

**IN THE SUPREME COURT
STATE OF ARIZONA**

BARRY GOLDWATER INSTITUTE
FOR PUBLIC POLICY RESEARCH,

Plaintiff / Appellant,

v.

CITY OF PHOENIX; JEFF BARTON;
DENISE ARCHIBALD, and SHEREE
RUCKER,

Defendants / Appellees.

Supreme Court
No. CV-25-0033-PR

Court of Appeals, Division One
No. 1 CA-CV 24-0176

Maricopa County Superior Court
No. CV 2023-003250

PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This case hinges on three interrelated issues: the burden and standard of proof applicable when a public body seeks to withhold information sought under the Public Records Law, the standard of review in public records cases, and the scope of the “best interests of the state” exception to disclosure.

The Court of Appeals erred (as did the trial court) in failing to hold the City to the standard set forth in [*Mitchell v. Superior Ct.*](#), 142 Ariz. 332, 335 (1984), which requires the City to show a *probability*—not a mere possibility—that *specific, material harm*—not a general, abstract harm—would *result from disclosure* of records—not that some harm might indirectly come about.

The Court of Appeals also erred by not conducting the balancing test established in [*Carlson v. Pima Cnty.*](#), 141 Ariz. 487, 491 (1984), *de novo*—that is, to *independently* scrutinize the City’s assertion of the so-called “best interests of the state” exception, without deference. As the decisions below demonstrate, the vagueness of that exception threatens to eviscerate the presumption favoring disclosure.

This Court should reaffirm *Mitchell*’s burden and standard of proof, remove any doubt as to the status of *de novo* review in public records cases, and define the contours of the “best interests” exception. It should consequently reverse and direct that judgment be entered in favor of Petitioner.

ARGUMENT

I. *Mitchell* provides the applicable evidentiary standard and burden of proof when a party seeking nondisclosure invokes a common law exception to disclosure.

[*Mitchell*](#) set out the evidentiary standard a party must satisfy when asserting the “best interest of the state” exception or other “common law” exceptions to disclosure. The Court held: “The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual

rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.” 142 Ariz. at 335.

In that case, a newspaper publisher sought access to a convicted criminal’s presentence report. *Id.* at 333. The Court said that privacy and confidentiality could be preserved on a case-by-case basis—notably through *in camera* inspections—and then articulated the burden of proof and evidentiary standard required to overcome the “usual rule of full disclosure.”¹ *Id.* at 334–35.

Mitchell has been relied upon in at least a dozen reported appellate cases, including this Court’s decisions in *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11 (1993), *Griffis v. Pinal Cnty.*, 215 Ariz. 1 (2007), and *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297 (1998). See also *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 260 (1991) (Corcoran, J., dissenting). Nothing in any of this Court’s or lower courts’ subsequent decisions has narrowed *Mitchell*’s holding. Indeed, until the decision below, see COA Op. at 10 ¶ 23, the Court of Appeals regularly applied it.² See, e.g., *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273 ¶ 22 (App. 2007) (Division 1); *Smith v. Town of Marana*, 254 Ariz. 393, 397 ¶ 12 (App. 2022) (Division 2).

Here, however, the lower court erred by suggesting that a failure to apply *Mitchell* did not constitute reversible error, that there’s no support for the

¹ *Mitchell* involved judicial records and rules, but this Court applies the same presumption and analysis in that context as when interpreting public records statutes. See, e.g., *Ariz. Sup. Ct. R. 123(c)(1)*.

² That’s true even though some decisions paraphrase, oversimplify, or slightly alter what this Court actually wrote in *Mitchell*. For example, the court below pointed to *ACLU v. Arizona Dep’t of Child Safety*, 240 Ariz. 142, 151 ¶ 29 (App. 2016), as “reflect[ing] a standard that, at least textually, differs from that Goldwater argues *Mitchell* mandates.” COA Op. at 10 ¶ 23. *ACLU* characterized the standard as requiring a governmental entity to “demonstrate specific material harm or risks to privacy, confidentiality, or the best interests of the state.” 240 Ariz. at 151 ¶ 29 (emphasis added) (citing *Hodai v. City of Tucson*, 239 Ariz. 34, 41 ¶ 20 (App. 2016)). But *Hodai* pulled its articulation of the “specific, material harm” standard from *Ellis*, *supra*, which in turn directly quotes the full sentence from *Mitchell*. See *Ellis*, 215 Ariz. at 273 ¶ 22.

proposition that the [Mitchell](#) standard applies in all public records cases, and that later appellate decisions altered this Court’s directive in [Mitchell](#). COA Op. at ¶ 23. *See also* Pet. at 10. None of that’s true.

This Court should reaffirm the [Mitchell](#) standard and hold anyone seeking to withhold public records to it. That means that persons or entities seeking to prevent disclosure must provide sufficient evidence to show four things: that it’s (1) *probable* that (2) disclosure would *cause* (3) *specific* (4) *material* harm.

Probable: “Probable” means “more likely than not”—that is, a preponderance of the evidence standard. *See, e.g., Conard v. Dillingham*, 23 Ariz. 596, 605 (1922) (“[T]he word ‘probable’ is defined as having more evidence than the contrary, or as having more evidence for than against.” (citation omitted)); *see also* “Probability,” [Black’s Law Dictionary](#) (12th ed. 2024) (“[t]he quality, state, or condition of being ... more likely than not to happen or to have happened”). “[S]peculation as to ... generalized *potential* harms that *might*” occur, is not enough. [Smith](#), 254 Ariz. at 399 ¶ 19 (emphasis added). Nor are “global generalities of the *possible* harm that *might* result from” disclosure, [Cox](#), 175 Ariz. at 14 (emphasis added).

Cause: Any probable harm must “*result from*” the “*disclosure*,” [Mitchell](#), 142 Ariz. at 335 (emphasis added)—not result from some other preexisting reason. Disclosure cannot be the scapegoat when *something else* causes the government’s claimed harm.

Specific: This requires particular—not general—harms. *See* “Specific,” [Black’s Law Dictionary](#), *supra* (“Of, relating to, or designating a particular or defined thing; explicit”). In [Board of Regents](#), 167 Ariz. 254, ABOR “*demonstrated specific instances* where publicity proved detrimental” in prior analogous circumstances. [Cox](#), 175 Ariz. at 14 (emphasis added) (discussing [Board of Regents](#)). A party seeking nondisclosure must also connect evidence of

anticipated harm to particular records or portions of records. *See Cox*, 175 Ariz. at 14; *Star Publ'g Co. v. Pima Cnty. Attorney's Off.*, 181 Ariz. 432, 434 (App. 1994) (county attorney only offered speculation as to possible harms without actually examining the actual records “to demonstrate why any particular individual record ought not be revealed for one of these reasons”). Otherwise, “we would effectively repeal the public records statute.” *Star Publ'g*, 181 Ariz. at 434. “Because it is *always* possible to argue that public records contain nondiscoverable matter, argument alone would always allow nonrevelation,” which would destroy the presumption favoring disclosure. *Id.* ““If disclosure is to be avoided, the public entity must point to *specific* risks with respect to a *specific* disclosure; it is insufficient to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases.” *Id.* (quoting *Star Publ'g Co. v. Parks*, 178 Ariz. 604, 605 (App. 1993) (emphasis added)).

Material harm: “Material” here means “significant.” *See* “Material,” *Black’s Law Dictionary*, *supra*. If any likely harm is minimal or trivial or reparable, it’s insufficient to overcome presumptive disclosure.³ As for “harm,” Black’s defines it as “[i]njury, loss, [or] damage,” or “material or tangible detriment,” “Harm,” *id.*, and “material harm” as “[h]arm in the form of financial loss, reputational damage, significant embarrassment, emotional distress, chilling of a constitutionally protected activity, or unwanted disclosure of personal data.” *Id.*

Harm must also be something more than mere embarrassment or inconvenience. *Carlson*, for example, said the “best interest” exception applies only to “the best interest of the state *in carrying out its legitimate activities*,” 141

³ *Mitchell*’s materiality requirement seems rooted in *Carlson*’s language expressing concern for “‘*substantial* and *irreparable*’” harm that could result from unlimited disclosure. 142 Ariz. at 334 (quoting *Carlson*, 141 Ariz. at 491 (emphasis added)).

Ariz. at 491 (emphasis added), which suggests the exception applies only to requests that would impede the government from carrying out its constitutional and statutory duties, such as law enforcement, or that would disrupt core government functions—e.g., security concerns. *See also Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 349 ¶ 18 (App. 2001) (“The public interest includes consideration of how disclosure would adversely affect the agency's mission.”). None of those, of course, apply here.

The bottom line is that nondisclosure is only justified by *particularity*: it must be proven by specific evidence that disclosure of specific information would, more likely than not, cause specific, substantial, and irreparable injury, loss, damage, or tangible detriment to the government and/or the public. *See id.* at 348–49 ¶ 18 (“best interests” standard not confined to narrow interest of custodian or agency, but “includes the overall interests of the government *and the people*” (emphasis added)).

That wasn’t shown below, in either court. *See* Pet. at 5–7, 10–11. As the Court of Appeals pointed out, the trial court quoted *Mitchell*, but then only found “that politicization of the negotiating process”—not disclosure, mind you, but “politicization” of the “process”—“has the *potential* to effect [sic] the City’s interests, including the taxpayers’ interests.” COA Op. at 9 ¶ 20 (emphasis added). That’s insufficient under *Mitchell* because it lacks probability, causation, specificity, or materiality. Yet the Court of Appeals then bizarrely concluded that Petitioner “has not shown how that recitation of the legal standard or characterization of the evidence was reversible error or how that summary was clearly erroneous, given the evidence considered by the court.” *Id.*

That missed the point. The problem wasn’t the “recitation,” but the *misapplication of the Mitchell standard*. The trial judge only found “*potential*” harm and then said this “*potential*” harm “outweighs the presumption in favor of

disclosure.” *Id.* at 10 ¶ 22. But “potential” isn’t the standard; it’s a *completely different* standard. That’s reversible legal error.

The City’s framing of the issue as disclosure here leading to a “heightened risk” or “increased likelihood” of the alleged potential harms is incorrect for the same reasons. Resp. at 1. It also begs the question. “Heightened” or “increased”—to what level? If the risk doesn’t rise to a *probability*, then it doesn’t preclude disclosure.⁴

Moreover, neither the City nor either court below made the required *causal* connection to disclosure of any particular record at issue. See [Star Publ’g](#), 181 Ariz. at 434; [Bolm v. Custodian of Records of Tucson Police Dep’t](#), 193 Ariz. 35, 40 ¶ 13 (App. 1998). That’s partially because the City didn’t request an *in camera* inspection (again, it’s the City’s evidentiary burden, not a requester’s). See GI’s COA APP.217 at 201:6–10 (trial judge acknowledging lack of *in camera* review, “[a]nd so I can’t look to see, in this *particular* instance, if there is a *specific* issue for *potential* harm or probability, I guess, of harm, if the documents were to be released” (emphasis added)). But it’s also because the record shows that the purported harms asserted by the City were already occurring *prior to* and *in the absence of* disclosure—which disproves causality. See Pet. at 5–6 & nn. 9–10.

And while the City’s assertions fail the specificity and materiality requirements, too, see COA Op. Br. at 21–24; COA Reply Br. at 10–11, it’s sufficient here to conclude that the lower courts’ errors regarding probability and causation require reversal. (Of course, this Court can and should draw its own conclusions of law as part of its *de novo* review of the City’s denial of access to the requested records.)

⁴ To the extent that the Court of Appeals’ addition of the words “or risks” after “specific material harm” in [ACLU](#), 240 Ariz. at 151 ¶ 29, is understood to depart from [Mitchell](#)’s probability standard, see COA Op. at 10 ¶ 23, the [ACLU](#) case’s framing of the standard should be rejected. See *supra* n. 2.

II. Application of the *Carlson* balancing test is a legal matter subject to *de novo* review, which means reviewing courts must independently weigh the public interest in disclosure against any countervailing interests.

[*Carlson*](#) requires courts to scrutinize the withholding decisions of public records custodians to ensure that any denial of access is supported by sufficient countervailing interests. 141 Ariz. at 491. Whether such denial is wrongful “is an issue of law which [courts] review *de novo*.” See, e.g., [*KPNX Broad. Co.*](#), 191 Ariz. at 302 ¶ 20 (quoting [*Cox*](#), 175 Ariz. at 14)).⁵

Even though the Court of Appeals cited this standard, it failed to apply it out of a concern that it would have to “reweigh on appeal the evidence considered and weighed by the superior court.” See Pet. at 12–14 (quoting COA Op. ¶ 24). But what the court below should have done is reweigh the *public’s interests* in disclosure against the City’s asserted interests in nondisclosure as part of the [*Carlson*](#) balancing test, based on the record. That’s a *legal* question, not a fact or witness-credibility question.

This Court should reverse the Court of Appeals for failure to independently conduct that balancing test, and it should also conduct its own [*Carlson*](#) test to find that the public’s interest in these records outweighs the government’s stated (and speculative) interests. See Pet. at 12–13 & n.15.

The test here pits the public’s interests in disclosure—including monitoring the performance of government officials, [*Keegan*](#), 201 Ariz. at 351 ¶ 33, and how tax dollars are spent, [*Griffis*](#), 215 Ariz. at 5 ¶ 12 —against the City’s asserted interests in preventing “collusion” among public sector unions and what it calls the “politicization” of the City’s “meet and confer” process (including the possibility

⁵ This Court has elaborated that “review of a denial of access to public records is *de novo*” because “the ultimate determination involves a mixed question of fact and law.” [*London v. Broderick*](#), 206 Ariz. 490, 493 n.3 (2003) (in the context of Rule 123).

of impasse) that it alleges would result from disclosure of written documents exchanged between the City and the union during labor negotiations.

Because the trial court found that disclosure could only *potentially* harm these interests, the application of [Carlson](#) is rather easy here. The Superior Court simply gave too much weight to the City’s speculation and erroneously concluded that it “outweigh[ed] the presumption in favor of disclosure,” GI’s COA APP.015. If this Court allows that to stand, the “best interests” exception will swallow the presumption entirely.

III. The “best interests of the state” exception, to the extent retained by this Court, must be narrowly construed to preserve the presumption favoring disclosure inherent in Arizona’s Public Records Law.

As the Court of Appeals observed, the “amorphous” “best interests of the state” exception has received relatively little attention from Arizona courts. COA Op. at 7, 13 ¶¶ 15, 33. That void has allowed public bodies to offer increasingly speculative and dubious justifications for nondisclosure; indeed, that’s precisely what the City has done here. *See supra* at 5–6. In resolving the questions presented, this Court should clarify the limited scope of the exception.

A. The phrase “best interests of the state” is vague.

One problem with a vague category is that virtually anything will plausibly fit within it. Indeed, the phrase “best interests” has been deemed unconstitutionally vague in other contexts. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 548, 553–54 (1975); [Fantasy Book Shop, Inc. v. City of Bos.](#), 652 F.2d 1115, 1123–24 (1st Cir. 1981); [Smith v. Ladner](#), 288 F. Supp. 66, 69 (S.D. Miss. 1968).

Other courts have made clear that the phrase “best interests” is not *necessarily* vague, as long as it’s accompanied by some list of “specific factors to be considered” in making a best-interests determination. [Speck v. Auger](#), 558 F.2d 394, 396 (8th Cir. 1977), for example, rejected a vagueness challenge to a statute allowing transfer of juvenile cases to the regular court system if in the public’s best

interest, because that statute specified factors to be considered in a transfer determination. And [Harris v. James](#), 127 F.3d 993, 1010 n.24 (11th Cir. 1997), rejected a vagueness challenge to a statute requiring state Medicaid plans to contain rules consistent with the “best interests of the recipients,” because the regulations set forth factors to be considered. The “best interest of the child” standard in family law is cabined by statutorily defined factors. [A.R.S. § 25-403](#).

But no case or statute sets out *any* explicit factors to evaluate the government’s assertion of its “best interests” when withholding information under the Public Records Law. A handful of related interests have been accepted by Arizona courts as sufficient to overcome the public’s interest in disclosure, but no definitive factors have been established.⁶

One reason for this lack of specificity is the convoluted history of the “best interests” exception, which made its first appearance in Arizona law in [Mathews v. Pyle](#), 75 Ariz. 76 (1952). But our public records law is much older, dating back to territorial days.⁷ Before 1975, it read:

Public records and other matters in the office of any officer are at all times during office hours open to the inspection of any person. But in cases of attachments and garnishments, the clerk of a court shall not make public the fact of filing the complaint or issuance of any writ of

⁶ See [Lake v. City of Phoenix](#), 222 Ariz. 547, 551 ¶ 15 (2009) (“unduly burdensome or harassing” requests); [ACLU](#), 240 Ariz. at 153 ¶ 35 (“unreasonable administrative burden”); [Hodai](#), 239 Ariz. at 41 ¶¶ 16–17 (protecting state’s “interest in effective law enforcement” justified withholding “information that would allow criminals to thwart surveillance technology”); [Judicial Watch, Inc. v. City of Phoenix](#), 228 Ariz. 393, 400 ¶ 31 (App. 2011) (“security-related” information). See also [Board of Regents](#), 167 Ariz. at 258 (“ensuring the state’s ability to secure the most qualified candidates for the university president’s position” sufficient to shield disclosure of prospects—who had overlapping privacy and confidentiality interests—but not interviewed candidates); [London](#), 206 Ariz. at 494-95 ¶¶ 12, 20 (preventing frustration of ongoing disciplinary investigation of public employee). [London](#) concerned Arizona Supreme Court Rule 123 rather than the analogous public records statutes, but this Court has adopted the “best interests” exception into that Rule. [Ariz. Sup. Ct. R. 123\(c\)\(1\)](#).

⁷ As Section 3125 of the [1887 Revised Statutes](#). It then became Section 285 of the [1901 Revised Statutes](#), and was adopted into Section 12-412 by the [1939 Statutes](#), before being amended to its present form in 1975.

attachment or garnishment, nor shall any sheriff or deputy disclose the fact of such writ of attachment or garnishment being in his hands until the service thereof.

Mathews was decided while the statute was in that form. There, a newspaper editor sought documents relating to the investigation of a state official. The governor withheld some of these, saying they weren't "public records," but were "confidential," and that "it would be detrimental to the best interest of the state" to disclose them. 75 Ariz. at 78.

The question presented was whether the documents were "public records" or not. The Court found they were *not*. It consulted various statutes that defined that term, and found that they contemplated two different categories of documents: public records and "other matters." The documents at issue fell into the second category. See id. at 80. The Court then asked whether "other matters" must be open to public view. After reviewing decisions from other states,⁸ it said "other matters" could be withheld if disclosure would be contrary to the state's best interests. Id. at 81. In other words, the "best interests" exception applied *only to the category of "other matters,"* not to "public records" which were *per se* open to inspection.⁹ But neither Mathews nor any other case indicated what factors should be considered in making a "best interests" finding.

⁸ Mathews didn't identify the out-of-state cases on which it relied except for Steel v. Johnson, 115 P.2d 145 (Wash. 1941), which did not hold that public records could be withheld based on a "public interest" exception. Rather, that case was about the hearsay rule; it held that investigative reports held by a public agency are hearsay and don't qualify for a hearsay exception just because they're prepared by state officers. See id. at 194-50.

⁹ Mathews is also relevant to the issue of *de novo* review. Even in applying the "best interests" exception, Mathews concluded that deference to the government's assertion of a "public interest" exception was *improper*. The trial court was wrong "to assume as an established fact that ... the disclosure ... would be detrimental to the best interests of the state or ... that the Governor is the sole and final judge of those questions." Id. Deference didn't apply even to the "other matters" category.

B. The “best interests” exception has created confusion.

Then, in 1975, the legislature significantly revised the public records statute.¹⁰ In [Carlson](#), this Court found that these alterations “obviate[ed] the need for any technical distinction between ‘public records’ or ‘other matters.’” 141 Ariz. at 490. From now on, [Carlson](#) said, courts should “mov[e] directly” to deciding whether “the countervailing interests”—that is, the reasons for withholding a record—“override the policy of disclosure.” [Id.](#)

But while [Mathews](#) said the “best interests” exception applied *exclusively* to “other matters”—not “public records”—[Carlson](#) applied the “best interests” exception to *both* public records *and* other matters. It said that “the common law limitations to open disclosure are not based on any technical dichotomy” between the two types of information, “but rather are based on the conflict between the public’s right to openness in government, *and important public policy considerations.*” 141 Ariz. at 490. In other words, [Carlson](#) effectively legislated common law “public policy” exceptions into Arizona’s public records laws.

What’s more, in claiming that the source of this “public interest” exception was “the common law,” [id.](#), the *only* source the Court cited was Laurent B. Frantz, *Records and Recording Laws*, 66 Am. Jur. § 12 at 349 (2d ed. 1973)—which did *not* support the proposition that public records requests are subject to an all-purpose “public interest” exception. That article said:

[S]ome jurisdictions hold that there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary. Another approach is that the common-law right to inspect public records is not absolute, but is to be determined by whether permitting inspection would result in harm to the public interest which outweighs the benefit; but that public policy favors the right of inspection of public records and documents and it is only in the exceptional case that inspection should be denied. *However, where there is an express or implied legislative intent that certain records be*

¹⁰ [1975 Sess. Laws chap. 147.](#)

open to public inspection, the right is absolute and the custodian has no authority to deny inspection.

Id. (emphasis added; citations omitted).

The italicized sentence shows why [*Carlson*](#)’s invocation of this article was inapt, or at least incomplete. Arizona law, then and now, *does* expressly demonstrate an intent that public records be open to public inspection, and that means there’s *no* basis for giving officials discretion to withhold, absent express statutory authority to that effect.

Arizona’s public records law says plainly that public records shall be open to public inspection. [A.R.S. § 39-121](#). In fact, the statute is in tension with [*Carlson*](#)’s incorporation of “public policy”-based “common law” exceptions, because the legislature, as the principal policymaking branch, typically details what information is private or confidential. [Sections 39-121](#) and [-121.01](#) set forth a general rule and presumption in favor of disclosure, and then other laws create statutory exceptions. These scattered exceptions are typically phrased in mandatory language¹¹ and rarely contemplate any interest-balancing at all. As the Legislature has codified the scope of various exceptions, the [*Carlson*](#) balancing test has become less relevant and more confusing. *See* COA Op. at 13 ¶ 33 (the “common law” exceptions “involve different kinds of balancing” depending on the exception).

C. The “best interests” exception threatens to swallow the presumption favoring disclosure if not subject to meaningful judicial scrutiny.

The “best interests of the state” exception must, at a minimum, be narrowly construed. *See, e.g., Cox*, 175 Ariz. at 13–14 (“generalized claims of broad state

¹¹ Examples include [Section 32-129\(B\)](#), which shields the “[i]nvestigation files of any investigation” relating to the registration and certification of engineers, landscape architects, etc. Similarly, [Section 46-460\(A\)](#) says that “personally identifying information” concerning people in the adult protective services program “is confidential and may not be released except as provided” by statute.

interest” and “argu[ing] in global generalities of the possible harm that might result from” disclosure are insufficient¹²). Otherwise, the “strong presumption in favor of disclosure,” [Griffis](#), 215 Ariz. at 5 ¶ 12, would be eviscerated, and courts would regularly be asked to stray into policymaking.¹³

Ironically, that concern was prominent in the cases cited by the Am. Jur. article on which [Carlson](#) relied. That article cited Wisconsin cases such as [State ex rel. Youmans v. Owens](#), 137 N.W.2d 470 (Wis. 1965), and [Beckon v. Emery](#), 153 N.W.2d 501 (Wis. 1967). Those cases said that rather than “attempt to catalog the situations in which harm to the public interest would justify refusal to permit inspection,” courts must apply a disciplined, non-deferential, “case by case” analysis. [Youmans](#), 137 N.W.2d at 474–75.¹⁴

Wisconsin’s test, like Arizona’s, begins with the presumption in favor of disclosure. [Id.](#) at 475 (“[P]ublic policy favors the right of inspection of public records and documents, and it is *only in the exceptional case that inspection should be denied.*” (emphasis added)). Subsequent cases elaborate that the right to inspect records is “absolute ... in the absence of specifically stated sufficient reasons to the contrary.” [Beckon](#), 153 N.W.2d at 504. If a record custodian determines that a statutory exception applies, or that disclosure “would result in harm to the public

¹² That’s true even if asserted interests are valid in the abstract. The interests proffered in [Cox](#) included protecting fair trials, ongoing investigations and prosecutions, witness testimony, grand jury secrecy, and ethical obligations. 175 Ariz. at 13. But even these were “generalized concerns,” not “*specific instances of harm*” that would result in *that* case from “disclosure of *particular portions*” of the record at issue. [Id.](#) (emphasis added).

¹³ Justice Corcoran pointed out the policymaking problem in his [Board of Regents](#) dissent: “[t]he public policy issue of what information or actions involved in the search for an official may be withheld from disclosure rests with the legislative branch.” ... Until the legislature acts, this court should apply the broad terms of the Public Records Law.” 167 Ariz. at 261 (quoting [Board of Regents v. Atlanta Journal](#), 378 S.E.2d 305, 308 (Ga. 1989)).

¹⁴ [Youmans](#) did identify some “typical” situations where nondisclosure might be warranted: “[d]ocumentary evidence in the hands of a district attorney, minutes of a grand jury, [or] evidence in a divorce action ordered sealed by the court.” 137 N.W.2d at 474.

interest which outweighs the legislative policy [of] ... allowing inspection,” she must “state specific public-policy reasons for the refusal [to disclose].”

[*Newspapers, Inc. v. Breier*](#), 279 N.W.2d 179, 184 (Wis. 1979). Then, the court—far from deferring to her—applies an independent review: “Whether harm to the public interest from inspection outweighs the public interest in inspection is *a question of law*.” [*Id.*](#) (emphasis added).

In other words, whether the reasons for withholding are justifiable is a legal question subject to non-deferential *de novo* review. The same rule should continue to apply here. In fact, *de novo* review should apply in at least two different respects. A reviewing court must both weigh the competing interests *de novo*, and also analyze individual withholding or redaction decisions based on those interests *de novo*. Deference is improper in both respects. [*Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*](#), 546 N.W.2d 143, 145, 148 (Wis. 1996) (whether blanket exception existed for public employee disciplinary records, and whether denial of access to specific records at issue was proper, were questions of law reviewed without deference).

So, the analysis proceeds as follows: The custodian must “*specify* reasons for nondisclosure,” whereupon “the *court’s* role is to decide whether the reasons asserted are sufficient. ... [I]t is the duty of [the] court ... to determine *as a matter of law* whether the custodian’s stated reasons show that inspection *would cause harm* to the public interest which outweighs the presumptive public interest in allowing inspection.” [*Breier*](#), 279 N.W.2d at 184 (emphasis added). That “balancing test must be applied on a ‘*case-by-case basis*’ ... to determine whether a *particular* record should be released, and there are *no blanket exceptions* other than those provided by the common law or statute.” [*Wisconsin Newspress*](#), 546 N.W.2d at 147 (citation omitted; emphasis added). *Accord*, [*Milwaukee Journal Sentinel v. Wisconsin Dep’t of Admin.*](#), 768 N.W.2d 700, 718 ¶ 56 (Wis. 2009).

Thus the focus is on specificity: has the custodian given *specific* reasons that are supported by *sufficient evidence* for withholding the *particular record* at issue? Courts review that question *de novo*—as this Court has repeatedly stated, e.g., [*Scottsdale Unified Sch. Dist.*](#), 191 Ariz. at 302 ¶ 20 (citing [*Cox*](#), 175 Ariz. at 14), and as the Wisconsin Supreme Court reiterated in [*Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*](#), 342 N.W.2d 682 (Wis. 1984). “*Exceptions*,” that case said, “should be recognized for what they are, instances in derogation of the general legislative intent, and *should, therefore, be narrowly construed*; and unless the exception is explicit and unequivocal, it will not be [available].” *Id.* (emphasis added).

Thus, *de novo* review itself, along with a prohibition on categorical exceptions, are two key limitations on the “best interests” exception, as recognized by both Arizona and Wisconsin courts. *See, e.g., Cox*, 175 Ariz. at 14. The reasons are because (1) deferential review would reverse the presumption favoring disclosure, replacing it with a presumption favoring the initial determination of the custodian,¹⁵ and (2) categorical exceptions would fatally undermine the presumption of access for particular categories of records, regardless of the strength of the government’s stated interest. [*Carlson*](#) adds that “best interests of the state” encompasses only “carrying out [the government’s] legitimate activities.” 141 Ariz. at 491. *But see Keegan*, 201 Ariz. at 348–49 ¶ 18 (“best interests” standard “not confined to the narrow interest of ... the agency ... [but] includes the overall interests of the government and the people”). And [*Mitchell*](#) sets a high bar

¹⁵ The City’s argument that this Court should defer to City ordinances in this context should be decisively rejected for the same reason. *See* Resp. at 11–12. The City cannot dispose of the statewide presumption of disclosure by local ordinance any more than it can contract it away in “Ground Rules” agreements with bargaining units. *Compare id.* at 4, and DSC.APP.3, with [*Moorehead v. Arnold*](#), 130 Ariz. 503, 505 (App. 1981) (finding promise of confidentiality to third party insufficient to prevent disclosure of public records). *See also* COA Reply Br. at 24–26 (discussing further).

for nondisclosure, as any purported harms must be specific, material, probable, and causally connected to the particular records and interests at issue.

The Court should reaffirm all these limits, each of which respects and effectuates the presumption of disclosure and the strong policy of transparency. The Court could go further and provide guidance to lower courts and records custodians regarding the types of interests that are likely to outweigh the public's interest in disclosure in particular circumstances, such as protecting fair trials and legitimate criminal or disciplinary investigations. *See, e.g., Cox, supra.*

CONCLUSION

The Court should reaffirm the *Mitchell* standard, reiterate that all public records withholding decisions are reviewed *de novo*, and narrowly construe the “best interests” exception. The Court of Appeals’ decision should be reversed, and this Court should grant the requested special action relief. Alternatively, the case could be remanded with direction to the Superior Court to enter judgment in favor of the Institute, or, at a minimum, to proceed with an *in camera* inspection in accordance with the principles described above.

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