IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ENERGY & ENVIRONMENT LEGAL INSTITUTE,
Plaintiff/Appellant,

v.

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

No. 2 CA-CV 2015-0086
Filed December 3, 2015

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NOT FOR PUBLICATION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

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

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

H O W A R D, Judge:

¶1 In this appeal from a superior court special action, Energy & Environmental Legal Institute (E&E) appeals the court's judgment denying the disclosure of certain e-mails of two University of Arizona (UA) professors, sought pursuant to A.R.S. § 39-121. E&E argues the court incorrectly considered whether the Arizona Board of Regents (Board) abused its discretion or acted arbitrarily or capriciously in withholding the e-mails, and instead should have conducted a de novo review to determine whether E&E is entitled to access the e-mails. Because the court applied the incorrect standard in part, we vacate in part and remand for further proceedings.

Factual and Procedural Background

¶2 The following facts are undisputed. E&E[2] filed a public records request with the Board[3] seeking over a decade's worth of e-mails of two UA professors whose work focuses on climate change. In response, the Board provided E&E with over 1,600 pages of records and a log describing approximately 1,700 records it was withholding. The Board stated it was refusing to provide E&E access to the withheld e-mails "to protect either the confidentiality of

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]At the time the requests were made, E&E was known as American Tradition Institute.

[3]E&E corresponded with the UA directly prior to the filing of this special action, at which time the Board appeared on behalf of the UA. To maintain consistency with the parties in this special action and the trial court's ruling, the Board is substituted for the UA where appropriate.

information, privacy of persons, or a concern about disclosure detrimental to the best interests of the state."

¶3 E&E then filed a statutory special action in Superior Court, pursuant to A.R.S. § 39-121.02, requesting that the trial court compel the Board to release the withheld e-mails. The Board answered, contending that, "due to considerations of privacy, confidentiality, academic freedom, and the competition for and retention of faculty members, and other factors," disclosure of the e-mails "would not be in the best interests of the state."

¶4 In addition to disagreeing on whether the e-mails should be released, the parties also disagreed on what standard of review the trial court should utilize. The Board contended the court should determine whether the Board had abused its discretion, or acted arbitrarily or capriciously in refusing E&E access to the e-mails. E&E conversely argued the court needed to determine, de novo, whether the e-mails should be made available.

¶5 After a hearing on the issue, the trial court stated that, pursuant to Rule 3, Ariz. R. P. Spec. Actions, "the question before the Court is whether [the Board], when exercising its discretion to withhold certain e-mail communications after receiving [E&E's] public records request, abused its discretion or acted arbitrarily and capriciously." It later denied E&E's request to reconsider the appropriate standard.

¶6 The Board disclosed, under seal, to the trial court for an in camera review, approximately ninety of the withheld e-mails, which the parties agreed were representative of all the withheld e-mails. The court determined several categories of e-mails were properly withheld because they contained, for example, confidential information or attorney work product. As to a portion of the e-mails it characterized as "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary," the court concluded the Board had not abused its discretion or acted arbitrarily or capriciously. It denied E&E's request for access to those records and entered a final judgment. We have jurisdiction over E&E's appeal pursuant A.R.S. §§ 12-2101(A)(1) and 12-120.21. *See* Ariz. R. P. Spec. Actions 8(a).

Discussion

¶7 E&E argues the trial court used an incorrect standard to determine whether the Board was required to disclose the requested records, contending the court should have conducted a de novo review. Relating its argument to Rule 3(a), Ariz. R. P. Spec. Actions, E&E contends the court must determine "'[w]hether 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.'" Conversely, the Board argues the court is limited to determining "[w]hether [the] determination was arbitrary and capricious or an abuse of discretion," pursuant to Rule 3(c). We review the court's legal conclusions, such as the correct standard of review, de novo. *See Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, ¶ 20, 955 P.2d 534, 539 (1998).

¶8 Although both parties couch their arguments in terms of Rule 3, that rule is inapplicable to this case. Ariz. R. P. Spec. Actions 1(b). The appeal from a denial of access to public records is a statutory special action authorized by A.R.S. § 39-121.02(A). *See Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). "[W]here a statutory special action is involved, the questions to be raised and considered are wholly unaffected by this Rule."[4] Ariz. R. P. Spec. Actions 1(b) (only provisions of rules related to "parties, procedure, interlocutory orders and stays, and judgments" applicable to statutory special actions); *see* Ariz. R. P. Spec. Actions 3 (titled "Questions Raised"). Instead, "the questions 'considered' are . . . determined . . . by the statute which expressly authorized the writ." *Miceli v. Indus. Comm'n*, 135 Ariz. 71, n.1, 659 P.2d 30, 32 n.1 (1983). Consequently, Rule 3 is inapplicable to determining the

[4]Rule 1, Ariz. R. P. Spec. Actions, speaks of all of the Rules of Special Action in the singular, "this Rule." For example, "provisions of this Rule as to parties [under Ariz. R. P. Spec. Actions 2], procedure [under Ariz. R. P. Spec. Actions 4], interlocutory orders and stays [under Ariz. R. P. Spec. Actions 5], and judgments [under Ariz. R. P. Spec. Actions 6] shall apply." Ariz. R. P. Spec. Actions 1(b); *see also* Ariz. R. P. Spec. Actions 1(a) ("Relief . . . shall be obtained in an action under this Rule.").

correct standard of review utilized by trial courts faced with a special action brought pursuant to § 39-121.02(A). *See Primary Consultants, L.L.C. v. Maricopa Cty. Recorder*, 210 Ariz. 393, ¶¶ 11, 16, 111 P.3d 435, 439-40 (App. 2005) (rejecting argument documents not public records and thus trial court's review limited to question raised in Rule 3(c)).[5]

¶9 "The statute which expressly authorized the writ," *Miceli*, 135 Ariz. 71, n.1, 659 P.2d at 32 n.1, here is Arizona's Public Records Law. A.R.S. §§ 39-121 through 39-121.03. It dictates that "[p]ublic records and other matters . . . shall be open to inspection by any person."[6] A.R.S. § 39-121; *see Scottsdale Unified Sch. Dist.*, 191 Ariz. 297, ¶ 9, 955 P.2d at 537. The law evinces the state's "'open access' policy toward public records," *Phx. Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81, 927 P.2d 340, 347 (App. 1996), *quoting Carlson*, 141 Ariz. at 489, 687 P.2d at 1244, and "exists to allow citizens 'to be informed about what their government is up to,'" *Scottsdale Unified Sch. Dist.*, 191 Ariz. 297, ¶ 21, 955 P.2d 534, 539-40, *quoting U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989).

¶10 Our supreme court, however, has recognized that "an unlimited right of inspection might lead to substantial and irreparable private or public harm." *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246. It therefore has stated that a public official may "deny in the first instance the right of inspection if he thinks that the document[s are] privileged or confidential, or if he thinks that it would be detrimental to the interests of the state to permit [disclosure]." *Mathews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 896 (1952).

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[5]Even though E&E relied on Rule 3 in its arguments, it also cited statutory and case law requiring the trial court to conduct a de novo review. Therefore the issue was presented properly to the court and here.

[6]The parties do not dispute that the withheld e-mails which are the subject of this appeal are public records pursuant to § 39-121.

¶11 Although a public official has the initial discretion to deny a request for access to public records, "under no circumstances should [that] determination be final." *Id*. Allowing a public official to be "the sole judge" as to what information should be available would be "inconsistent with all principles of Democratic Government." *Id*. at 80-81, 251 P.2d at 896; *see also Church of Scientology v. City of Phx. Police Dep't*, 122 Ariz. 338, 340, 594 P.2d 1034, 1036 (App. 1979) ("We are not persuaded that our statutory policy in favor of disclosure should be so easily, and permanently, thwarted by the unilateral and potentially self-serving inclination of government officials to classify files as confidential.").

¶12 Pursuant to § 39-121.02(A), the requesting party "may appeal the denial [of its request] through a special action in the superior court." The burden then falls on the official to prove "specifically how the public interest outweighs the right of disclosure." *Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, ¶ 19, 35 P.3d 105, 110 (App. 2001). Ultimately, the courts are the final arbiters of whether a public record must be disclosed. *Mathews*, 75 Ariz. at 81, 251 P.2d at 896; *see also Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; *A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, ¶ 14, 42 P.3d 615, 619 (App. 2002) ("It falls to Arizona courts to determine case by case, as the question arises, whether an asserted . . . interest does overcome the presumption.").

¶13 In sum, although the public official has discretion to deny the request initially in order to prevent "substantial and irreparable private or public harm," the trial court must determine whether that was the correct decision and if, in fact, the records must be produced. *See Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; *see also Primary Consultants*, 210 Ariz. 393, ¶ 16, 111 P.3d at 398; *A.H. Belo Corp.*, 202 Ariz. 184, ¶ 14, 42 P.3d at 619. In doing so, the court must apply the presumption favoring disclosure and may, if necessary, balance that presumption against "the countervailing interests of confidentiality, privacy or the best interests of the state." *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; *see also Griffis v. Pinal County*, 215 Ariz. 1, ¶ 13, 156 P.3d 418, 422 (2007). This is a de novo review. *See Primary Consultants*, 210 Ariz. 393, ¶ 16, 111 P.3d at 398; *see also Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d

1194, 1198 (1993); *Sulger v. Ariz. Corp. Comm'n*, 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967) ("'de novo' [review] in the classic sense" means "the Superior Court may exercise independent judgment").

¶14 Below, the trial court, based on Rule 3(c), stated the only question before it was whether, "in denying E&E's records request, did [the Board] abuse its discretion or act arbitrarily or capriciously?" It also cited *Stant v. City of Maricopa Employee Merit Bd.*, 234 Ariz. 196, 319 P.3d 1002 (App. 2014), as support for the proposition that it must determine only whether the Board abused its discretion or acted arbitrarily or capriciously. *Stant*, however, is not a public records case, but rather involves an appeal from a disciplinary committee which had upheld Stant's termination from the Maricopa Police Department. *Id.* ¶ 1. As such, the appeal was governed by its own set of rules and standards which explicitly dictated that the court was to decide whether the administrative board's determination "'was arbitrary and capricious or an abuse of discretion.'" *Id.* ¶ 14, *quoting* Rule 3(c), Ariz. R. P. Spec. Actions; *see also* A.R.S. §§ 38-1004, 12-2006. The standard of review set forth in *Stant* thus is inapplicable to a statutory special action pursuant to § 39-121.02(A).

¶15 The Board similarly relies on non-public record case law to support its argument that the trial court was correct in considering only whether the Board had abused its discretion or acted arbitrarily or capriciously in denying E&E access to the requested public records. *See In re Esther Caplan Trust*, 228 Ariz. 182, ¶¶ 17-18, 265 P.3d 364, 368 (App. 2011) (discussing whether trustee acted within discretion conferred upon it by trust); *Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App. 1997) (appellate court reviews trial court's ruling on motion to dismiss for abuse of discretion); *Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982) (discussing standard for abuse of discretion under Rule 3(c)). None of those cases address a trial court's review in a § 39-121.02 special action and the Board has not cited any other legal authority supporting its position.

¶16 Here, the trial court was required de novo to weigh the Board's contention that disclosure of the records would be detrimental to the best interests of the state against the presumption

in favor of disclosure. *See Griffis*, 215 Ariz. 1, ¶ 13, 156 P.3d at 422; *see also Carlson*, 141 Ariz. at 490-91, 687 P.2d at 1245-46. Accordingly, we vacate the portion of the court's order pertaining to e-mails addressing "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary" and remand so that the court may balance the countervailing interests and determine whether E&E is entitled to access those e-mails.

Attorney Fees and Costs on Appeal

¶17 E&E has requested its attorney fees and costs on appeal pursuant to § 39-121.02(B), which authorizes an award of fees and costs "if the person seeking public records has substantially prevailed." Because E&E has not yet prevailed in its quest for access to the withheld e-mails at issue here, we deny its request for attorney fees without prejudice. *See Stauffer v. U.S. Bank Nat'l Ass'n*, 233 Ariz. 22, ¶ 26, 308 P.3d 1173, 1179-80 (App. 2013). As the prevailing party in this appeal, however, it is entitled to its costs, upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 34, 273 P.3d 668, 676 (App. 2012).

Disposition

¶18 For the foregoing reasons, we affirm the trial court's judgment in part, and vacate and remand the portion of that ruling pertaining to e-mails containing "prepublication critical analysis, unpublished data, analysis, research, results, drafts and commentary" for further proceedings consistent with this decision.