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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ENERGY & ENVIRONMENT LEGAL INSTITUTE Petitioner/Plaintiff v. ARIZONA BOARD OF REGENTS, *et al* Respondents/Defendants.	Case No. C2013-4963 **PETITIONER'S REPLY BRIEF** [Hon. James Marner]

PETITIONER'S REPLY BRIEF

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 Plaintiff replies to the University's arguments and we assist the Court by offering our views on balancing of the equities, a discussion the order of briefing required we reserve for this reply brief.

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INTRODUCTION

Plaintiff Energy & Environment Legal Institute ("E&E Legal") offers this memorandum for two purposes, (1) to reply to Defendants Arizona Board of Regents' and Teri Moore's (collectively "ABOR") points and authorities as presented in their responsive memorandum; and, (2) to provide a summary of the reasons why ABOR should or should not disclose the public records sought - a "balancing of the equities." The Court will not actually place the presumption of disclosure on one side of a scale and all interests of the state on the other because in some instances, the best interests of the state may demand withholding documents and in other instances the best interests of the state may demand disclosure.

We organize our reply by responding to three themes resident in ABOR's response. ABOR's first theme is a wish to be complete master of its own destiny. It does not wish the public or the Court to know how its form of the government works, the ethics of its faculty or the basis for its presumption of scientific authority. Nor does it want the Court to do what the Court must, conduct *de novo in camera* review of the records ABOR wants withheld. ABOR goes so far as to threaten to dump thousands of records in the Court's lap if the Court won't leave it alone. We deal with these issues in the standard of review in the second section of this memorandum and the question of ethics and professionalism in the third section.

Second, ABOR wants to rewrite the Public Records Act. It wants to turn a "rule of reason" analysis into a "bright line test." It wishes to lay down a few specific criteria that presumptively mean it may withhold public records. Under its theory of the law a professional baseball player would be equivalent to a member of the little league for the simple reason that both play baseball. ABOR wants to take all context out of the equation. We address this in the

third section of the memorandum.

Third, ABOR wants the Court to erase Arizona law and replace it with a Federal statute. ABOR offers a smorgasbord of legal theories intended to avoid the Court's review - the traditional legal tactic of throwing a plate of ideas against the wall to see if any stick. None do. This, too, is addressed in the third section.

The fourth section addresses the irrelevancy of four legal arguments with which ABOR burdens the Court and which can be quickly dismissed. The fifth section addresses on a case by case basis the specific harms ABOR alleges will ensue if held to its obligation to disclose any of the sought public records it maintains. In every case, ABOR fails to offer admissible evidence that there is "substantial and irreparable private or public harm" that would result from disclosure, the high bar ABOR must clear to overcome the presumption of disclosure the Arizona legislature created in its public records act. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P. 2d 1242, 1246 (1984)). ABOR does not refer to a single email now before the Court to show how or why substantial and irreparable harm would result.

We begin this memorandum with the central question, a balancing of the equities in this case.

ARGUMENT

I. The Equities Favor Disclosure of the Records

A. Recognizing the Power of the Scientific-Technological Elite

E&E Legal wishes to place this case in its proper context. To do so, we begin with a portion of President Eisenhower's 1961 Farewell Address to the Nation — one that perfectly

encapsulates the reason we bring this case and the legitimacy of the Arizona public records act's presumption in favor of disclosure, particularly of old and policy-related academic records.

> [T]he free university, historically the fountainhead of free ideas and scientific discovery, has experienced a revolution in the conduct of research. Partly because of the huge costs involved, a government contract becomes virtually a substitute for intellectual curiosity. For every old blackboard there are now hundreds of new electronic computers.
>
> The prospect of domination of the nation's scholars by Federal employment, project allocations, and the power of money is ever present and is gravely to be regarded.
>
> **Yet, in holding scientific research and discovery in respect, as we should, we must also be alert to the equal and opposite danger that public policy could itself become the captive of a scientific-technological elite.**[1]

Note with care, President Eisenhower does not limit his comments to how research may affect public policy, but focuses specifically on the people who do the research, the scientific-technological elite. Our concern in the instant case is precisely that - the scientific-technological elite who's views, biases, activism and activities have become the fundament of major local, state, federal and international policies that affect every sector of our lives.

With regard only to research, Professor Peter Ferrara acknowledges that President Eisenhower's fear has become manifest. *See* Plaintiff's Opening Brief, Ex. 18. Peter Ferrara formerly worked in the White House Office of Policy Development and was an Associate Deputy Attorney General in the U.S. Department of Justice. An Arizona native, he was a professor on the faculty of George Mason University ("GMU") School of Law and directed the International Center for Law and Economics at GMU. He testifies:

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[1] President Dwight D. Eisenhower, "Farewell Address" (1961) (*accessible at* http://www.ourdocuments.gov/doc.php?flash=true&doc=90&page=transcript) (*emphasis in the original. Eisenhower underlined this section of his speech notes and gave heavy verbal emphasis to this sentence.*)

> Throughout my career I have been involved in the formation and implementation of public policy. It is my experience that academic research has a profound effect on the formation and implementation of policy, and is used both by private organizations and those within the government to support various causes. When academic research is conducted properly, it can provide policymakers with a tool through which to develop effective public policy. When academic research is flawed, it is of little use in developing public policy.
>
> Because academic research is only useful to policymakers to the extent it was conducted properly, it is important for those interested in public policy to carefully validate the quality of that academic research. Academic research may be flawed if it is conducted by biased researchers, if proper safeguards are not employed in experimentation, or if data is massaged to fit a particular narrative.
>
> Without access to public records generated by academics, it is difficult or impossible to assess the quality of their work and the impact it deserves to have on public policy.
>
> Academics may want to protect records generated while research is ongoing, because results prior to publication are preliminary in nature and subject to change. 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.
>
> 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. Academics, however, do more than research. They engage in "service" that takes the form of editing professional journals, testifying before state and federal legislatures, and preparing reports such as the chapters for the Intergovernmental Panel on Climate Change ("IPCC") and, as Professor Overpeck has done, provide time and service to politically activist groups. Policy makers draw heavily on these academics' opinions, relying on them as "authoritative." Indeed, courts have gone so far as to lift scholarly opinions to the level of actual facts. *See, e.g., Humane Society of the United States v. Superior Court*, 214 Cal. App. 4th 1233, 1257, 155 Cal. Rptr. 3d 93, 113 (2013). One question before this Court is whether the scientific-technological elite

governing climate policy have behaved in a manner that demands greater transparency and thus the presumption of disclosure of ABOR's public records. As the next section explains, it surely has.

B. Practices of the Climate Elite work against the Best Interests of the State.

Where academics hold biases and those biases infuse their opinions and where those opinions inform policy, the potential for mischief is great. Testimony shows this is a serious problem within the climate change community. We begin with the late Steven Schneider's now infamous suggestion to his colleagues, including Drs. Overpeck and Hughes:

> On the one hand, as scientists we are ethically bound to the scientific method, in effect promising to tell the truth, the whole truth, and nothing but — which means that we must include all the doubts, the caveats, the ifs, ands, and buts. On the other hand, we are not just scientists but human beings as well. And like most people we'd like to see the world a better place, which in this context translates into our working to reduce the risk of potentially disastrous climatic change. To do that ***scientists should consider stretching the truth*** to get some broadbased support, to capture the public's imagination. That, of course, entails getting loads of media coverage.
>
> So we have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of any doubts we might have. This 'double ethical bind' we frequently find ourselves in cannot be solved by any formula. ***Each of us has to decide what the right balance is between being effective and being honest***.[2]

Assistant Director of the federal National Institute of Statistical Sciences, Dr. Stanley Young, explains that this "stretching the truth" has become a problem in climate science.

> With regard to climate change, the current theories and models hide considerable uncertainty and confusion. Attempts to understand systems as complex as climate are fraught with uncertainty. Any data sets examining such systems will show numerous trends, and multiple data points contradicting or reversing those trends.

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[2] Stephen H. Schneider, Prof., Dept. of Biological Sciences and Sr. Fellow Inst. for International Studies, Stanford University, "Don't Bet All Environmental Changes Will Be Beneficial," American Physical Society APS News, 5:8 (1996) (*the first emphasis is in the original, the second is not*).

> It is far too easy for researchers to cherry pick data sets in order to reach conclusions that seem certain, while failing to take into account the contradictory information. This lack of certainty has to be openly acknowledged so that those examining the research can see that a broad range of outcomes is possible, not just a single conclusion. Unfortunately this has not been happening. Instead the trend has been to promote certainty in one direction in the current debate on climate change.
>
> Those engaged in the debate on this subject need to be aware of the levels of uncertainty so that a broad array of policy options can be considered.[3]

The problems in climate change science go well beyond statistics as Dr. Michaels' affidavit makes clear. Dr. Patrick Michaels is a past President of the American Association of State Climatologists, was a research professor of Environmental Sciences at the University of Virginia for thirty years and is now Director of the Center for the Study of Science at the Cato Institute. He was also a contributing author to, and reviewer of the IPCC and its reports. His affidavit reinforces concern about the problems in this branch of (largely publicly underwritten) science and the subsequent need for disclosure of the public records sought.

> Instead of acknowledging criticism, examining it, and taking it into account as scientific theories and models are developed, criticism of the established views on climate change are ignored. This impedes the publication of objective testing of the current climate change models, which is a normal process in science.
>
> As a result, evidence that tends to challenge the current models is being ignored or even suppressed in order to dissuade arguments with the consensus view on climate change. This is especially a problem as some climate scientists have attempted to influence the public debate.
>
> Despite claims that academics merely put forth scientific conclusions, I have found that many in the academic community seek to directly influence or control the debate about public policy. The essence of the scientific process is that the data used to reach a scientific conclusion must be made available in order to test and challenge that conclusion. When forecasts of environmental change fail to be verified in a scientific manner, the forecasts must be modified or abandoned.

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[3] Dr. Young affidavit, Plaintiff's Opening Brief, Ex. 15 at ¶¶ 12-15.

> Debates exist within scientific communities over many scientific theories, even the most rigorously tested. Climate scientists representing the consensus view have not performed straightforward tests of hypothesis on the most recent ensemble of climate models. In fact, the ensemble of climate models used by the United Nations Intergovernmental Panel on Climate Change has demonstrably failed.
>
> This is harmful to the public and to science. As the failure of these models becomes known, and threatened consequences fail to materialize[4], it will tend to discredit all science in the eyes of the public.
>
> To prevent this there needs to be robust debate over the underlying assumptions and data that goes into climate change theories and models. Such robust debate is difficult within the confines of the academy, as the vested interests within the climate scientist community seek to prevent dissenting or alternative views and theories.
>
> Instead such a debate must occur in public, so that there are no backchannel efforts to quiet the debate. In order for the debate to occur the data underlying climate change theories and models have to be available to all. It cannot be hidden away and only known to those within the climate scientist community who have a vested interest in keeping it hidden.
>
> Such data were explicitly withheld from me in my role as a reviewer of the Second Assessment Report of the United Nations' Intergovernmental Panel on Climate Change.[5]

The problems extend further. The scientific-technological elite, against which President Eisenhower warned, have successfully corrupted public policy in two ways. They have imposed their biases on their work and they have blocked the participation and publication of other experts with whom they disagree. Professor Michaels continues:

> [E]vidence that tends to challenge the current [climate] models is being ignored or even suppressed in order to dissuade arguments with the consensus view on climate change. This is especially a problem as some climate scientists have attempted to influence the

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[4] Notably, global temperatures have remained level for the past 17 years despite a continuing growth in carbon dioxide. This, alone, has impeached the climate scientific-technological elite's predictions upon which the IPCC reports and many policies now rest. *See*, http://wattsupwiththat.com/2014/07/03/rss-shows-no-global-warming-for-17-years-10-months/.

[5] Dr. Michaels affidavit, Plaintiff's Opening Brief, Ex. 21.

public debate.

> There have been attempts to place the scientific community squarely on one side of the debate, as though there is no disagreement within the community. Scientists or academics who do publically disagree are treated as though they are not legitimate scientists. This has been done so that a small group within the community of climate scientists can set the terms for public debates over climate change. It allows them to portray legitimate disagreements over the issue as "science vs. anti-science".
>
> With regard to climate change, there has been a steady effort to intimidate or discredit those who do not accept the established orthodoxy. Within the community of academic scientists who work on climate issues, there has been an effort to create an illusion of a consensus that does not exist. Attempts to disagree with this consensus view have resulted in efforts to dissuade academics, scientists, and journal editors from publishing research that disagrees with the accepted view.
>
> It is known that challenging the consensus view can result in harm to ones reputation within the community, and can hinder professional advancement, by impeding the academic publication process. Those who do publish works challenging this orthodoxy, as I have, have been subject to unethical and scurrilous attacks by a cabal of prominent climate scientists. There have been concerted efforts to attack, and restrict public access to such work, and academic journals willing to publish it.
>
> As the climate scientist community has become more rigid and inflexible, the need [for] public disclosure tools like the Freedom of Information Act has grown, in order to prevent the chilling of debate within the community and prevent the suppression of research and data that challenges the consensus view on climate change.[6]

The problem of a scientific-technological elite goes beyond simply the imposition of biases of a small, influential group[7] on the policy debate. As just explained, such an elite can limit its membership and control the scientific debate, thus controlling the policy debate. Professor

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[6] *Id*.

[7] Call them a coterie, a clique, a group or, as Hughes, Overpeck and Mann have named themselves, the "hockey team," it does not matter. The Wegman report to Congress, discussed *infra*, identifies the subgroup of the scientific-technological elite that has controlled publication and peer review within the community of scientists involved in climate change.

Michaels is not alone in understanding this problem. Former Arizona State University faculty member, Dr. Craig Idso, explains,

> I was a faculty researcher in the Office of Climatology at Arizona State University and received a National Science Foundation grant to study urban CO_2 concentrations. I am a member of the American Association for the Advancement of Science, American Geophysical Union, American Meteorological Society, Association of American Geographers, Ecological Society of America, and The Honor Society of Phi Kappa Phi.
>
> Recent efforts by some climate scientists to become more active in the public debates on climate change have displayed a disturbing pathology within the community of climate scientists. There has been an effort by some of the biggest names among climate scientists to chill and curb dissent to their views. Well hidden from the public eye, some climate scientists have used incivility and pressure tactics to force colleagues to fall in line with their views or to force them out of university positions and thus out of academic debates.[8]
>
> These scientists have propounded an alarmist view that an increase in carbon dioxide in the atmosphere would have an exclusively negative effect on the planet and on human civilization. They have attacked and sought to discredit all evidence that might disagree with this view and they have worked to undermine the credibility of any scientists gathering data that challenges their theories.
>
> They have cherry picked their own data in order to publish works that show the outcome they want to push and hide any data they gather which shows contrary results, even long after studies are finished and articles are published.
>
> They have also worked to frame the public narrative on climate changes so that only the solutions they find politically acceptable are considered and that alternative options are deemed to be the work of "fringe lunatics"
>
> To counter this, greater transparency within the academic community is needed. Laws like the Federal Freedom of Information Act and state equivalents are important tools to show the full range of data that research has uncovered, and what data is being cited and what data is being ignored. Transparency is also needed to demonstrate that good science is being done, with real disagreement and debate on climate science issues being allowed to occur.[9]

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[8] This is a reference to the successful efforts to have Professor de Freites fired as a journal editor, discussed at greater length *infra*.

[9] Dr. Idso affidavit, Plaintiff's Opening Brief, Ex. 19.

C. Interests of the State Heavily Favor Disclosure

Beyond the obvious value in disclosure that allows examination of the scientific-technological elite's publicly funded activities and behavior, there are other interests of the state that require disclosure of the records at issue in this case. Arizona taxpayer Russell Cook explains the importance of having access to public records of these academics from the perspective of a citizen seeking to be a participant in the policy debate.[10] In brief, he is concerned about how the University of Arizona will spend the $516 million it requested this year and what "Arizona taxpayers are getting for our money."[11] He recognizes that the Arizona budget is finite and that funds used for climate research cannot be spent on other public projects.[12] He makes a simple yet compelling argument — without access to records showing how the academic portion of the government works, he has no way to determine if the Arizona legislature is wisely spending his tax dollars.

Mr. Cook presents first-hand evidence of the problems Professors Michaels and Idso outlined, the lack of transparency of the science, the biases and the influence of academy and academicians. In Mr. Cook's words,

> Without access to records generated by publicly-funded scientists at the University of Arizona, I cannot adequately determine whether climate research is a good use of taxpayer funds, whether such research is reliable when it may have been skewed due to questionable bias against others scientists' research, whether such research is effective at

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[10] *See*, Cook affidavit, Plaintiff's Opening Brief, Ex. 16.

[11] *Id*.

[12] "It has been reported that climate change policies have already cost the United States in excess of $5 Billion and will grow to more than $50 Billion." *See* Marshall affidavit, Plaintiff's Opening Brief, Ex. 17 at ¶ 14.

> generating good public policy, or whether the legislators and other public employees are being wise stewards of the public fisc.[13]

And, Mr. Cook's concerns extend to more than biases. He wants certainty on the level of integrity exhibited by his state's premier university, a very reasonable demand in light of the problems identified by Professors Michaels and Idso. Finally, Mr. Cook does not entertain these questions with biases of his own. He simply wants the facts and for good reason: "Both faculty whose emails are the subject of this litigation are part of a small coterie of scientists who have taken extraordinary steps to silence anyone, including other academics, who disagree with them. Whether these faculty have engaged in such abhorrent behavior can only be determined through access to their emails. In my view, the best interest of the state cannot be served by allowing a university or its Board of Regents to keep secret information that could exonerate faculty or expose their misbehavior."[14]

There is little legislative history to guide the Court on the intent of Arizona's public records act and it would be inappropriate and outside black letter principles of administrative law to attempt to get a sitting legislator to explain why the legislature created this authority. The overall policy of these kinds of acts, however, deserves some attention.

The Honorable Robert G. Marshall is a Virginia legislator who has authored elements of the Virginia Freedom of Information Act. He sums up the importance of transparency. "As a legislator, I cannot do my job without input from the public on questions of policy and they cannot inform me if they do not have access to public records, including work rising out of universities that is used as the basis for policy formulation. . . . It is my view that it is in the best

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[13] *Op cite*, Cook affidavit.

[14] *Id* at ¶ 21.

interests of every state that policy-related work and communications of faculty be open to the public just as it is for state employees because without this transparency, the public cannot participate in the policy process and the Legislatures cannot adequately monitor the work of these government institutions."[15]

To summarize the need to honor the presumption of disclosure of the public records before this court, all of which are associated with publicly funded climate science and climate scientists: (1) there is a climate scientific-technological elite; (2) it significantly influences public policy; (3) it has behaved badly; (4) Professors Hughes and Overpeck are members of that elite; (5) their work has been influential on the formation of public policy; (6) confidence in the professionalism and integrity of this scientific-technological elite needs to be restored, and if necessary, their behavior needs to be corrected; (7) disclosure of the emails could exonerate Hughes and/or Overpeck; (8) disclosure of the emails could provide greater insight into the status of the science; (9) disclosure will create an incentive for honesty, professionalism and ethical behavior within the academy; (10) disclosure will allow greater public participation in policy formulation; (11) disclosure will assist legislators as they consider the importance of state and local appropriations associated with climate alarmism; (12) the University gains a competitive advantage over other universities by demonstrating it has extraordinary faculty who meet the highest expectations of the scientific and academic community and the public; and, (13) the scientific community benefits from access to the past, unpublished activities, data and knowledge produced at the University of Arizona in this important area of research.

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[15] Marshall affidavit at ¶ 12.

Against this lengthy list of reasons to honor the presumption of disclosure of public records at issue in this case, ABOR offers a list of fear-based opinions, many of which rest on demonstrably flawed assumptions and all of which offer no actual demonstration of harm that is "substantial and irreparable," the standard which they must meet to overcome the presumption of disclosure. Section V, *infra*, documents allegation by allegation that ABOR has no compelling basis for withholding the records E&E Legal seeks. In contrast, as explained in Section V, E&E Legal offers specific facts that show universities that disclose these kinds of emails, including the University of Arizona, have suffered no harm whatever. The balance of the equities is for disclosure of the emails sought in this matter and E&E Legal asks the Court to grant the relief sought in light of its *in camera* review and application of the law to the facts, the subject of the next section.

II. The Court will conduct an *in camera* review to determine whether disclosure of the classes of records is overcome by substantial and irreparable harm to the Faculty or the University.

ABOR attempts to eliminate the Court's jurisdiction, judgment and review through a series of arguments, not one of which has merit.

A. Scope of Review

ABOR wishes to restrict the Court's jurisdiction in this matter by narrowing the scope of review under Arizona rules, limiting the Court's attention to only one of three questions E&E Legal raised in its complaint. This it may not do. The questions that may be raised in a special action are:

(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or

(b) Whether the defendant has proceeded or is threatening to proceed without or in excess

of jurisdiction or legal authority; or

(c) Whether a determination was arbitrary and capricious or an abuse of discretion.

A.R.S. Special Actions, Rules of Proc., Rule 3. In this case, E&E Legal argues that ABOR failed to exercise discretion (disclosure of public records) that the Public Records Act requires; that by failing to disclose documents, ABOR exceeds its legal authority; and that its review of documents and the decisions they made were arbitrary and capricious.

ABOR wants the Court to apply only the third question and in so doing apply a standard of review that does not examine the documents and determine whether they qualify for disclosure, but instead examine whether ABOR's own evaluation was arbitrary and capricious. That is not the applicable standard of review.

B. Standard of Review

This Court must follow the procedure explained in *Griffis*. The determination whether the Public Records Law requires disclosure of a record entails a two-stage analysis. *Griffis v. Pinal County*, 215 Ariz. 1, 5, 156 P.3d at 422 (2007). The threshold determination is whether the document is a public record subject to the statute. *Id*. (quoting *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 536, 815 P.2d 900, 905 (1991)). "If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies and, when necessary, **the court** can perform a balancing test to determine whether privacy, confidentiality, or the best interest of the state outweigh the policy in favor of disclosure." *Schoeneweis v. Hamner*, 223 Ariz. 169, 172 (Ariz. Ct. App. 2009) (emphasis added); (*quoting Carlson v. Pima County*, 141 Ariz. at 491); *and see*, *A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, 188, 42 P.3d 615, 619, (Ariz. Ct. App. 2002) ("**It falls to Arizona courts** to determine case by case, as

the question arises, whether an asserted privacy interest does overcome the [disclosure] presumption.") (emphasis added).

ABOR inappropriately cites to *Bistrow v. Sova (In re Caplan)*, 228 Ariz. 182, 183, 265 P. 3d 364, 365 (Ariz. Ct. App. 2011).[16] That case involved a dispute concerning future principal distributions of a trust and had nothing to do with a Public Records Act matter. The parties disputed whether a court should be allowed to examine trust records *in camera*. In the instant matter, the Court makes that examination as a matter of law. As cited above, ABOR's argument is in error. This Court has both the authority and the responsibility to conduct the balancing test.

There is a point at which the Court will examine the question as to whether ABOR's withholding of the documents was arbitrary and capricious. Plaintiffs have requested costs and fees. If the Court finds that ABOR was wrong to deny access to the public records, that alone is not sufficient to conclude ABOR's actions were arbitrary or capricious, if ABOR made an honest attempt to interpret the law and gave due consideration to the facts before them. See, *Arizona Board of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 806 P.2d 348, 353 (1991) (citing T*ucson Public Schs. Dist. No. 1 v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). Thus, this Court may find ABOR should not have withheld the documents E&E Legal seeks, but that in so doing, ABOR was not arbitrary and capricious and thus E&E Legal may not obtain its costs and fees. E&E Legal argues ABOR was arbitrary and capricious and should be awarded its costs and fees, but that question is not now ripe.

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[16] ABOR cites this case as "In re Esther Caplan Trust". It is, however, properly reported as *Bistrow v. Sova*.

C. Necessity is not the Standard of Review

ABOR argues that it need not release documents where the effort to find and evaluate them under the Public Records Act had been unduly burdensome, unless the release of the records is a necessity. ABOR misstates the law regarding burden or harassment.

Citing to *Lake v. City of Phoenix*, ABOR suggests that the Court can refuse to grant disclosure of documents if the request is unduly burdensome or constitutes harassment. *Lake* makes no such finding. *Lake* states specifically that that unduly burdensome or harassing public records request "can be addressed under existing law." *Lake v. City of Phoenix*, 222 Ariz. 547, 551, 218 P.3d 1004, 1008 (2009). ABOR could have asked E&E Legal to narrow its request and, if denied, could have moved a court to enjoin commencing a review of the documents in the first instance, but they did not. Once ABOR had reviewed the documents, sorted them into what they would disclose and what they would not, and then created a log of the withholdings, it was too late to argue they shouldn't have had to do that work in the first place. Nor does ABOR cite to a single document that, if released, would cause additional burden or constitute harassment of either professor.

The correct citation regarding harassment of the kind alluded to in *Lake* is discussed in *Belo*, a case in which a television station sought police audio tape of a deeply distraught baby-sitter watching her three year old ward die while seeking assistance on the 911 line. The Court held that a transcript was sufficient to meet the needs under the Public Records Act and the equities balanced in favor of the child's parents and the baby-sitter to prevent release of the audio tape. *Belo Corp. v. Mesa Police Dep't*, 202 Ariz. at 187 (*Belo* addresses whether alternative means to comply with the public records act may be used in place of the original form of the

records. They may.)

Necessity of records release is, however, important in balancing the equities, as discussed in the third section below.

D. There is no Issue Preclusion

ABOR argues the Court may not engage in an *in camera* review of the documents due to issue preclusion. They are wrong. For issue preclusion to bar a claim, Arizona precedent requires a finding that all of four conditions exist: (1) that the issue in question was actually litigated in a previous proceeding; (2) that there was a full and fair opportunity to litigate the issue; (3) that there was a final decision on the merits; and (4) that resolution of the issue in question was essential to the prior decision. *Pettit v. Pettit*, 218 Ariz. 529, 189 P.3d 1102 (Ct. App. Div. 1 2008); *Corbett v. Manor Care of America, Inc.*, 213 Ariz. 618, 146 P.3d 1027 (Ct. App. Div. 2 2006); *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 208 Ariz. 176, 91 P.3d 1019 (Ct. App. Div. 1 2004); *Hullett v. Cousin*, 204 Ariz. 292, 63 P.3d 1029 (2003*); Irby Construction v. Arizona Dept. of Revenue*, 184 Ariz. 105, 907 P.2d 74 (App. 1995).

The traditional view of issue preclusion required that for issue preclusion to apply the parties to the action had to be the same as in the original case, or at least in privity with those original parties. However Arizona precedent does allow the use of issue preclusion by a party not part of the original case when it is raised defensively. *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 483, 562 P.2d 360, 363 (1977); *Spettigue v. Mahoney*, 8 Ariz. App. 281, 282, 445 P.2d 557, 558 (1968). Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff previously litigated against another party. *Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo*, 206 Ariz. 447, 79 P.3d 1206, Prod. Liab. Rep. (CCH) P

16845 (Ct. App. Div. 2 2003); *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 62 P.3d 966 (Ct. App. Div. 1 2003).

Defendant cites *Wetzel v Ariz. State Dept of Real Estate*, 151 Ariz 330, 332-34 (App. 1986) and *Di Orio v. City of Scottsdale*, 2 Ariz. App. 329, 331-32 (1965) for its claim that issue preclusion should apply in this case. While these cases support the proposition that that a defendant not part of the original case may use issue preclusion to bar the relitigation of an issue actually decided, ABOR fails to discuss the question of when an issue was actually decided.

The first principle in applying issue preclusion is that the **same issue** is actually being relitigated. For collateral estoppel to bar a party from litigating an issue, the issue must have been actually litigated. *Corbett v. Manor Care of America, Inc*., 213 Ariz. 618, 146 P.3d 1027 (Ct. App. Div. 2 2006). The issue sought to be precluded must be the same as that involved in the prior action. *In re Giangrasso*, 145 B.R. 319, 322 (B.A.P. 9th Cir. 1992). A key question as to whether the same issue is being relitigated is "Does the new evidence or argument involve application of **the same rule of law** as that involved in the prior proceeding?" Restatement (Second) of Judgments § 27 (1982).

The issue in the instant case is whether the ***relevant*** open records law requires the release of public records. Defendant's claim that this issue was decided by the Virginia Supreme Court fails since the court there decided the case based on terms present in Virginia's Freedom of Information Act which do not exist in Arizona law. 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. In contrast, the Arizona standard is "whether privacy, confidentiality, or the best interest of the state outweigh the policy in favor of disclosure." *Schoeneweis v. Hamner*, 223 Ariz. at 172.

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

The most ABOR could argue is that some of the emails E&E Legal seeks (specifically those in custody of both the University of Virginia and ABOR) contain data, records or information "of a proprietary nature." That question, however, is not before this Court. To reiterate, the issue before this Court is "whether privacy, confidentiality, or the best interest of the state outweigh the policy in favor of disclosure."

Because the issue before the Virginia Courts (the proprietary nature of records) is not before this Court, *In re Giangrasso* applies and there is no issue preclusion. Because the same rule of law is not before this Court, the Restatement (Second) of Judgments § 27 applies and there is no issue preclusion.

III. The Court will Apply a Rule of Reason Analysis

A. The Virginia Case does not apply in Arizona

ABOR argues that a Virginia case at law controls this case and offers a "weighty" reason why they should not have to disclose the public records sought. We have explained, *supra*, that the Virginia case does not control this matter. Here we explain further how it is particularly unsuited as a model.

Virginia applies a bright line test. To withhold a public record under its research exception, the University of Virginia was required to demonstrate that each email (or class of emails) met all seven requirements as discussed above. The Virginia courts only examined one criterion, whether the emails contained data "of a proprietary nature." Every email could have contained data of a proprietary nature and still fail to qualify for withholding. Indeed, the vast majority of the emails in that case involved communications among authors and editors of an IPCC report, much like many of the emails in the instant case. The Virginia courts never reached the question as to whether those emails qualified as research or study sponsored or co-sponsored by the University. Of course, they do not. The IPCC report is sponsored exclusively by the United Nations and the World Meteorological Organization.

ABOR cites to two sentences in the opinion, the latter of which is pure dicta. The first sentence endorses the argument made by E&E Legal and adopted by the court as opposed to the argument offered by the University of Virginia. 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. The second sentence suggests that the loss of this competitive advantage is the "overarching principle" guiding application of the exemption.

Whether or not it is an overarching principle, it is not controlling on the question as to whether a University of Virginia email may be withheld. If the email does not contain data, records or information collected by or for the faculty and arising from or used in research or a study sponsored or co-sponsored by the university, then the proprietary nature of the data is irrelevant and the university must disclose the public records. This point is now being contested with the University of Virginia and thus is not settled law under the case ABOR cites.

Despite the inapplicability of the Virginia case, the "principle" of losing a competitive advantage is a valid question that this Court can use in its balancing of the equities. The Virginia case identified four activities that might be harmed by a disclosure: harm (unspecified) 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. ABOR claims harm to the last three of these and we discuss each in turn *infra*.

B. ABOR Must Demonstrate Harm

The California case offers little comfort in this case. First, as discussed further below, ABOR relies on declarations from a variety of individuals, each evincing "fear" of harm but offering not a single example of actual harm from the repeated and voluminous release of emails by ABOR or by many other universities, including the University of Virginia. In *Humane Society*, the Court made clear that unsubstantiated fear not supported by evidence is not a basis for denying disclosure of public records. *Humane Society of the United States at* 1257. Even where a party offers expert opinion on speculative harm, all the Court need do is properly weight that opinion against that of other experts with similar experience who testify there is no harm. Adding to the weight against speculation of harm is the failure to produce any actual evidence of

harm under the conditions that it is speculated would cause the harm. As discussed below, ABOR offers no evidence of harm from its own release of faculty emails and E&E Legal offers evidence of no harm from similar disclosures by other universities. The California case was based exclusively on speculation, a ploy ABOR would like to use in this matter. Here, actual *evidence of no harm* exists, is provided and serves as the basis of E&E Legal's expert affidavits.

C. The OMB Circular does not Apply

ABOR makes another attempt to replace Arizona law with a bright line test, referring to the federal policy discussed in OMB Circular A-110. The obvious first problem with this is that the Court is bound to Arizona law, and cannot replace it with some other rule ABOR happens to like better. The Arizona Public Records Act is more than adequate to protect the citizens' right to disclosure and any interests of the state that demand equal protection.

The second problem with the OMB Circular is that it has a different purpose than the Arizona Public Records Act. OMB's purpose for its circular is to "set forth standards for obtaining consistency and uniformity among Federal agencies in the administration of grants to and agreements with institutions of higher education, hospitals, and other non-profit organizations." OMB Circular A-110*, at* ¶ 1 (1999) (Def. Ex. U).

The third problem with A-110 is that it only applies if no other statute specifically prescribes policies or specific requirements that differ from the standards provided by the circular. *Id*, at ¶ 3. Here the Arizona Public Records Act and case law interpreting it applies and A-110 never has and never will.

Finally, the circular does not reach beyond a narrow set of records, specifically research data. This is akin to the Virginia statute and encompasses only recorded factual material. The

circular's functional purpose is to require federal contractors to supply federal agencies with the actual research data they create or collect. Under the federal Freedom of Information Act, because this data must be supplied to the federal agency, it is within the reach of the public under the authorities of FOIA as that data is considered within the custody of the Agency.

Other kinds of records only held by the contractors, specifically preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues, are not within the custody of the federal agencies and thus are not (always) available under the federal FOIA. Should those kinds of records happen to actually be within federal custody or access, they must be disclosed because there is no exception that protects such information in the federal FOIA.

In this case, all the public records associated with research are within the reach of the Public Records Act, all are within the custody of the government agency and all are subject to the balancing of the equities. As we explain, *infra*, E&E Legal does not seek all such forms of research data and in fact mostly seeks records not even associated with research.

IV. ABOR's Irrelevant Arguments Fail

A. The First Amendment does not protect emails

ABOR cites to *Sweezy* and *Dow* to suggest that the emails at issue in this case are protected by the First Amendment. Under bedrock black letter law, they are not.

The U.S. Court of Appeals for the Fourth Circuit explains *Sweezy*:

> 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*). More significantly, the First Amendment only protects speech in a public forum. We explained this in our Opening Brief (beginning at p. 44) and ABOR has not responded to that argument. We see no reason to repeat those arguments in their entirety, but believe it useful to offer the legal and policy conclusions as a reply to ABOR.

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 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).[17] The determinative issues in these tests, as they relate to email, are whether "private

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[17]*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)."

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.

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 is an oxymoron. *See* Affidavit of Dean Ronald Rychlak, Opening Brief Ex. 14. at ¶¶ 1 & 14-17.

ABOR's citation to *Dow* is equally without merit. As ABOR admits, *Dow* involved seeking information during the pendency of research. E&E Legal has specifically agreed that such information is properly withheld. ABOR 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 Legal is not unsympathetic to this point. But, ABOR 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 Legal has never found such an email and the onus is on ABOR to provide the Court with such an example. We suspect this entire issue is moot.

Finally, ABOR's discussion of the 9th Circuit case *City of Erie* is unpersuasive.[18] If ABOR is attempting to say that the emails at issue are equivalent to dancing naked and that such behavior is protected by the First Amendment, it again runs afoul of the First Amendment forum analysis. Dancing naked is public speech. Emails are not. Further, as discussed, *infra*, the public has a right to know whether faculty behavior is akin to dancing naked, even if done in a

[18] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)

private forum. And, ABOR has offered no evidence whatever that disclosure of records showing how faculty do their work would result in threats to the health and safety of the faculty or their families.

B. There is no Harm to Academic Freedom

ABOR holds academic freedom up as some sort of shield they may use to hide its activities from public view. As we have previously explained, and to which ABOR has not responded, while academic freedom provides "absolute freedom of thought, of inquiry, of discussion and teaching within the academic profession," it does not protect fraud, incompetence, immoral or unethical behavior or incivility.[19] While the academy has a responsibility to discipline itself, this does not replace the public's right to see how the government does its business. It is more likely to police itself under public scrutiny. And, as discussed next, while personnel disciplinary activities are surely not appropriate to release under Arizona law, the facts and evidence of improvident behavior, including emails, are.

We discuss the potential chilling effect on peer-to-peer communications of records disclosure *infra*, documenting that it has not happened and concern about it is nothing more than unsubstantiated fear. On that basis, the "freedom of discussion" is not substantially and irreparably harmed; and, there is no impact whatever on freedom of thought, of inquiry or of teaching, nor does ABOR offer any evidence that there is.

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[19] AAUP Statement on Professional Ethics (2009) (requiring intellectual honesty; respect and defense of findings and conclusions that differ from their own; a duty to not discriminate against or harass colleagues, among others). *See* http://www.aaup.org/report/swtatement-professional-ethics *accessed* 6/4/2014).

C. Ethical Academic Behavior is Everyone's Business

ABOR offers the incredibly self-serving proposition that the public has no business inquiring into the professionalism and ethics of government employees that happen to be professors — that this is the exclusive responsibility of the university. Not even the American Association of University Professors buys that argument. In fact, AAUP proclaims that it "stands ready" to "inquire into complaints [of unethical behavior] when local considerations is impossible or inappropriate." Def. Ex. Q.

ABOR also suggests that Plaintiffs have laid a false trail with regard to professionalism and that E&E Legal provided not one example of such a problem. We direct the Court to Plaintiff's email examples No. 7, 8, and 10-12. In these emails two of Professor Hughes colleagues engage in a clear violation of the AAUP Statement on Professional Ethics with regard to respect, defense of findings and conclusions that differ from their own and a duty to not discriminate against or harass colleagues. Professor Hughes is an addressee on each of these emails and Professor Overpeck was an addressee on one of them. The emails propose several methods of harassment as needed to get a Journal editor fired (de Freitas), boycott a journal and harass editors at still another journal. It is surely in the best interests of the state to know whether whether Professors Hughes and Overpeck encouraged this unethical behavior; participated in it; or, as they should have done, stood up and admonished their colleagues for behavior in clear violation of the AAUP Statement on Professional Ethics.

ABOR lays its own false trail, attempting to diminish the power of Professor of Ethics Michael Krauss' testimony. ABOR argues that investigations into allegations of misconduct should only be done by the university. Fine. The question is not as to whom does an

investigation, the question is as to whether there is evidence sufficient to make an allegation in the first place. Professor Krauss offers a discussion he believes is one with which the Court would be familiar. As Professor Krauss explains,

> I don't believe that a blanket withholding of all faculty emails is needed to avoid chilling discussions on academic activities. Where, after inspection by the Court, there is evidence of serious academic misconduct, I believe, as is the case conceding the crime-fraud exception to attorney-client privilege, the interests of the public must have priority over the privilege."

Krauss Affidavit, Opening Brief Ex. 20 at ¶ 10.

In a final effort to shield its faculty, ABOR holds up the investigation of Michael Mann conducted by Pennsylvania State University as a model that shows why these questions are best left to the University and thus somehow requires emails that may show misbehavior to never be disclosed. The Penn State investigation as a model? Really?

We remind the Court that the same President of Penn State who presided over the Mann inquiry was fired for failure to ensure proper investigations of allegations against faculty. A Penn State investigation exonerated football coach Jerry Sandusky — a man later convicted of pedophilia and who will die in prison. Penn State applied the same investigative process for Michael Mann. It is a two-step process. The "Inquiry Committee" receives allegations and then crafts specific questions to be investigated. It then appoints an "Investigation Committee" that conducts the investigation. As ABOR accurately stated, the Inquiry Committee identified four allegations. This same Inquiry Committee then limited the Investigation Committee's scope to only one issue due to "a lack of credible evidence." MIT Professor Richard Lindzen responded to the Investigating Committee with the following statement: "It's thoroughly amazing. I mean these [three allegations] are explicitly stated in the emails. I'm wondering what's going on.?"

See McIntyre, S. "Penn State President Fired", Climate Audit (Nov. 10, 2011) (*accessed at* climateaudit.org/2011/11/10/penn-state-president-fired/.) In other words, it was a whitewash from the get go.

To add further context to this, we introduce Dr. Lindzen to the Court. Dr. Lindzen holds A.B, S.M. and PhD degrees in Physics and Applied Mathematics from Harvard University. He was the Alfred P. Sloan Professor of Meteorology at MIT from 1983 through 2013, and is a member of the National Academy of Sciences. Dr. Lindzen has been the recipient of numerous awards and honors, including the Nobel Prize, the Jule Charney award for "highly significant research in the atmospheric sciences" from the American Meteorological Society in 1985, and the Distinguished Engineering Achievement Award from the Engineer's Council in 2009. When he questions the validity of an academic investigation, so should we.

The Penn State inquiry on Mann was a whitewash. That is its proper characterization. Whether or not it shares that intent, ABOR wants the freedom to do the same thing and more. It doesn't even want to allow the public to learn about misbehavior so no one can make allegations and thus they won't ever have to investigate. We suggest to the Court that blinding the public to misbehavior, a whitewash or the ability to conduct a whitewash are not in the best interests of the state.

D. A.R.S. §15-1640 is applicable

ABOR offers a confusing argument about trade secrets that demands some attention. Although repeatedly referring to §15-**1604**, it appears ABOR is discussing A.R.S. §15-**1640**, code provision that addresses trade secrets. Arizona code defines trade secrets as

> 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 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.

ABOR suggests that §15-1640 does not apply to emails. It could, of course.

The "hockey stick" graph, which ABOR graciously provided the Court as an aesthetic divertissement in the opening pages of its brief, rested in large measure on computer programing — ostensibly the kind of trade secret §15-1640 might protect until such time "the subject matter of the records becomes available to the general public." §15-1640(C).

This graph has been impeached as deeply flawed, and the investigations into those flaws shows how §15-1640(C) would apply. After the "hockey stick" graph was published, and in large measure because it became the icon of climate alarmists, statisticians attempted to take a hard look at its derivation. McIntyre and McKitrick (MM) published three papers in 2003 and 2005 explaining the errors in the Mann, Bradley and Hughes (MBH) papers of 1998 and 1999. In essence, McIntyre and McKitrick showed that even with random data as an input, the computer programing MBH used would produce a hockey stick shape, thus fully impeaching the papers.

The U.S. Congress took note of this and commissioned an independent study to determine which of the two sets of papers were correct. A team of three professors from George Mason University, Rice University and Johns Hopkins University, with the assistance of professionals from the Naval Surface Warfare Center and MITRE Corporation, conducted the

analysis. Their subsequent report is usually referred to by the name of the lead author (The Wegman Report, Plaintiff's Opening Brief, Ex. 9).

To conduct their investigation, the Wegman team needed be able to completely reproduce the results from each set of authors. This required access to the programing code and a full description (documentation) of the data used and the computer code. McIntyre and McKitrick provided the code and related documentation while Mann, Bradley and Hughes provided their code but either would not or could not provide the documentation.

The first finding of the Wegman Report was, "In general, we found MBH98 and MBH99 to be somewhat obscure and incomplete and the criticism of MM03/05a/05b to be valid and compelling. Plaintiff's Opening Brief, Ex. 9 at p. 4.

In other words, it took an act of Congress to obtain what any interested person should have been able to obtain under §15-1640 — the computer code (and documentation) used in the MBH 1998 and 1999 papers. The subject matter of the records had become available to the general public through publication of the two papers. Prior to their publication, the computer programing would fit the description of a trade secret and could be withheld. After publication it can not.

E&E Legal has no idea whether any such formerly trade secret information is within the withheld collection, but if there is such information in the collection, and if, as in the case of the MBH papers, it has been used to support a published paper, then it is subject to public disclosure and there is every good reason for other scientists to be able to obtain that information, including through a public records request.

V. ABOR has Not Shown that it Suffers Substantial and Irreparable Harm

Arizona law places on ABOR the burden of establishing that its responses to E&E Legal's requests were sufficient. *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539, 177 P. 3d 275 (2008); *and see*, *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194 (App. 1998) (holding that the "burden fell squarely upon [the Maricopa County Attorney], as a public official, to overcome the legal presumption favoring disclosure."); *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51 (1984) (holding that the burden of showing that a harm will result from disclosure "is on the party that seeks non-disclosure rather than on the party that seeks access").

Publicly funded activities are "not meant to be clothed in secrecy, but to be subject to open discussion and debate." *Moorehead v. Arnold*, 130 Ariz. 503, 505, 637 P.2d 305 (App. 1981). To withhold the records at issue, ABOR must show that release of the documents would result in ***"substantial and irreparable private or public harm.***" *Carlson v. Pima County*, 141 Ariz. at 491 (*emphasis added*). This would have to take the form of "harmful effect on the duties of the officials or agency in question," *Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. at 257-258. ABOR offers several forms of harm it believes would result from disclosure, but offers no admissible evidence that they would. We take them up in this section.

Before we begin with specifics, however, there are three facts we first ask the Court to recognize.

A. E&E Legal's requests are circumscribed and few involve research

In its Opening Brief, E&E Legal identified the "kinds" of records ABOR stated it had withheld, segregating ABOR's list into those that should and those that cannot be withheld.

ABOR inaccurately describes this as what E&E Legal "wants." It isn't. E&E Legal's request is the best evidence of what we seek. *See* Plaintiff's Opening Brief at pp. 6-7. The records sought are chiefly emails and documents attached thereto. Most of them are associated with discussions regarding preparation of IPCC reports and associated issues directly related to the important public policy debate on the nature of climate change, human contribution to such change and the need to mitigate or adapt to such change, whether caused by humans or not. These are not associated with ABOR research. Other classes of records include work performed for another activist group by Professor Overpeck.

In its May 15th, 2014 "Response to Defendants' Explanatory Memorandum," E&E Legal organized this list into six classes of emails:

(1) records and communications concerning current, ongoing research;
(2) records and communications concerning completed research the results of which have been published;
(3) peer-review related communications;
(4) communications associated with professional associations and societies;
(5) communications documenting participation in the development of public policies; and
(6) informal communications unrelated to any of the preceding classes, but capable of demonstrating how an Arizona employee does his work.

E&E Legal specifically admits records in the first and third categories should be withheld. The remaining classes are what E&E Legal seeks. Based on the log of withheld documents, it appears most of the emails fall into the 4th, 5th and 6th classes, none of which involves research.

ABOR describes this list as "scary" and offers a satiric sketch that grossly overstates a future that would arise when the Court directs ABOR to disclose these classes of emails.

Because E&E Legal has both the facts and the law on its side, it need not "pound the rostrum" with a silly fairy tale.

B. ABOR has already released emails of the kind they seem to want to withhold.

Most of ABOR's discussion of harm is grounded on what would happen if the University did in fact disclose the classes of emails described above. We ask the Court to keep in mind that the University of Arizona, the University of Virginia and many other universities have routinely released emails of the kind sought in this case. Thousands of them.

Consider, for example, the request of Dan Vergano of USA Today (newspaper) who sought emails of Professor Edward Wegman with regard to the Wegman Report. The request was made by email on October 21, 2010, a request quite similar to E&E Legal's request in the instant case. Stated in full, Vergano sought the following:

> Pursuant to the Virginia Freedom of Information Act (FOIA), located§ 2.2-3700 et seq. of the Code of Virginia, I request access to and copies of information and documentary materials, including electronic mail and other communication, made by Dr. Edward J. Wegman and his associates, Yasmin J. Said and Walid Sharabati, in connection with I or related to the following grants:
>
> 1. National Institutes on Alcohol Abuse and Alcoholism grant 1 F32 A A015876-01A1
> 2. Army Research Office contract W911 NF-04-1-0447
> 3. Army Research Laboratory under contract W911 NF-07-1-0059
>
> As well as in connection with I or related to the following reports created by some or all of these authors at George Mason University:
>
> 1. Computational Statistics & Data Analysis 52 (2008) 2177 – 2184, Said, Y. et al
> 2. COMPST AT 2008 – Proceedings in Computational Statistics: 18th Symposium Held in Porto, Portugal, 2008 Wegman, E. et al, pp. 173-189
>
> Please note that Dr. Wegman uses the e-mail address: xxx and Dr. Said uses the email address: xxx to conduct university business as seen in 2008 study's author information, which cites their university affiliations. Please restrict the search to Sept. 1, 2005 to the present [a five year period].

> If the university employees included in this request inform you that any of this material is not available, I am requesting a copy of their communications to that effect.
>
> I would like to receive the information in electronic format.[20]

Fourteen days later George Mason University ("GMU") produced all the information sought which included emails falling in to each of the six categories listed above, withholding nothing. GMU provided this information at no cost and in electronic form. This is the common practice of universities that have nothing to hide or no proclivity to keep public records secret. Notably, not one academic lobby group protested this release.

Nor can ABOR claim it takes a different path. Indeed, ABOR released Exhibits 1 and 2 (attached) under the Public Records Act request at issue in this case. Exhibit 1 is a 2001 email from Michael Mann to Malcolm Hughes (and others) that falls into Plaintiff's 2nd and 6th categories, communications about previously published work and informal communications. Exhibit 2 is somewhat more instructive, in this case falling within the 2nd and 5th categories. It is a detailed discussion of technical information sought by a University of California - San Diego professor who is attempting to harmonize multiple scientific studies with the MBH papers. Receiving short shrift and the claim that the science is settled from Mann, Bradley and Hughes, Professor Kelker complains, "there are just too many exceptions and conundrums to say the issue is closed."

These are just two of the emails ABOR has already disclosed and are merely examples of the kind of emails they don't believe would cause harm if released. As the Court examines emails representative of each category, these two examples can serve as some examples of what

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[20] *See*, climateaudit.org/2011/05/28/the-vergano-foi-request/.

ABOR considers benign, although certainly other emails with considerably different content would also be benign.

C. ABOR's entire argument is based on fear not fact

ABOR grounds its case on unsubstantiated fear. As *Humane Society* explains, unsubstantiated fear not supported by evidence is not a basis for denying disclosure of public records. *Humane Society of the United States v. Superior Court*, 214 Cal. App. 4th at 1257. Time and again, ABOR turns to declarations as the "evidence" of harm, and each time, the declarations offer only a fear of harm, not actual evidence of harm.

We note here, as a relevant aside, that under 16 A.R.S. Rules of Civil Procedure, Rule 80(i), two declarations are inadmissible. Rule 80(i) provides that

> an unsworn written declaration, certificate, verification, or statement, [must be] subscribed by such person as true under penalty of perjury, and dated, in substantially the following form:
>
> "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)."

Two declarations fail to meet the requirements of Rule 80(i), those of Professors Hughes and Overpeck. In addition, the copy of Defendant Moore's declaration that ABOR provided to E&E Legal is unsigned. Under rule, none of the information in those declarations is admissible and we oppose their consideration by the Court.[21] For obvious reasons, however, we will argue as though ABOR has corrected its mistakes and had provided identical but properly endorsed

[21] As previously discussed, E&E Legal does not employ "gottcha" litigation practices. We ask the Court to disregard these three declarations until such time that ABOR offers properly endorsed versions. There is little doubt that they will, knowing the degree to which they rely on those declarations, but until they do, the Court should give them no weight.

declarations.

Returning now to the use of ABOR's declarations as the "evidence" of harm, the best ABOR can do is claim that and expert's fear of harm should be viewed as evidence of impending harm. If, however, E&E Legal offers its experts opinion that there is no basis for these fears and goes further and provides testimony that despite a long history of release of emails by public universities, there has been no harm, then any weight ABOR would attached to its declarants' fears is more than completely offset by E&E Legal's affiants. As the Court will see in the next Subsections, that is the case for every kind of harm ABOR alleges.

Having discussed these preliminary points, we turn now to the specific harms of which ABOR complains.

D. Desire for Confidentiality is Insufficient

ABOR would like this Court to adopt a "presumption of confidentiality" in faculty emails. Def. Opening Memorandum at 22. Under Arizona law, however, not even "the promise of confidentiality standing alone is [ ] 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.

ABOR offers no specific example of how it will, much less did suffer any form of harm through loss of the presumption of confidentiality (something it never had in its emails in the first place[22]). Instead, it sprinkles this issue over some of its specific allegations of harm, each of which is discussed below. We will take up confidentiality in those discussions, if it rears its head.

E. Abandoned Ideas are Not Protected

ABOR suggests that ideas that may emerge during research should be protected in perpetuity, also suggesting that release of such ideas proffered by young academics would rob those academics of future opportunities they deserve. In contract, Dean Ronald Rychlak states that "There should be no chilling effect on ongoing research when records from past research are generated. In fact, it should generate better research." Rychlak affidavit, Plaintiff's Opening Brief, Ex. 14 at ¶ 29. He also states, "once research is published, it is beneficial for the entire academic community to be able to examine how that research was conducted." *Id*. at ¶ 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, Plaintiff's Opening Brief, Ex. 18 at ¶ 21.

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[22] 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* security.arizona.edu/computer-network-agreement. 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.

ABOR has not offered a single example of an idea that needs to be protected or an email containing such an idea. Nevertheless, we think ABOR could under the right conditions. If an academic, young or old, is communicating with colleagues on possible future research ideas, or otherwise identifies a conundrum he or she thinks worthy of attention, that communication is likely to be of the kind that ought to be withheld. If, however, an email states that the professor or graduate student simply does not have the time or resources to pursue a new idea, then that email should be released because it offers information some other academic with the time and money could use.

We ask the Court to keep in mind the purpose of academia. Its purpose is not simply to provide a safe haven for really smart people. It is supposed to have products we call ideas and knowledge. A new idea that can't be used should not be hidden or thrown away. It should be offered out to the academic community so that someone else can use it. Notably, dissemination of ideas worthy of research is a common practice. Professors within subject areas routinely summarize the state of their research and usually end such a summary with areas demanding future investigation. *See, e.g.,* Water Research Foundation, "The Future of Research on Climate Change Impacts on Water," (2011) (*available at* www.waterf.org/publicreportlibrary/4340.pdf). Professor Hughes, himself, routinely offers up areas of research that he believes need address in the concluding paragraphs of his published works, a very common practice. *See*, MBH99, "Northern Hemisphere Temperature During the Past Millennium: Inferences, Uncertainties, and Limitations" (1999), Def. Opening Memorandum, Ex. E., p. 762. Protection of nascent ideas must be done on a case by case basis, and absent a clear relationship to planned future work, emails listing ideas that need to be pursued should be made available widely.

Beyond the nascent idea issue is the issue of abandoned research. The University of Virginia placed an email before that court that identified three projects one of its faculty wanted to pursue. We cannot provide a copy of that email as it was sealed by the court and under agreement between the parties, all copies of sealed material held by plaintiffs had to be returned and destroyed. That has been done. Nevertheless, that email was described in brief in a manner that did not disclose its contents and it provides a particularly apt example for the instant case.

UVA had three projects it wanted to pursue and the email gave direction to the research team on what to take up. An examination of publications by this team showed that they pursued two of the three projects and published papers on their results. A diligent search showed, however, that over the past 12 years, they never published on the third project. Either the research ideas for that third project, or the actual research activities they conducted (if any) should be made available now, 12 years after it was discussed. To do less is to lose knowledge and research opportunities to the entire academic community. It is in the best interests of the state to ensure ideas that have floundered, been ignored and been shelved be made available to anyone who might want them. ABOR cannot claim they are using what they have abandoned. Viewing abandoned ideas like household waste, once they hit the dust bin, the law considers them no longer the property of those who discarded them. There is no cogent reason to use a different rule of law for dustbin ideas.

F. Recruitment and Retention have not been Harmed

ABOR 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 happening despite years of ABOR 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 ABOR was made to disclose any of its emails. Note, these claims don't apply to any particular class of emails. ABOR leaves the Court with the unsubstantiated presumption that release of any emails would cause harm to recruitment and retention. Of course, ABOR has released emails for years and yet cannot document any such harm.

ABOR 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." Def. Opening Memorandum, Ex. II. LaBaer's lengthy exegesis does not distinguish between the harms of releasing documents associated with ongoing research from the harms of releasing documents associated with completed or abandoned research. He simply lumps them all together. In contrast, E&E Legal 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." Ferrara affidavit (Plaintiff's Opening Brief, Ex. 18) 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. It is not a card worth playing.

Unlike ABOR'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), presage 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." Rychlak affidavit at ¶¶ 6-8, & 10.

ABOR offers one final statement on this issue that demands a reply. Dr. LaBaer complains 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." La Baer declaration (Def. Opening Brief, Ex. II) at ¶ 21. 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, ABOR 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 ABOR cannot and did not refute, to wit that universities routinely make faculty emails public (Ferrara affidavit at ¶ 28), that applicants know about such a policy at George Mason University, and there has been no adverse effect of that email policy on recruitment or retention (*id* at ¶ 29). We note against that GMU, unlike the University of Virginia, has proved a paragon of compliance with Virginia's Freedom of Information Act, routinely releasing faculty emails.

In light of all the evidence before the Court, the weight of the evidence is that release of emails of the kind E&E Legal seeks has no adverse effect on recruitment or retention.

G. Research Money has Not Dried Up

ABOR trots out Vicki Chandler's declaration as evidence that research money will dry up if ABOR 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 Legal seeks records from ongoing research. Def. Opening Memorandum, Ex. DD at ¶ 12. E&E Legal does not.

Nor does Chandler, nor any other ABOR declarant provide evidence that the routine practice of releasing university emails, including as seen in Exhibits 1 & 2 to this brief, have had any effect on research funding. 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. Rychalk affidavit at ¶¶ 33 & 35.

H. Academic Collaboration has not Diminished

In his inadmissible declaration, Professor Hughes claims that his collaboration with Michael Mann and Ray Bradley has been harmed by the release of the ClimateGate emails. Examination of Professor Hughes' ersatz declaration and his curriculum vitae tell a very different story. In the five years prior to the ClimateGate release, Hughes published 21 papers, not significantly larger than the 16 he published after the 2009 release. Every one of the 16 was a product of collaboration with other faculty, many at other universities. *See* Def. Opening Memorandum, Ex. GG (vitae attached therein). To the degree that Hughes' productivity dropped after 2009 (if it did) there is evidence this had nothing to do with the ClimateGate release. Rather, Hughes states in his declaration that he was and is heading toward retirement. A drop off in productivity reflects the fact that established professors with lengthy careers turn from productive research late in those careers to leadership duties in their professions and their universities. By 2010, Hughes had been in academia for 40 years. In 2010 he took on leadership responsibilities with the American Association for the Advancement of Science ("AAAS"), in 2012 became an Associate Editor for the professional journal Tree-Ring Research, in 2013

became President of the Global Environmental Change Focus Group within the American Geophysical Union ("AGU") and also became a member of the Council of AGU. In other words, Hughes continued his research collaboration with Mann and Bradley, and with many others, but reduced his collaboration (his production) because of his increased leadership roles in professional organizations.

To put it gently, this is not proof of a loss of collaboration, much less a "substantial and irreparable" one.

Nor have other high profile academics who have had their research emails released suffered from loss of collaboration. A Google Scholar search of papers by GMU Professor Edward Wegman shows he produced the same number of papers (all with collaborators) in the four years before and after the email release of public records associated with the Wegman Report (16 before and 16 after). Professor Hughes' self-serving statement in his unsworn declaration is without weight in any balancing of the equities, even if it were admissible before this Court. The Wegman data, however, is objective data and is direct evidence that release of emails causes no harm to collaboration.

I. The Academy's "Thinking" has not been Tempered

ABOR makes the bold statement that fear of having emails disclosed will actually temper a professor's thinking. This they exclaim without reference to any evidence whatever. It is a spectacularly untethered statement that demands to be tempered with reality.

Professor Mihaly Csikszentmihalyi, former University of Chicago psychology department head, provides a basis for examining ABOR's bizarre claim. Creative thought appears to consist of five steps: (1) preparation, becoming immersed in a set of issues that arouse

curiosity; (2) incubation, the churn of ideas below the threshold of consciousness; (3) insight, when the pieces of the puzzle fall together; (4) evaluation, deciding whether the insight is worth pursuing; and, (5) elaboration, the period in which one validates the idea. This last step is also called "research" or testing of hypotheses. *See*, Csikszentmihalyi, M. (1996) Creativity: Flow and the Psychology of Discovery and Invention.

According to Csikszentmihalyi, only the final step involves colleagues and then only to get a sense that things are moving in the right direction and also to make the most effective sales pitch. More importantly, the fifth step is not about thinking, it is about validation of the thought.

In other words, it doesn't take email to think. Meditation, mind altering drugs, booze, a television sitcoms — these will stop a person from thinking. Otherwise, you can't turn it off. And, if anything increases the rate of thinking, it is probably fear.

J. Communications have not been Truncated.

ABOR suggests that the mere risk of having some old emails disclosed is "unnerving" and that communications will therefor be truncated. ABOR never suggests how and offers a single example of this from the unsworn Hughes declaration. Hughes is afraid to email Michael Mann because of concern that their emails might once again become public. This concern demands a deep examination.[23]

There is only one reason an scientist would not want his communications about his scientific work disclosed once the related work is done and published — embarrassment. As

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[23] Based on our experience with other governmental and academic organizations, we suspect there is a 100% likelihood that Hughes and Mann are emailing right now but using private accounts. Had the Court the opportunity, it might ask him if he really has not been emailing Mann on a private account.

Dean Rychlak explains, "Once research is published, it is beneficial for the entire academic community to be able to examine how that research was conducted. This is reflected in the 'scientific method,' which demands repeatable results." Rychlak affidavit, Plaintiff's Opening Brief Ex. 14, at ¶ 28. He continues, "There should be no chilling effect on ongoing research when records from past research are generated. In fact, it should generate better research. *Id* at ¶ 29. And, "Records generated as a result of research are . . . beneficial to the academic community. In fact, their research should spur additional research and reveal 'dead ends,' so that future work is more precise." *Id* at ¶ 30.

Professor Ferrara makes all the same points (Ferrara affidavit at ¶¶ 20-25) but carries the argument to its sad conclusion, "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." *Id* at ¶¶ 27-28. 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 ¶ 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.

K. There has been No Competitive Disadvantage from Email Disclosures

ABOR drapes the decision in the Virginia case over its brief like an enveloping shroud, arguing with stark disconnect that the definition as to what constitutes proprietary data in the Commonwealth creates an impenetrable "best interests of the state" shield behind which ABOR can hide in Arizona. ABOR neither understands nor applies the Virginia principle correctly. We note for the Court's attention that Plaintiff's counsel in the instant case crafted the principle that the Virginia Supreme Court adopted and will be happy to provide this Court the briefs filed in that case which document this fact. Thus, we speak from authority in explaining what this principle means and how it can apply to the instant case.

A university can have a competitive advantage when it holds trade secrets, has innovative ideas not yet examined, offers facilities not available elsewhere in the nation, and generally offers unique opportunities. A university finds itself at a competitive disadvantage when it chooses not to, or cannot offer benefits its competitors do. This could involve a wide range of benefits from salary to institutional prestige. In the Virginia case, and here, it is our position that a statute or statutory interpretation allowing disclosure of emails associated with ongoing research as a clear example of potentially causing a loss of competitive advantage in the marketplace of ideas.

Beyond that entirely reasonable exception, E&E Legal's affiants offer direct testimony that disclosure of old emails on completed research and emails not associated with research do not chill communications, the creation of ideas, honesty, ethical behavior, civility, funding, retention, recruitment or any other necessary, desirable or positive attribute of the academy. The same is true regarding other kinds of emails Plaintiff seeks. All ABOR offers is fear and all disclosure does is apply that fear in a manner that increases honesty and civility. That is in the best interests of the state.

CONCLUSION

The law places on ABOR the burden of convincing this Court that disclosure of the emails at issue would cause "substantial and irreparable harm." This they have not done. ABOR relies exclusively on opinions. E&E Legal has countered every one of ABOR's allegations with facts bolstered by equivalent academic opinion and experience and gone further, offering testimony from Arizonians and a legislator who helped write public record act statutes. Plaintiff E&E Legal has documented the benefits of disclosure are many and weighty and overwhelmingly outweigh any harms ABOR alleges but does not support. Because a balancing

of the equities favors disclosure, Plaintiff asks the Court to grant all its claims for relief.

RESPECTFULLY SUBMITTED this 28th day of August, 2014, by:

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Exhibit 1

Exhibit 2

CERTIFICATE OF SERVICE

I hereby certify that on the August 28, 2014, I served by electronic mail and by U.S. Post a true correct copy of Petitioner's Reply Brief to:

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