1640 so often, it is inconceivable that the trial court was not cognizant of and did not apply the statute. E&E was first to cite

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[3] William Shakespeare, *Romeo and Juliet* act 2, sc. 2; *and see*, *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1130 (9th Cir. Cal. 2013); *Ziegfield Inc. v. Ariz. Dep't of Revenue*, 2016 Ariz. App. Unpub. LEXIS 1254, *7 (FN 6), (Ariz. Ct. App. Oct. 6, 2016); *C&I Eng'g, LLC v. Performance Improvement of Va.*, 2012 Ariz. App. Unpub. LEXIS 474, *13 (Ariz. Ct. App. 2012).

the statute, followed by the Board's reference to it as a planned defense.[4] The §1640 exemption was addressed in E&E's Motion to Compel (ROA 22) and the Board's Opposition to same (ROA 26).

The Board used §1640 as a defense in the first document log the Court directed them to prepare (ROA Doc. 30) and in the accompanying memorandum (*id*. at EP5). E&E responded to this defense by arguing that review of the records at issue could only be done efficiently by classifying them into categories – categories drawn from those articulated in §1640. (ROA 32, EP 4-5). E&E applied this §1640 approach in its presentation of records for *in Camera* review (ROA 34). E&E cited to §1640 in its opening brief, identifying records that should be withheld under §1640 (ROA 35, EP 23-24) and records that could not be withheld under §1649(C) (*id* at EP 25-26). The Board relied heavily on §1640 in its Opening [Trial] Brief (ROA 37, EP 35 *et seq*). E&E replied to the Board's §1640 arguments (ROA 46, EP 36-37). When confronted with an onerous order, the parties jointly moved for reconsideration of the order, citing to §1640 categories (ROA 56, EP 5).

Confronted with a large number of withheld documents, the trial court held a hearing specifically to determine how to efficiently and properly review the

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[4] ROA 13, Amended Complaint ¶¶ 35 & 51; ROA 29, Answer ¶ 59.

withheld documents. At this hearing, E&E again provided a categorization schema based on §1640. *See*, Exhibit 1. The court pointedly inquired of the Board whether it had an alternative schema or whether it should even use such a schema. Nov. 6, 2014 Hearing Transcript at EP 57:22 – 58:2. The Board disliked using any form of categorization, including under §1640, but admitted:

> I don't think we can avoid having to deal with these categories that are being suggested by Mr. Schnare because they are the heart and soul of the merits of this case. So I'm prepared to live with that and come in and talk about those issues one at a time when we discuss the merits in the case.

Id. at EP 58:14. In its post-hearing Ruling, the trial court adopted the §1640-based categorization offered by E&E, stating: "After reviewing applicable caselaw *and considering the arguments of the parties*, the Court concludes that separating the representative samples into the following categories would be the most efficient way to resolve this matter." ROA 64, November 17, 2014 Ruling at EP 1-2 (*emphasis added*).

As discussed below, the trial court applied the structure of §1640 and having done so, met the *Lee v. Kemna* requirements by "substantially mak[ing] the basic showings" required by law.

II. The Records at Issue should be Released under A.R.S. §15-1640.

Before chronicling the trial court's actions that applied A.R.S. §15-1640, we discuss what this statutory section addresses, applying normal cannons of administrative law, to wit: examining the plain language of the statute and the

linguistic references, the structure of the statute, and its context and history,[5] and then apply that interpretation to the records at issue. Like this Court, we begin with the plain meaning of the statute and its context[6]. Although we go further, we argue this Court need not go beyond that.

A. The Purpose of §1640 is to Protect Trade Secrets and similar "secret sauces".

The Board's primary argument is that application of A.R.S. §15-1640 would prohibit release of the emails E&E sought under the Public Records Act. To obtain that result, the Board must show that the emails constituted "trade secrets" or something similar to that, for that is what §1640 protects.

Specifically, §1640(A) protects only the following:

(A)(1) – Trade Secrets;
(A)(1)(a) – Unfunded grant applications or proposals;

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[5] *Estate of Braden v. State*, 228 Ariz. 323, 325, 266 P.3d 349, 351 (2011) ("'When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute.' *State v. Christian*, 205 Ariz. 64, 66 ¶ 6, 66 P.3d 1241, 1243 (2003). Statutory terms, however, must be considered in context. *See State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983).")

[6] *State v. Nereim*, 234 Ariz. 105, 110 (P15), 317 P.3d 646, 651 (Ariz. Ct. App., 2014) (context gives meaning).

(A)(1)(b) – Data or material developed by university personnel or contractors whose release would be contrary to the best interests of this state;

(A)(1)(c) – Information provided by a contractor;

(A)(1)(d) – unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews;

(A)(2) – Historical records; and,

(A)(3) – Donor records.

A.R.S. §15-1640(A). However, "Any exemption provided by subsection A of this section shall no longer be applicable if the subject matter of the records becomes available to the general public." A.R.S. §15-1640(C).

In this matter, there are no trade secrets, contractor information, historical records or donor records at issue. Nor is any unpublished research data, manuscripts, preliminary analyses, or drafts of scientific papers ***associated with ongoing research*** at issue.[7] The trial court also adopted E&E's argument that unpublished current research plans and peer reviews sought by journal editors of proposed publications should also be withheld.[8] So, what's left?

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[7] E&E has argued throughout this matter that ongoing research and prepublication peer review must be protected and should be withheld (*see* Exhibit 1), a position the trial court adopted (*see*, ROA 76 Ruling March 24, 2015, Finding 3) and which is not at issue.

[8] *See preceding footnote.*

On remand, the trial court had before it, "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary" of work that was no longer ongoing, either because it was abandoned, completed or published. (*See*, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, 2015 Ariz. App. Unpub. LEXIS 1468 (P18), 2015 WL 7777611 (Ariz. Ct. App. 2015)). These records appear to fit within categories (A)(1)(b) and (A)(1)(d) but are also "subject matter" that has already become available to the general public. Reflection on the purposes of the subsections results in a conclusion that the records E&E sought must be disclosed. This material is not the secret sauce protected under the "trade secrets" banner.

1. The Legislature Intended to Protect Intellectual Property, not jobs, commentary, or emails.

This Court will first examine the statute's language to determine if it has a plain meaning and clearly reflects the legislature's intent.[9] A.R.S. §15-1640(A)(1) states that trade secrets as defined in A.R.S. §44-401(4) are "not available to the public." §44-401(4) states:

> 4. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that both:
>
> (a) Derives ***independent economic value***, actual or potential, from not being generally known to, and not being readily ascertainable by

[9] *Estate of Braden v. State*, 228 Ariz. 323, 325 (¶10), 266 P.3d 349, 351 (2011).

> proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(*emphasis added*). We emphasize that, by using the term "trade secrets," the Legislature was prohibiting release to economic competitors the specific kinds of information within the four corners of the public records that have "***independent economic value***." In other words, and notably the words of the Legislature, protection of intellectual property. Least this not be crystal clear, the Court might look to the legislative history. The sponsor of the bill which became §15-1640 states on the record that the statute is intended to protect "intellectual property" belonging to a contractor that wants to protect clinical trial information.[10] The Senate Committee also heard testimony explaining "While this is a great economic tool, we are just dealing with open records."[11]

We introduce the legislature's purpose of §1640 trade secret protection in order to understand the intent of the legislature's protection of (A)(1)(b) and (A)(1)(d) records. "Statutory terms must be interpreted with reference to the

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[10] *See*, Senate Committee on Commerce and Energy can be accessed at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10606&meta_id=196906 (last visited May 19, 2017) at 13:08 minutes.

[11] *Id* Ken Quartermain at 18:21 minutes.

surrounding language."[12] This Court has routinely applied two closely related canons of statutory interpretation – *noscitur a sociis* and *ejusdem generis*.[13] The former dictates that a statutory term is interpreted in context of the accompanying words[14] while the latter, *Ejusdem generis*, dictates that "general words [that] follow the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class."[15] A.R.S. §15-1640(A)'s language, "a trade secret as defined in section 44-401 or that is either [(A)(1)(b) or (A)(1)(d)]:" places the (A)(1)(b) and (A)(1)(d) language into the same "class of things" that, under the canon of *Ejusdem generis*, must be of the same general nature or class as trade secrets.

In the instant case, application of the canons means the "data and material" developed by persons employed by the university (*see* (A)(1)(b)) and the "unpublished research data, manuscripts, preliminary analyses, [and] drafts of scientific papers"] (*see* (A)(1)(d)) must contain intellectual property that, if made public, have "***independent economic value***" to others, including academic

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[12] *State v. Nereim*, 234 Ariz. 105, 110 (¶15), 317 P.3d 646, 651 (Ariz. Ct. App., 2014).

[13] *Id. and see*, *Estate of Braden v. State*, 228 Ariz. at 352 (§ 13).

[14] *See Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa Cnty.*, 92 Ariz. 231, 235-36, 375 P.2d 719, 722 (1962).

[15] *State v. Barnett*, 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984).

competitors. This explains the inclusion of subsection (C) that disallows withholding the subsection (A) records "if the subject matter of the records becomes available to the general public." A.R.S. §15-1640(C). Once made public, the intellectual property becomes available to all, including academic competitors, and loses its "independent economic value."

2. The "Subject Matter of the Records" are the ideas with which the IPCC Study was Concerned.

At the heart of this matter, so the Board argues, is the scope of the relief provided by §1640(C), and it's "catchall" phrase. E&E agrees that the phrase "subject matter of the records" is sufficiently ambiguous that the civil bar will benefit from this Court reflecting on §1640(C), as it applies to A.R.S. 39-121, and as it applies in this matter.

The Legislature does not define "subject matter" in either A.R.S. §15-1640 or A.R.S. 39-121 and a review of all Arizona's Revised Statutes fails to identify any operational definition under any statute. It is, however, a common term used throughout the statutes and the common law and has been discussed by the Federal courts. In ascertaining its meaning, a "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734

(1973). In addition to such authority, this Court may wish to look to common definitions[16] and then to the context of the term as used in the statute.

Black's Law Dictionary, cited to by Arizona courts 861 times over the past 123 years, defines the term as: "the subject, or matter presented for consideration."[17] The Oxford English Dictionary, cited 76 times in the past 81 years, defines "subject matter" as "that with which thought, deliberation, or discussion, or a contract, undertaking, project, etc., is concerned; that which is treated of or dealt with."[18] The Random House Dictionary, cited to 84 times over the past 50 years, defines the term as meaning "the subject or substance of a discussion, book, writing, etc. as distinguished from its form or style."[19]

In operational terms as regards the "subject matter of the records" *sub judice*, it is "that with which thought, deliberation, or discussion, or a contract, undertaking, project, etc., is concerned; that which is treated of or dealt with," *i.e.*, the subject matter of E&E's public records request, to wit, the subject matter of:

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[16] *W. Corr. Group, Inc. v. Tierney*, 208 Ariz. 583, 587, 96 P.3d 1070, 1074 (Ariz. Ct. App. Aug. 31, 2004) ("To determine the plain meaning of a term, we refer to established and widely used dictionaries.")

[17] Black's Law Dictionary, West Publishing, (St. Paul, MN 1990).

[18] "subject matter, n.". OED Online. March 2017. Oxford University Press. http://www.oed.com/viewdictionaryentry/Entry/192713 (accessed May 12, 2017).

[19] The Random House College Dictionary, Random House, (New York, 1984).

> "records related to climate change research and publication"[20]

> "an inventory in whatever form it is easiest for the University to provide of (a) all requests for information received in the past approximately 6 months, and (b) all University correspondence to those parties requesting information over that period of time, stating that it has completed its response to those requests."[21]

> "Any correspondence . . . between Jonathan Overpeck . . . and Thomas Stocker, dated during the four-month period of February 2010 to May 2010, inclusive."[22]

As Justice Marner has explained, the vast majority of the records sought are the "prepublication material for the IPCC" [Intergovernmental Panel on Climate Change]. As he described it, "[I]sn't that the chief gate that you're asking me to open? . . . Within the scope of this lawsuit, though, isn't that – isn't that the main gate?"[23]

And, what is that subject matter, as described by the trial court and as directed for review by this Court? It is the "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary" of the IPCC report and related commentary and work on climate change. The IPCC report is

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[20] E&E Legal request of December 7, 2011, ROA 30, EP 10.

[21] E&E Legal request of May 31, 2012, ROA 30, EP 114 (seeking records to see whether the University was slow walking the December 7th request).

[22] E&E Legal request of August 6, 2012, ROA 30, EP 16.

[23] Feb 6 2015 Merits Hearing transcript, EP 55-56.

not research, was not conducted under any form of grant by the University and certainly contains nothing having "independent economic value" since the only grist for the report are previously published, peer-reviewed journal articles.

B. The Structure of A.R.S. §15-1640 Establishes the Purpose of the Statute and resolves latent ambiguities.

The statute created another ambiguity by use of the phrase "data and material" in §1640(A)(1)(b) and "data", etc. in (A)(1)(d). This Court can resolve this ambiguity by examination of the structure of subsection (A) and (C), a structure used by the trial court, as discussed *infra*. "If the operative text is ambiguous when read alongside related statutory provisions, we 'must turn to the broader structure of the Act,'" *Hernandez v. Williams*, 829 F.3d 1068, 1073 (9th Cir. Ariz., 2016) (citing to *King v. Burwell*, 135 S. Ct. 2480, 2492, 192 L. Ed. 2d 483 (2015)).

Section (A) exempts several categories of records and the structure of that section into categories illuminates the intent of the legislature. First, the statute divides "trade secrets" from other "information or intellectual property." The latter it divides into four core categories, (a) unfunded proposals; (b) the university's data or material; (c) information or property controlled by terms and conditions of a contract; and (d) unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews. All of these share one common feature – at some point in time they have

had "independent economic value" that deserves protection. Subsections (a) and (c) are not at issue in this matter, so we need only look to see how the structure of the section distinguishes the (b) "data and material" subject to a *Mathews* "best interests of the state" test from the (d) "unpublished research data", etc., that is simply barred from release.

Information that has independent economic value does not remain in that state forever. *Cox Ariz. Publications v. Collins*, 169 Ariz. 189, 201, 818 P.2d 174 (Ariz. Ct. App. 1991) ("We find nothing in those cases to indicate that investigative materials should forever remain confidential simply as a result of its original characterization as such."). As Dean Rychlak explained, "once research is published, it is beneficial for the entire academic community to be able to examine how that research was conducted." Rychlak Affidavit, ROA 35 EP 226 (¶¶ 14 & 28). Professor Ferrara agrees with Dean Rychlak, "My experience as an academic convinces me that the release of records after research has been published will not chill academic research, but may improve the quality of future academic endeavors." Ferrara affidavit, ROA 35 EP 244 (at ¶ 23).

The difference between subsection (b) and (d) turns on whether the "data and material" to be protected have become stale and no longer have sufficient independent economic value to deserve absolute protection. The existence of subsection (b) suggests that subsection (d) "data and material" eventually graduate

out of subsection (d) and into (b), having lost a high level of independent economic value, *i.e.,* having become stale.

For example, plans for future research have a high level of independent economic value until such time as those plans are abandoned or otherwise grow stale. The same is true for unpublished research data, manuscripts, preliminary analyses, and drafts of scientific papers. Once the final research reports associated with such "data and material" is published, it too becomes stale.

The one element of (d) to which the "stale" approach does not apply is prepublication peer review. Unless released by the journal, the common peer-review agreement is to keep the peer review forever confidential. The purpose for this is obvious. One does not obtain honest reviews if the reviewer knows his/her comments will become public. There is never an independent economic value in a peer review. It is simply something one does not disclose. The remainder of subsection (d) material is of like character (one does not disclose it), but only until it becomes stale.

Thus, the structure of Section (A) imposes the legislative purpose. One simply does not disclose subsection (d) records while they have independent economic value, *i.e.*, while they reflect planned or ongoing research. Once they become stale, they graduate to subsection (b) which applies the *Mathews* test. And, once the subject matter of the records becomes available to the general

public, the "data and materials", having graduated from (d) to (b), now graduate to (C) and must be released without consideration of the *Mathews* test.

C. The Records E&E Sought Contain Subject Matter that has become Available to the General Public.

With regard to the records at issue in this matter, beyond question they are stale. As the Board has noted, the material sought is associated with a 2007 report not only long-published, but already superseded by a more recent (2014) report.[24] Further, it is not research, much less research conducted by the University. The IPCC reports are based exclusively on peer-reviewed papers. The IPCC report is merely a compendium of other published work. It contains no trade secrets, no secret sauce, nothing that creates "independent economic value" subject to protection under §1640. The vast majority of emails sought by E&E never had any independent economic value as, for the most part, they are either commentary or prepublication discussions of previously published reports. They constitute subsection (C) records – subject matter that has become available to the public.

Notably, because the trial court did *Mathews* balancing on all emails, this Court may not need to interpret §1640(C), all potential disclosures having been resolved under §1640(A)(1)(b).

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[24] Feb 6 2015 Merits Hearing transcript, EP 20.

III. The Court applied the Construct of §1640.

A. Initial Application of §1640

Taking the parties' extensive §1640 arguments into consideration, the trial court ordered the Board to prepare a privilege log that required identification of documents into one of nine categories, five of which mimic the §1640 categories and four others which are not governed by §1640.[25] ROA Doc. 64.

On initial findings, the trial court adopted E&E's position that certain §1640(A)(1)(d) categories of data and materials should not be disclosed. March 24, 2015 Ruling, ROA 76 (Findings 3 & 5). As discussed above, §15-1640(A)(1)(d) disallows disclosure of non-stale ongoing research. Table 1 provides a comparison of the Judge Marner categories 2, 3, and 4 with the §1640(A)(1)(d) categories, showing the trial court hewed to the statute.

Table 1

§ 15-1640(A)(1)(d) Categories Exempt from Disclosure	**Marner 11/17/2014 Categories the Trial Court Allowed to be Withheld**
• unpublished research data, • manuscripts, • preliminary analyses, • drafts of scientific papers	**Finding 3** (2) ongoing research (3) prepublication research expected to be published
plans for future research	(None identified by the Board)
prepublication peer reviews	**Finding 5** (4) Prepublication peer review

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[25] The following Marner categories are not covered by §1640d: (1) Not public records; (5) Student/personal information; (6) Non-work personal correspondence; and, (9) Otherwise withheld under law. As E&E argued early and often, all of these should have been and were properly ordered withheld.

E&E asks this Court to take careful note that Categories 2, 3 and 4 are not empty sets. The Board specifically identified records associated with ongoing research and materials associated with pending publication, as well as formal peer-reviews. E&E never disputed that these records should be withheld and the trial court found that they were properly withheld. The Board misrepresents this fact to this Court, claiming that "A literal application of A.R.S. §15-1640(C), as requested by E&E, however, would mean that peer review materials lose protection after publication." Appellants' Opening Brief at EP 23. As explained immediate above, this is balderdash.

The Board misdirects this Court with a second statement regarding the trial court's findings. It claims that Findings 5 and 14 are "inconsistent" and thus clearly erroneous. *Id.* at EP 23-24. Finding 5 states:

> "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."

ROA 76 EP 3 (*emphasis added*). Finding 14 states:

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

ROA 123 EP 2 (*emphasis added*). The trial court made Finding 5 in its March 24, 2015 ruling (ROA 76). It made Finding 14 in its June 14, 2016 ruling – a ruling

made on remand that dealt exclusively with "emails which were identified in the initial and supplemental logs as prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary." ROA 123 EP 4. In its Finding 14, the trial court signaled that it had already addressed "peer-review material" and that such materials were not within the collection of "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary" to which Findings 6 – 25 applied. Findings 5 and 14 are not inconsistent, they are complementary, the former addressing one set of records the latter another, different set.

We turn next to grant proposals. Marner Category 2 records are those associated with ongoing research, an activity that commences with articulation of research plans, includes grant requests, and ends with either publication of results or abandonment of the work.[26] E&E has argued from day one that these records should be withheld and the Board was given every opportunity to identify Category (2) records. The Board now comes to you and argues that the trial court erred by ordering release of documents related to grant proposals that were not funded. [ROA 70, EP 45-46; MH-18-7060, 7074, 7169].

An examination of the table entry for these three documents shows that the

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[26] *See, e.g.*, ROA 46 EP 39 & 52 (identifying records that should be withheld and explaining the research process).

Board placed them in Category 8 – those subject to the *Mathews* test. They claim that the proposals were "built" on (used as the starting point) in subsequent proposals. If these documents contained independent economic value that was still active, the Board should have identified them as under §1640(A)(1)(a) protection and under Category 2 (ongoing research). The Board did not. Having failed to do so at the trial level, they waived the protection[27] and opened the records for review under §1640(A)(1)(b), the *Mathews* test.

B. Application of §1640 on Remand

On remand, the trial court was directed to apply the *Mathews* test to "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary,"[28] not associated with ongoing research. These records made up Categories (7) and (8). Judge Marner further segmented these two categories in his final ruling, now on appeal, through his making of an addition 20 findings. Those findings are associated with both §1640(A)(1)(b) (subject to the *Mathews* test) and §1649(C). The (A)(1)(b) findings are listed in Table 2, arrayed

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[27] *See*, *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 374, 93 P.3d 1086, 1090 (Ariz. Ct. App. Div. 2, 2004) ("because the Amparanos did not raise this argument below, we will not reverse the trial court based on it. *See Hahn v. Pima County*, 200 Ariz. 167, P 13, 24 P.3d 614, 619 (App. 2001) (failure to raise issue in trial court constitutes waiver of issue).").

[28] *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, 2015 Ariz. App. Unpub. LEXIS 1468 at P18.

next to the (A)(1)(b) criteria.

Table 2

§ 15-1640(A)(1)(b)	**Marner 11/17/2014 Categories the Trial Court Ordered Disclosed**
(A)(1)(b) disclosure of this data or material would be contrary to the best interests of this state	(8) withheld under the *Mathews* test Finding 25: Board "did not specifically identify any substantial and/or irreparable private or public harm that will result from disclosure of the subject emails" Finding 13 (discussions and analysis of publicly funded papers and studies) Finding 14 (contain no ongoing research, peer-review material or identifiable prepublication materials)

Judge Marner also addressed the conditions under which §1640(C) would apply. It is here that he applied the "subject matter of the records becomes available to the general public" test, finding the Category 7 records associated with now published papers and reports are not subject to withholding. *See* Table 3.

Table 3

§ 15-1640(C)	**Marner 11/17/2014 Categories the Trial Court Ordered Disclosed**
(C) non-exempt as the subject matter of the records has become available to the general public	(7) critical analysis to subsequently published reports including, but not limited to, the IPCC Assessment Finding 8 (published articles referenced, revised and/or supplemented) Finding 10 (edits/revisions to articles that were subsequently published) Finding 11 (data used to support subsequent publications) Finding 12 (data publicly available for decades)

Notably, he applied the *Mathews* test to this category of documents as well, finding that they satisfied both (A)(1)(b) and (C) requirements.

Because the trial court met the *Lee v. Kemna*[29] test and did "substantially make the basic showings" required by law, this Court can only find that the trial court did in fact consider and properly apply A.R.S. § 15-1640, the Arizona research exemption to the Public Records Act.

IV. Misapprehension of Federal Rules

Again in error, the Board misapprehends the meaning and scope of a federal rule regarding public records disclosure under the federal Freedom of Information Act (FOIA). Because the Federal FOIA does not reach beyond final research reports and the data on which the research is founded, it does not reach prepublication critical analysis, unpublished data, unpublished analysis, unpublished research, unpublished results, drafts and commentary. These items are not "exempted" by federal rule. They are never covered by federal rule.

The purpose of the Federal FOIA is "to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). It is an authority that gives the federal citizen the ability to see how the federal government works. Where the federal government uses public records from a non-

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[29] 534 U.S. at 366-367.

federal entity, the federal citizen has the right to see those public records. In the case of academic research, the federal government does not use "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary" – the public records at issue in this matter. Thus, the Federal rules do not make those kinds of records available to the federal citizen.

The Board fails to recognize the fundamental difference between the purposes of the Federal FOIA and a state public records act. The former opens Federal activity to public view, and nothing more. State public records acts open State activity to public view. If the Court (or better, the Legislature) were to fashion a state approach based on the Federal one, then any State record that explains how state government works would be required to be disclosed, including "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary". In fact, the "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary" of federal scientists working at federal installations are subject to FOIA and withheld, if ever, only rarely and only in part.[30]

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[30] The Federal FOIA allows withholding personal information and "deliberative process" information, but only that. Of the "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary," only those parts of drafts and commentary <u>in the form of policy recommendations</u> are withheld. Arizona does not make a deliberative process exemption available to

Examination of Federal rules demonstrates the error the Board makes in thinking the Federal FOIA rules exempt state "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary." They don't. Their scope simply does not reach these state records.

Section 2 CFR 200.314(e) addresses what a "non-Federal entity" must disclose in response to a federal FOIA request.[31] The only records at issue under §200.314(e) are those "that were used by the Federal Government in developing an agency action that has the force and effect of law." *Id.* at § 200.314(e)(1). The purpose of the 2 CFR 200.314(e) is to assist the public in the Federal rulemaking process. Its purpose is to expose "how the federal government does its business," not how the non-federal entity does its business. That, the federal government leaves to states or the non-governmental entities themselves.

The federal courts have held that the 15 U.S.C. 3710a protections, under which 2 CFR 2003.14(e) rule is promulgated, are "coterminous with FOIA Exemption 4". *Pub. Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37,

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most government workers, a fundamental difference between the Federal FOIA and the Arizona Public Records Act.

[31] *And see*, Federal Technology Transfer Act, 15 U.S.C. 3710a(c)(7)(A) (protecting trade secrets or commercial or financial information that are "privileged or confidential" under a cooperative research agreement held by a non-Federal party participating with the federal government, as cited in 5 U.S.C. 552(b)(4).)

43 (D.D.C. 2002). "Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[32] As the Department of Justice explains:

> For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit in *Public Citizen Health Research Group v. FDA*,[33] has adopted a "common law" definition of the term "trade secret" that is narrower than the broad definition used in the Restatement of Torts. The D.C. Circuit's decision in *Public Citizen* represented a distinct departure from what until then had been almost universally accepted by the courts -- that a "trade secret" encompasses virtually any information that provides a competitive advantage. In *Public Citizen*, a "trade secret" was more narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[34] This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process.[35]

In simpler terms, the Federal rule on trade secrets (and the like) is much narrower than the Arizona statute. If Arizona adopted the Federal Exemption 4, it would not

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[32] Department of Justice Guide to the Freedom of Information Act, Exemption 4, p. 263. (*accessed* May 23, 2017).

[33] 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[34] *Id.* at 1288.

[35] *Id.*, *accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001) (reiterating the *Public Citizen* definition and emphasizing that it "narrowly cabins trade secrets to information relating to the 'productive process' itself").

protect the "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary."

Because of its failure to understand either the purposes or reach of the Federal FOIA, the Board ends up asking this Court to legislate to remove §15-1640(A)(1)(b) and (C) from the statute. As Judge Marner explained, the Board wants "creation of an academic privilege exception to ARS §39-121. This is a proposition more properly made to the legislature rather than the courts." Final Ruling, ROA 123 EP 4.

V. The Trial Court's Application of the *Mathews* Test was NOT Clearly Erroneous.

The Board argues that the trial court's conclusions of fact were clearly erroneous and thus should be overturned. Realizing they were unable to mount a convincing argument on that issue, the Board also claims this Court has discretion to redo the massive effort already completed by Judge Marner. E&E addresses these two issues in this section.

A. The Trial Court's Factual Findings are Without Error.

The trial court made 25 factual findings. The Board argues that the 24th and 25th findings are in error – that they are "clearly erroneous." They are not.

1. The Standard of Review

This Court has already spoken to the legal standard to be applied to the public records at issue. *See*, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*,

2015 Ariz. App. Unpub. LEXIS 1468 EP 7 & 9, at P13 & 18 (this Court ordered the Superior Court to exercise independent judgment to determine whether withholding the public records was necessary to prevent "substantial and irreparable private or public harm."). To be clear, the trial court was ordered to make factual findings.

"In reviewing findings of fact, this Court must recognize a trial court's findings of fact unless they are clearly erroneous." *Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991) (*emphasis added*), *citing to* Rule 52(a), Ariz.R.Civ.P. A Court will not disturb the trial court's factual findings "unless they are clearly erroneous, meaning that they are unsupported by substantial evidence." *Felder v. Physiotherapy Assocs.,* 215 Ariz. 154, ¶ 72, 158 P.3d 877, 891 (App. 2007); *see also Associated Aviation Underwriters v. Wood,* 209 Ariz. 137, 171 (¶ 107), 98 P.3d 572, 606 (App. Div 2. 2004). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *Gravel Res. v. Hills,* 217 Ariz. 33, ¶ 14, 170 P.3d 282, 287 (App. 2007). If reasonable people "might differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial." *Ariz. Chuck Wagon Serv., Inc. v. Barenburg,* 17 Ariz. App. 235, 236,

496 P.2d 878, 879 (1972).[36]

Primarily at issue is finding 25: "AzBOR did not specifically identify any substantial and/or irreparable private or public harm that will result from disclosure of the subject emails." June 14, 2016 Ruling, ROA 123 EP 3. The trial court explains its final finding with specificity, both in other findings and in text. Findings 20 & 21 indicate both parties offered evidence regarding the impact on higher education in Arizona and throughout the country. In reviewing this evidence, the trial court concluded:

> 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,[FN] 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.
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> > FN. 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.

June 14, 2016 Ruling, ROA 123 EP 4. Under the rule of *Ariz. Chuck Wagon Serv.*, because the Board and E&E differed as to the effect of disclosure, the trial court's finding of no substantial and/or irreparable private or public harm from disclosure

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[36] This Court has favorably cited to this line of cases: *see*, *DeSantiago v. Pargas*, 2009 Ariz. App. Unpub. LEXIS 1518, *19 (Ariz. Ct. App. 2009).

was based on substantial evidence and thus was not clearly erroneous. A brief review of the evidence in the following section documents the soundness of the trial court's decision.

2. The *Mathews* Analysis

The Board raises five issues which fall under a claim of necessity in confidentiality in academic email communications, arguing that the trial court was clearly erroneous in its findings. Because E&E offered more compelling counter evidence, the trial court had no option but to find substantial evidence that disclosure of the emails would not cause substantial and/or irreparable private or public harm.

a. There is No Academic "Presumption of Confidentiality" Privilege nor a Need for One.

The Board wanted the trial court to adopt a "presumption of confidentiality" in faculty emails. Def. Opening Memorandum (ROA 37, EP 21) and renews that plea before this Court. Under Arizona law, however, "the promise of confidentiality standing alone is not sufficient to preclude disclosure." *Moorehead v. Arnold*, 130 Ariz. 503, 505 (App. 1981). An individual's desire for confidentiality to keep public records from the public's view does not present the material harm necessary to allow withholding public records. *Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. at 257-258. Nor is there specific, material harm once investigative work is stale. *Cox Ariz. Publications v. Collins*,

169 Ariz. 189, 201, 818 P.2d 174 (Ariz. Ct. App. 1991) ("We find nothing in those cases to indicate that investigative materials should forever remain confidential simply as a result of its original characterization as such."). All of this reaffirms the legislature's enactment of a strong bias toward disclosure and the Board's recognition thereof.[37]

b. The Board's Concern about Confidentiality is Groundless

The Board trots out Vicki Chandler's declaration as evidence that confidentiality among academics is vital. Her declaration focuses on her fear that research money will dry up if the Board releases emails. Dr. Chandler's declaration is without merit for the same reason that Dr. LaBaer's declaration fails — both argue from the false premise that E&E seeks records from ongoing research. Def. Opening (Trial) Memorandum, ROA 36, Ex. DD at ¶ 12. Dr. Kennedy addresses confidentiality in the context of harassment, admitting, none-the-less that "[s]cientific research and its results should be available for sharing with interested members of the public under most circumstances. Indeed, much scientific progress

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[37] The University of Arizona Computer and Network Access Agreement Policy (IS-700) specifically states that the University offers no presumption of privacy or confidentiality in its email system. They state that files, data and disks are subject to access by the University and that these are also subject to access pursuant to Arizona Public Records statutes (and other authorities). *See* "Computer and Network Access Agreement Policy." Notably, every member of the faculty must agree to abide by this policy or they are not given access to the school's email system.

has been guaranteed by the sharing of research data." ROA 36, EP 448 at ¶ 3. Dr. Nadel's concerns about confidentiality, like Chandlers and LaBaer's, are not grounded in experience, but are hypothetical. Nadel argues that the essential "give-and-take" necessary to research "Nowadays . . . frequently involves electronic exchanges amongst colleagues and collaborators – these interchanges would become impossible if they couldn't be kept private." ROA 36 at EP 502-03, ¶ 5.

More compelling than these Board experts is the University of Arizona's own specialist in Public Records law, Professor David Cuilier, Director of the university's School of Journalism and, among many others awards, the recipient of the "First Amendment Award, Society of Professional Journalists (2010, October). (Honored by the national organization for "extraordinarily strong efforts to preserve and strengthen the First Amendment.")[38] Professor Cuillier's vitae documents his deep academic experience regarding access to public records and he is the most knowledgeable University of Arizona academic on this topic. His take on the need for confidentiality of academic emails:

> "It's just gibberish to say these laws stifle research. These are government scientists funded by taxpayers, and the public is entitled to see what they're

[38] *See* Cuillier Curriculum Vitae (*accessed* May 24, 2017).

working on."[39]

Nor does Chandler, nor any other Board declarant, provide evidence that the routine practice of releasing university emails, including Exhibits 1 & 2 of E&E's trial Reply Brief (ROA 46 EP 58 & 60), have any effect on research funding. How, for example, did these two emails containing data and materials associated with research, some to be done at the University of Arizona and others done by faculty at other institutions, affect funding? The Board has no answer. In contrast, E&E Legal affiant Dean Rychalk and his University Mississippi colleagues are funded through both state and federal grants. He has no concern about future funding and endorses release of faculty emails. ROA 35, EP 226-27 at ¶¶ 28 - 35.

c. Evidence Shows Disclosure of Emails does not cause a Chilling Effect or Loss of Collaboration.

The Board offers the fears of Drs. LaBaer and Alberts that disclosure of the emails will cause a chilling effect that will result in loss of collaboration. E&E experts refuted this and direct evidence on how release of embarrassing emails of Professor Hughes did not alter his productivity or ability to obtain academic collaborators. As discussed at length in E&E's trial court Reply Brief (ROA 46 EP

[39] David Abel, "How public must science be?" Boston Globe, March 19, 2016. (*accessed* May 24, 2017).

50-51), after the highly embarrassing release of emails from an English university, where Professor Hughes was shown to have been a coauthor of a misleading and eventually impeached journal article, his productivity and collaboration was not harmed in any way. This was not a one-off. E&E also placed before the trial court evidence on the release of similar emails of George Mason University Professor Edward Wegman. After release of his emails, he produced the same number of papers (all with collaborators) in the four years before and after the email release. Id. *at* EP 51.

Nor has the Board offered actual evidence of a chilling effect nor offered actual evidence that boorish incivility is a necessary component of academic enterprise, something which Alberts and Nadel suggest. In contrast, E&E has offered evidence of no chilling effect and directly refutes the notion that incivility is an acceptable academic behavior. Professor Ferrara explains:

> "When scholars say that the release of records generated during research may have a chilling effect, they are unlikely referring to research notes or materials. Such records are generally quite mundane, boring, or even incomprehensible to an average layperson. What scholars are more likely to fear is the release of records demonstrating uncivil discourse. The release of such records is likely to embarrass researchers, and to chill such incivility in the future. This is hardly a negative effect of releasing public records."

ROA 35, EP 244 at ¶¶ 26-28. Professor Ferrara's affidavit then gives an example of the kind of incivility that can be found in academic emails, referring to one

from the late Steven Schneider, a Stanford Professor, who called those who disagree with him on climate issues "idiot[s], bozos, and laughably incompetent."

Ferrara ends his affidavit with the normative statement reflecting the views of most academic administrators and the AAUP ethics standards,

> "While a director of an academic unit, I would not condone such boorish behavior in a member of my [GMU] faculty and because at George Mason University such emails are routinely made public, I believe the mere existence of a public records act that would allow discovery of such emails serves as a deterrent for such misbehavior."

Id. at EP 244, ¶ 28.

An honest, ethical and civil academician does not fear that his professional communications may become public. A dishonest, unethical or uncivil one, not so much.

d. Competitive Advantage has been Preserved.

The Board argues that the trial court failed to protect the competitive position of Arizona's universities because "some of the emails ordered produced by the trial court involve plans for possible future research, unfunded grant proposals" and other information that may reduce their competitive position. We have dealt with this issue *supra*. E&E reiterates its agreement that ongoing research, including live plans for future research and non-stale unfunded grant proposals must be withheld. The fact that the Board failed to characterize four of its records as such material and instead placed them in a category subject to the

Mathews test simply means the Board waived the protection those records might have deserved.

e. Recruitment and Retention is not a Problem

The Board alleges that recruitment and retention of top candidates can become a problem if any of its emails are disclosed. They offer not a single example of this actually happening despite years of Arizona universities providing emails under the Arizona Public Records Act. They offer not a single example from any university within the nation. The best they can offer is a rather nasty exclamation by former Rice University Provost Eugene Levy that he would "play the public- records-law-card" if the Board was made to disclose any of its emails. Note, these claims don't apply to any particular class of emails. The Board leaves the Court with the unsubstantiated presumption that release of any emails would cause harm to recruitment and retention. Of course, the Board has released emails for years and yet cannot document any such harm. *See*, *e.g.* June 14, 2016, Ruling ROA 123 at ¶ 22.

The Board leads its argument on this form of harm relying on the declaration of Professor Joshua LaBaer. Dr. LaBaer offers nothing more than fear of harm and no evidence of any kind of actual harm. His concerns are useless to this Court because of the premise of his fears. He states, "I have been advised that the Tucson case in which this affidavit is to be filed involves requests . . . that seek access to,

among other things, email communications among research collaborators concerning ongoing research, completed research, abandoned research and discarded data, including critical and self-critical analysis of ongoing, completed or abandoned projects." ROA 36, EP 459 at ¶ 8. LaBaer's exegesis lumps together the harms of releasing documents associated with ongoing research from the harms of releasing documents associated with completed or abandoned research. In contrast, E&E offers Professor Ferrara's affidavit distinguishing the two kinds of records. "Academics may want to protect records generated while research is ongoing . . . Prior to publication the impact academic research has on public policy is either minimal or nonexistent. On balance, there is little need for the public to access such records." ROA 35, EP 243 at ¶¶ 18-19. He continues:

> "Academics have no valid interest in protecting such records after research has been published, however. At that point, all results are final. Moreover, public policy is heavily influenced by published results of academic research. On balance, the public right to know how researchers came to their conclusions outweighs the interest of researchers in keeping their work secret."

Id at ¶ 20. The fact is, Provosts and Presidents of private universities like Rice have played the "we are private and not subject to any state legislature" card for a long long time. Experience shows it is mere puffery.

Unlike the Board's declarants, Dean Rychlak does not need to rely on a guess about the future. His experience shows that this is not a problem.

> "It has been my experience that there is usually an abundance of qualified applicants for open faculty positions. It is my experience and belief that applicants for faculty positions evaluate competing offers on the basis of funding (both for salary and research), prestige of the institution, and quality of life issues. I have never heard that a qualified applicant for a faculty positions was dissuaded from seeking or taking employment at the University of Mississippi or any other public university because such universities are potentially subject to state freedom of information laws. . . . Private universities offer freedoms not available to public universities, including freedom from public information statutes. I have never heard that this difference between public and private universities has prevented public universities from recruiting and hiring outstanding faculty."

ROA 35, EP 224 at ¶¶ 6-8, & 10.

The Board offers Dr. LaBaer complaint that "knowing that there was a possibility that [his email might become public] would have impacted my decision to move to Arizona as part of my recruitment here." This statement carries no weight for two reasons. As previously discussed, it is based on a presumption that records from ongoing research would be released when no one argues they should. But, it is also a conditional statement. LaBaer does not specify how his decision would have been impacted. There is little suggestion that he chose to move from Harvard to Arizona to get additional prestige. Harvard and the University of Arizona simply are not competitive in that regard. There had to be something else that LaBaer wanted and we have no idea what it was. To presume that whatever that was would be completely overturned by release of old emails on completed research that are not trade secrets with continuing value is impossible from the LaBaer declaration. In other words, the Board has no evidence whatever that

release of old emails would affect recruitment and retention in any manner, not even LaBaer's. Compare that with the direct testimony of E&E Legal affiant Professor Ferrara who makes the point the Board cannot and did not refute, to wit that "such emails are routinely made public" by universities (ROA 35, EP 244 at ¶ 28), that applicants know about such a policy at George Mason University, that and there has been no adverse effect of that email policy on recruitment or retention (*id* at ¶ 29).

Judge Marner had compelling evidence that "the release of the requested emails would not seriously and negatively impact higher education in Arizona and throughout the country." ROA 123 EP 4 validating EP 3, ¶ 21.

f. Faculty can still Correspond in a Confidential Manner

The Board takes issue with the trial court's finding that communications confidentiality among faculty "remains available." The Board makes the false claim that "any" communication between faculty would become subject to disclosure under the trial court's ruling.

Communications regarding peer-review, proposed new work and ongoing work would not be disclosed under existing law. What's more, where a faculty member wishes to discuss something that they believe should not become public, they can pick up the telephone and call their correspondent and that communication will not be subject to disclosure.

As Judge Marner explains, the Board simply wishes this Court would create an "academic privilege exception" that eliminates application of the Arizona Public Records act to university professors. ROA 123, EP 4. Only one state university in the union has extended this privilege to faculty, and that was because it was a public/private university. *See*, *Pa. State Univ. v. State Emples. Ret. Bd.*, 594 Pa. 244, 935 A.2d 530 (2007). Full state universities in Pennsylvania, as in every other state in the nation, are subject to state freedom of information/public records acts. In any event, this desire for a policy change should be directed to the Legislature, not this Court.

B. This Court Should Rely on the Trial Court's Findings.

Under the principles laid out in *Ariz. Chuck Wagon Serv.*[40], if reasonable people "might differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial" and a trial court, having substantial evidence upon which to ground its findings has not offered findings that are clearly erroneous[41].

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[40] 17 Ariz. App. at 236, 496 P.2d at 879.

[41] *Felder v. Physiotherapy Assocs.,* 215 Ariz. at ¶ 72, 158 P.3d at 891 (An appellate court will not disturb the trial court's factual findings unless they are clearly erroneous, "meaning that they are unsupported by substantial evidence.").

Rather than show that E&E offered no substantial evidence, the Board simply reargues the case it made below. It does not challenge trial court finding 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.

ROA 123 EP 3, ¶ 21. Because the Board did not, and could not, challenge findings 21 or 25, it cannot surmount the appellate court's deference to the trial court on factual findings.

Throughout this case, the Board has argued that the *de novo* review of the records must be done at the appellate level. This Court rejected that argument when it remanded the case for *de novo* review by the trial court.[42] Now, the Board renews its plea to have this Court conduct a *de novo* review of the record in this matter. As we explained when last we were before this Court, the Board "asks three more judges to expend significant time reading more than 680 pages of expert reports and associated exhibits, the several hundred pages of exemplar records, most under seal, and the hundreds of pages of arguments raised both at

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[42] The Board renewed its request that this Court conduct the *de novo* review again in its motion for reconsideration made to this court on December 15, 2015. This Court properly denied the motion.

trial and on appeal, only to get this Court to the point at which the trial court has already arrived."[43] To this now must be added the more than 150 pages of trial court argument, transcript and exhibits created upon remand.

The Board bases its extraordinary request on *Meyer v. Warner*[44], suggesting the reviewing court is "not bound by the trial court's findings." This is, at best, a tortured reading of that case. A careful reading of *Meyer* notes that court cited to *Arizona Cent. Credit Union v. Holden*,[45] finding that "the evidence being documentary, we are in an equal position with the trial court to determine the facts." *But*, *Meyer* also cited to *De Santis v. Dixon*[46] for its authority on this point. In *De Santis*, the Arizona Supreme Court made clear, "If there is reasonable and competent evidence to support the findings of fact of the trial court they will be sustained by this court."

VI. The California and Virginia Cases Are Unpersuasive and Improperly Applied.

A. *Humane Society* Supports E&E's Argument

Near the conclusion of the February 6, 2015, Hearing, and noting ARS § 39-121 was enacted long ago [in 1956, *Industrial Comm'n v. Holohan*, 97 Ariz. 122,

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[43] E&E October 1, 2015, Appellate Reply Brief at EP 4.

[44] *Meyer v. Warner,* 104 Ariz. 44, 46-47, 448 P. 2d 394, 396-97 (1968)

[45] 432 P.2d 276, 277 (Ariz. Ct. App. 1967).

[46] 72 Ariz. 345, 349, 236 P.2d 38, 41 (Ariz. 1951).

126 (Ariz. 1964)], the trial court posed to the Board's counsel the question that, if the fear of adverse effects of public record disclosure was real, why has the Board been unable to document any such significant and irreparable harm? In Judge Marner's words, "wouldn't [that harm] have actually manifested with enactment of 39-121?"[47] In response, the Board, citing to *Arizona Bd. of Regents v. Phoenix Newspapers* 167 Ariz. 254; 806 P.2d 348 (1991), suggested that an ASU presidential prospect's mere fear of harm from public disclosure was sufficient to allow the Board to withhold the records. This is a misreading of *Phoenix Newspapers*. That court did not allow Board to withhold some records in order to prevent harm to some of the prospects. Rather, it was concerned about protecting the selection process. Specifically, the Court held "In some cases the publicity attendant to the search ***has proven detrimental to the search process***, resulting in lesser qualified, but thicker skinned, persons applying. The public's interest in ensuring the state's ability to secure the most qualified candidates for the university president's position is more compelling than its interest in, or need to know, the names of all of the prospects." *Id* at 258 (emphasis added). This is a factual finding of actual harm, not reliance on fear; and a prevention of harm to the search process, not the prospects. In final ruling, Judge Marner acknowledged this

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[47] Feb 6 2015 Merits Hearing transcript at EP 84.

distinction. Doc 123, EF 4 at FN 4. In the final call, the *ABOR v. Phoenix Newspapers* Court required the Board to disclose relevant documents at a point in time when the selection process could not be harmed.

The University then offered *Humane Society of U.S. v. Superior Court*, 214 Cal. App. 4th 1233, 1257 (2013) a California case, arguing two points. The first is the Board's claim that the opinions of an academic describing his fear of harm from release of emails (which document the research process) constitute fact of harm sufficient to defeat the presumption favoring disclosure. The second is the Board's claim of a "researcher's privilege." Reliance on *Humane Society* for either proposition is inapposite.

First, the statements of an experienced academic (that there could be harm to the research process) were the only record evidence in that case. In the absence of testimony contradicting the legitimacy of the fears, the court had no option but to consider them as fact from an expert witness. In the instant case, however, E&E presented testimony from six academics documenting a complete lack of harm despite routine, repeated release of emails by their various universities. Nor, in the instant case, has the Board identified any actual, specific harm over the fifty-nine (59) years since codification of A.R.S. §39-121.[48] When expert testimony

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[48] The Board additionally argued that Professor Hughes suffered a reduction in collaboration after release of the Climategate emails. E&E debunked this

documents an effort specifically looking for harm but finding none, an opposing opinion that there could be harm, in the absence of evidence showing harm, even from a seasoned academic, rises to no more than speculation. *Humane Society* acknowledges this, stating that an unsubstantiated fear not supported by evidence is not a basis for denying disclosure of public records. *Humane Society* 214 Cal. App. 4th at 1257.

It is this lack of actual harm from routine release of emails, including the Board's own release of emails over several years (and in this case), that reduces their fear of harm to no more than unsubstantiated opinion. That opinion-based fear does not rise to the level of specific evidence showing "substantial and irreparable harm," the level the Board must display to overcome the presumption of disclosure. Judge Marner followed *Humane Society* and cited specifically to *Arizona Bd. of Regents*, finding that the Board "did not specifically identify any substantial and/or irreparable private or public harm that will result from disclosure of the subject emails." ROA 123, EF 3 and 4 at FN 4.

Secondly, the Board offers *Humane Society* to suggest that California recognizes a researcher's privilege that protects emails documenting the progress

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statement in its Reply Brief ROA 46, EF 50-51. In the five years after publication of the Climategate emails, Hughes published 16 papers, everyone a product of collaboration with other faculty, many at other universities, including an additional paper with Bradley and Mann.

of a research project. In this they err. *Humane Society* categorically states: "The Regents also failed to demonstrate the existence of a 'researcher's privilege' under California law." 214 Cal. App. 4th at 1245. Rather, *Humane Society* stands for the principle that the court (not the government) must examine the public records on a case by case basis, looking for specific information that, if released, would cause more harm to the state than the benefit resulting from disclosure. Please keep in mind, in *Humane Society*, the state was ordered to release a number of documents because the value of their disclosure exceeded the purported harm to the academy. And note, *Humane Society's* standard for non-disclosure: "The burden of proof as to the application of an exemption is on the proponent of nondisclosure, who must demonstrate 'that on the facts of the particular case the public interest served by not disclosing the record ***clearly outweighs*** the public interest served by disclosure of the record.'" *Id* at 1255 (*emphasis* in the original.)

At the February 6th Hearing, E&E used Exhibit 1 (ROA 46, EF 58) of its reply brief, an email the Board released in the instant case, as an example of how an email generated valid, important questions about published reports that could not be asked based on the published work alone. They could not be asked because the factual material in the email (a problem requiring subsampling of reconstructions) never appeared in the published literature, but only in this professional correspondence. Exhibit 2 of the E&E reply brief (ROA 46, EF 60-

64) offers another example of communications that help illuminate issues not directly addressed in published reports and from which serious scientists benefit when made public, but which could not be identified absent access to this email.

Humane Society does not and cannot serve as precedent for denying the public the kinds of valuable insights resident in pre-publication and post-publication academic discussions found in the emails at issue, once the research is completed and published. In this case, the record evidence documents no harm from disclosure of such academic emails. The Board failed to provide a single example of an email whose release would cause harm to the university, or an example of this occurring in the past. "It is not enough to make generalized claims such as . . . impair the privacy and confidentiality interests of persons." *Cox Ariz. Publ'ns, Inc. v. Collings*,App. 175 Ariz. 11, 13 (App. 1998). Yet, all the Board has done is make generalized claims in the instant case.

Nor can the Board point to *Humane Society* to impeach A.R.S. § 15-1640 that categorically requires all related research records be disclosed upon a public records request once "the subject matter" of the research has been made public.

B. The Virginia Case Can Not Apply to the Arizona Statute.

The Board states that in a Virginia case dealing with emails similar to those at issue in the instant case, the trial court ordered the University of Virginia (UVA) to disclose 1,793 emails and then reversed itself. This is not true. On May 24

2011, the court ordered UVA to complete its reviews and release all remaining non-exempt documents within 90 days, some 1,793 emails (5,649 pages). UVA complied with this order.

The Virginia Freedom of Information Act allows a university to withhold public records if those records meet all of seven criteria, to wit:

> Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

Virginia Code §2.2-3705.4. The Virginia Circuit (trial) court and the Virginia Supreme Court limited their decisions exclusively to whether the records met the requirement of having a "proprietary nature."[49] Neither court ever addressed whether even one of the documents (all of which are emails) actually contained "data, records or information," whether that data, records or information was "collected by or for the faculty," whether any such collection was done "in the conduct of or as a result of study or research," whether the study or research was

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[49] *American Tradition Institute v. Rector and Visitors of the University of Virginia,* 287 Va. 330 (Va. 2014).

sponsored or co-sponsored by the university, or whether any of that data, records or information had previously been released.

The Board argues that the Virginia case at law controls this case and offers a "weighty" reason why they should not have to disclose the public records sought. The Board cites to a single sentence in the opinion. That sentence endorses the argument made by E&E in this case and in Virginia, one the Virginia Supreme Court adopted. It held that data, records and information are of a proprietary nature if their disclosure would harm the competitive advantage of the University or its faculty. In discussing the harms to competitive advantage that might be at issue, the Virginia court identified four potential harms: to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.

E&E has dealt with each of these *supra* and, in the words of Judge Marner, "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." ROA 123 EF 3, Finding 21. As the trial court made clear, the Board "did not specifically identify any substantial and/or irreparable private or public harm that

will result from disclosure of the subject emails." Under the *Mathews* test, that they must do to prevail at law in this case. For all the reasons provided in argument above, and as documented in hundreds of pages at trial, the Board did not meet its burden of proof and, for that matter, would not have done so in Virginia.

VII. Disclosure of emails does not harm a Constitutionally Protected Right

A. Academic Freedom is not a Constitutionally Protected Right

In its final subsection, the Board again encourages this Court to make law rather than interpret it. The Board seeks an "academic privilege." Admitting that academic freedom is not an enumerated constitutional right, it attempts to suggest it is an unenumerated right rising out of the First Amendment. As a matter of law, it does not.

The right to free speech is a constitutional right protected by the First Amendment. Academic Freedom is a "right" granted to faculty by a University as a contractual matter. It is a privately obtained benefit accorded it in a private agreement that is not protected by the Constitution.[50] The reason "academic freedom" gains no protection from the First Amendment is based squarely on First

[50] *See*, James Liszka, Dean of the College of Arts and Sciences and Professor of Philosophy, University of Alaska, "Academic Freedom: A Basic Guide" (*accessed* May 28, 2017)

Amendment law, as bedrock black letter law explains. The U.S. Court of Appeals for the Fourth Circuit explains *Sweezy*[51]:

> At best, it can be said that six justices agreed that the First Amendment protects values of academic freedom. However, the justices were plainly of very different minds as to the nature of this "right." And, even if *Sweezy* could be read as creating an individual First Amendment right of academic freedom, such a holding would not advance Appellees' claim of a First Amendment right pertaining to their work as scholars and teachers because *Sweezy* involved only the right of an individual to speak in his capacity as a private citizen.

Urofsky v. Gilmore, 216 F.3d 401, 413 (4th Cir. 2000) (*emphasis added*). The point of *Sweezy* and *Urofsky* is that academic freedom shares with free speech the value of providing a platform for vigorous debate, but differ significantly in the nature of that platform and hence of the source of the "right."

First Amendment free speech concerns are only implicated when speech is made in a public forum. Email is not a public forum because it is not provided "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Only one federal or state case has directly addressed whether email systems constitute public fora. In *Page*, the Fourth Circuit examined a school's website and its email system under the now familiar four-part

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[51] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)

government speech test established in *Sons of Confederate Veterans*, and the similar two-prong test of *Johanns*. *See*, *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008).[52] The determinative issues in these tests, as they relate to email, are whether "private viewers could express opinions or post information" or, more specifically, whether the public "had access to the email facility" to also participate expressively. *Page* 531 F.3d at 285. They did not and as a result the school did not create a limited public forum through an email system. With no public forum there is no First Amendment free speech protection.

As a matter of policy, the idea that the First Amendment offers a professor at a public institution speaking in a public forum a right to keep secret his free speech

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[52] *Page v. Lexington County School District One*, 531 F.3d 275, 281 (2008) ("Whether speech is government speech depends on the government's ownership and control of the message, and the government's ownership and control of the message may be determined from consideration of various factors. We have identified factors such as (1) the purpose of the program in which the speech occurs; (2) the "editorial control exercised by the government" over the message; (3) the identity of the person actually delivering the message; and (4) the person "bear[ing] the ultimate responsibility for the content of the speech." *Planned Parenthood of S. C., Inc. v. Rose, 361 F.3d 786, 792-93 (4th Cir. 2004)* (quoting *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). After we identified these nonexclusive factors, the Supreme Court issued its decision in *Johanns,* which distilled them, particularly in cases involving the government's use of third-party messages, focusing on (1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550,560-62 (2005).").

is an oxymoron. *See* Affidavit of Dean Ronald Rychlak, ROA 35 EP 224-225, ¶¶11-18 (¶14: "Courts have found that silence is a form of speech. Secrecy, however, is not the same thing as silence.")

The Board's citation to *Dow*[53] is equally without merit. As the Board admits, *Dow* involved seeking information during the pendency of research. E&E has specifically agreed that such information is properly withheld. The Board argues that doctoral candidates' communications might contain ideas that they reserve for research many years in the future and that too should be protected, even though the research that spawned those ideas was published and completed a decade ago. E&E is not unsympathetic to this point. But, the Board does not identify a single email that raises this problem. Sensible review of emails should be able to identify those that inculcate nascent research ideas that should be withheld. Based on past experience, however, E&E has never found such an email and the onus is on the Board to provide the Court with such an example and it has not.

B. Transparency in the Academy is Essential to Good Public Policy

The Board never admits that transparency of the academy might be needed. While they spend time attempting to suggest that E&E has nefarious purposes in its requests, they fail to respond to the sad state of academic research today. It's a

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[53] *Dow Chemical Co. v. Allen,* 672 F.2d 1262, 1275 (7th Cir. 1982).

mess. One of the most efficient ways for the public to learn about how their institutions are doing are the states' public records laws. Consider the following.

Of the 4,614 degree-granting post-secondary institutions, 292 offer doctoral programs and 675 offer master's degrees. Respectively, 62% and 41% are publicly sponsored institutions.[54] Of the more than 1.5 million faculty at degree granting post-secondary schools, nearly one million (62.8%) are employed by public institutions.[55] Almost all of these million faculty are subject to public records acts.

A tension arises between public records act transparency and the role of the academic, one exacerbated by an increasing interest of faculty to participate in public discourse on high visibility public issues. In 2014, 86 percent of approximately 300 faculty respondents at one university agree or strongly agree that public engagement should be part of an academic's role.[56] But, 56% believe such activity is not valued by tenure committees and only 35% believe such

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[54] U.S. DoEd., Digest of Education Statistics, Table 317.40, accessed on August 13, 2016.

[55] U.S. DoEd., Digest of Education Statistics, Table 315.10, accessed on August 13, 2016.

[56] Hoffman, Andrew, University of Michigan, "Professors and the Public Debate", accessed on August 13, 2016.

activity is valued by their institutional managers.[57] Further, 41% find such activity time consuming and distracting.

Freedom of information requests add to the burden of academics acting as academics (and not as citizens) within the public forum. In 2015, alone, the University of Illinois received 517 information requests, nearly a third seeking research information or email, text message and regular correspondence associated with issues of clear public interest.[58] The demand for academic transparency appears to have grown with the concern that some academics have failed in their academic honesty, a question not only on the lips of policy activists.

In a recent case at law, the Court raised the point that peer review is not "the bedrock of open government," asking "Why should general citizens have to look at expert panels of peers to perceive that they are being properly ruled?"; "Why does the general public have to trust scientists?"; "Why would we yield to peer review panels?".[59] The court went so far as to give notice that "FOIA is the citizens' right to see what government is doing" and suggested that there might be a need to

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[57] *Id*.

[58] University of Illinois, "FOIA log", accessed on August 13, 2016.

[59] *American Tradition Institute et al. v. Rector and Visitors of the University of Virginia* Civil Docket No. CL 11-3236, Petitioners' Memorandum of Facts and Law, Pet. Exhibit. No. 9, R. at 166 - 167.

balance protection of peer review values against the FOIA rights of openness[60], the two being imperfectly aligned.

These comments are consonant with the public's level of trust in academics. In 1998, 31% of Americans felt that we put too much trust in science. By 2008, that had grown to 41%.[61] In 2014, only half think the scientific information they hear about is generally true.[62] Within this group, only 15% base their trust in the information on peer review. In other words, only 8% of people trust scientific information for the reason that it is peer reviewed.[63] Thirty percent trust scientific information without any basis for that trust whatever.[64]

There are valid reasons the public does not consider peer review an adequate means of ensuring academic honesty, and thus turning to transparency laws as an alternative. Courts have found that peer reviewed publication of science is not a *sine qua non* of admissibility in a court of law.[65] Nor does peer review necessarily

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[60] *Id* at 168.

[61] University of Chicago NORC General Social Survey Trust in Scientists question accessed August 14, 2016.

[62] Castell, Sarah, et al, "Public Attitudes to Science 2014", Ipsos MORI Social Research Institute, accessed August 14, 2016.

[63] *Id*.

[64] *Id*.

[65] *Hasson v. Commonwealth*, 2006 Va. App. LEXIS 225, 229-30 (Va. Ct. App. May 23, 2006).

correlate with reliability.[66] Peer review has failed to screen out papers that offer complete dishonesty. In a single month, one scientific publisher had to remove more than 120 papers that were found to be no more than computer-generated nonsense.[67] In fact, a fictional researcher added fake papers to the Google Scholar database under a fake name making the fake scholar the 21st most highly cited scientist.[68] To show this was not an aberration, researchers at the University of Granada replicated the process and boosted their own citations scores in Google Scholar, uploading six fake papers with long lists to their own previous work.[69] Reporter John Bohannon published in *Science* , his success in getting more than 150 peer-reviewed journals to accept a deliberately flawed study for publication.[70] This is especially disconcerting when studies now show that "most

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[66] S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers pp. 61-76 (1998), Harvard University Press, ISBN 9780674300620

[67] Richard Van Noorden, "Publishers withdraw more than 1120 gibberish papers", Nature, Feb. 24, 2014, http://www.nature.com/news/publishers-withdraw-more-than-120-gibberish-papers-1.14763?utm_content=buffer95c78&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

[68] *Id.*

[69] López-Cózar, E. D., Robinson-García, N. & Torres-Salinas, D. J. *Assoc. Inform. Sci. Technol.* **65**, 446–454 (2014).

[70] John Bohannon, "Who's Afraid of Peer Review", *Science*, Vol. 342(6154), pp. 60-65 (Oct. 2013).

published research findings are false."[71]

Neither the First Amendment nor academic freedom was ever intended to be a shield against the public's right to know what their government is up to. Indeed, to the extent bad science is being supported by taxpayer funds, the public records acts are precisely the means needed and used to ferret out academic misbehavior. As well, they are the means to discover how government scientists do their work.

CONCLUSION

For the reasons offered above, E&E ask this Court to DENY the Board's request for remand and AFFIRM the findings and Order of the trial court.

RESPECTFULLY SUBMITTED this second day of June, 2017.

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[71] Ioannidis JPA (2005) Why Most Published Research Findings Are False. PLoS Med 2(8): e124. doi:10.1371/journal.pmed.0020124, http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0020124.

EXHIBIT 1

Categories to be Withheld	Categories at Issue
▪ Personal information ▪ Protection of student information (FERPA) (only non-facebook information) ▪ Personal home, private or cell phone numbers ▪ Personnel matters and correspondence ▪ Ongoing or planned research ▪ Prepublication peer review	**I. Previously and Subsequently Completed Research** a. Scientific ideas or conclusions b. Draft publications/manuscripts c. Unpublished research data d. Research and data collection procedures e. Data analysis and interpretation f. Potential data sources g. Grant proposals
	II. Faculty Service and Professional Society Activities a. IPCC Communications b. IPCC Chapter edits and discussion c. Discussions other than peer review with regard to professional journal submissions and editing
	III. Communications associated with government policies a. Discussions on policy alternatives b. Political and Public Relations activities
	IV. Non-Research and Non-Service Faculty Activities a. Discussion of others research b. Criticism and complaints of competing scholars and researchers

CERTIFICATED OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached brief uses proportionately spaced Times New Roman 14 point typeface, is double spaced and contains 13,905 words.

Date: June 02, 2017

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CERTIFICATE OF SERVICE

I certify that on the second of June, 2017, I served the above Brief on all counsel of record by electronic mail addressed as follows:

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NOTICE OF INTENT TO CLAIM ATTORNEY'S FEES

Pursuant to Arizona Rules of Civ. App. Proc., Rule 21, Appellee gives notice of an intent to claim attorneys' fees incurred on appeal. This claim for fees is authorized by A.R.S. §39-121.02(B).

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