COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARRY GOLDWATER INSTITUTE FOR PUBLIC POLICY RESEARCH, Plaintiffs / Appellants v. CITY OF PHOENIX; JEFF BARTON; DENISE ARCHIBALD, and SHEREE RUCKER, Defendants / Appellees.	No. 1 CA-CV 24-0176 Maricopa County Superior Court No. CV 2023-003250

PLAINTIFF/APPELLANT'S REPLY BRIEF

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INTRODUCTION

Mitchell v. Superior Court, 142 Ariz. 332, 335 (1984), sets forth the rule for when the City can withhold public records under the "best interests" exception: a "probability that specific, material harm will result from disclosure" must be shown. The trial court simply did not hold the City to that standard here. Instead, it candidly relied on "speculative concerns," APP.015, to justify withholding labor negotiation records. Failure to employ the governing legal analysis was reversible legal error.[1]

What's more, "the balancing test [for disclosure] must be applied on a case-by-case basis to determine whether a *particular* record should be released." *Bolm v. Custodian of Records*, 193 Ariz. 35, 40 ¶13 (App. 1998) (cleaned up). No record-by-record analysis occurred below because the City never proposed redactions, requested *in camera* inspection, or sought to otherwise minimize nondisclosure. *See id.* at 41 ¶17 (noting similar situation in *Cox Ariz. Pub'ls v. Collins*, 175 Ariz. 11, 15 (1993)). The trial court therefore erred in finding that the City met its burden to justify withholding *all* labor negotiation records.

[1] Although the City claims that this Court should apply a deferential standard of review (Answer Br. at 12–13), the proper standard is *de novo* because the Superior Court applied the wrong legal test, and legal questions are reviewed *de novo*. *W. Valley View, Inc. v. Maricopa Cnty. Sheriff's Off.*, 216 Ariz. 225, 227 ¶7 (App. 2007) ("We review de novo whether the denial of access to public records is wrongful.").

Due to these fundamental errors, the Superior Court was misguided in its consideration of the City's argument that the City's "best interests" outweigh the public's interest in disclosure here. Under *Carlson v. Pima County*, 141 Ariz. 487, 490–91 (1984), courts must compare the government's proffered explanation of how public harm would result from disclosure against the policy favoring disclosure. But while the Superior Court referred to *Carlson*, it never actually made that comparison—i.e., never truly conducted the balancing test—because it took what the court itself admitted were "speculative" risks of disclosure as if they were dispositive. That is not the comparison *Carlson* requires. This, too, was reversible legal error.

In its Answering Brief, the City tries to diminish *Mitchell*, ignore *Bolm*, gloss *Carlson*, and take shelter in the trial court's factual findings. But the record actually supports the Goldwater Institute, when analyzed under the proper legal framework. The trial court only found "potential" harm from disclosure—not the "probability" as informed by *Mitchell* requires, or with the particularity *Bolm* requires. APP.012, APP.015; *see also* Opening Br. at 12. Proper examination of probability and particularity makes clear that the *Carlson* test weighs in Goldwater's favor.

In short, the Superior Court misapplied the governing legal standard, thereby improperly inflating the City's purported confidentiality interest, and putting a

thumb on the scale for the government. And rather than defend the Superior Court's reversible legal errors, the City reiterates its generalized, amorphous, non-material, potential concerns that result from causes *other than* the disclosure of the specific records at issue here. But those arguments are not persuasive.

I. The trial court applied the wrong legal standard.

The *Mitchell* standard for withholding records consists of four elements: any harm[2] must be: (1) probable; (2) specific; (3) material; and (4) resulting from (*i.e.*, caused by) disclosure. *See* 142 Ariz. at 335. But the Superior Court failed to apply this governing standard. Instead, it found only (1) "potential" harm, APP.012, APP.015—pointing to risks the record demonstrates are (2) general, (3) non-material, and (4) preexist disclosure.

The City, perhaps recognizing the significance of this requirement and not being held to it below, dedicates less than one page of its 47-page Answering Brief to arguing that the standard was properly applied—without citing *Mitchell* (or its progeny) directly. *See* Ans. Br. at 31.[3] But *Mitchell* is the binding standard, and the Superior Court erred by not applying it.

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[2] Of course, consequences of disclosure must be *harmful* to justify withholding. *See Church of Scientology v. City of Phoenix Police Dept.*, 122 Ariz. 338, 339 (App. 1979). Some of the City's reasons even fail that test because disclosure may actually *benefit* the City, the unions, and the public. *See, e.g.*, Op. Br. at 24, 26.

[3] The City only actually cites *Mitchell* once, in its final Argument paragraph, attempting to distinguish a different part of the case that cuts against their argument for ongoing secrecy even after negotiations conclude. Ans. Br. at 46.

A. The City failed to show *probable* harm.

To prevent disclosure of public information, purported harm to government interests must be *probable*. *Mitchell*, 142 Ariz. at 335. Without that crucial requirement, the "best interests" exception would swallow the rule favoring disclosure. The government could simply invent speculative harms whenever it wanted to hide information from the public. That is obviously not the law. *See Church of Scientology*, 122 Ariz. at 340 ("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."); *see also Star Publ'g Co. v. Pima Cnty. Atty's Office*, 181 Ariz. 432, 434 (App. 1994) (acceding to speculative arguments "would effectively repeal the public records statute").

None of the harms the City proffers are *probable*, and this Court can straightforwardly resolve this case on that ground alone.

"Probable" means more than possible. It means "having more evidence than the contrary, or as having more evidence for than against." *Conard v. Dillingham*, 23 Ariz. 596, 605 (1922). It certainly does not mean speculation.

The City dismisses the distinction between possibility and probability as a mere "quibble[]." Ans. Br. at 31. But nothing is more elementary, or more critical, than the legal distinction between possibility and probability. It permeates entire

areas of the law. *See, e.g.*, *Martin v. Reinstein*, 195 Ariz. 293, 314 ¶68 (App. 1999) (explaining that "one may not be constitutionally detained on the mere possibility of dangerousness" but only on a "probab[ility]"); *Benkendorf v. Advanced Cardiac Specialists*, 228 Ariz. 528, 530 ¶8 (App. 2012) (expert witness must testify to probabilities, not possibilities); *Republic Inv. Fund v. Town of Surprise*, 166 Ariz. 143, 151 (1990) (noting importance of distinction in constitutional law); *Strickler v. Greene*, 527 U.S. 263, 291 (1999) (stressing distinction in criminal law).

Not only would a "possibility" standard allow the government to evade the disclosure laws by pure speculation, but it would be unworkable, given that courts in disclosure cases are required to *compare* the risks of nondisclosure with the burden of withholding the documents. *Carlson*, 141 Ariz. at 490–91. But a court cannot meaningfully compare mere possibilities—only probabilities.

In short, the Superior Court reversibly erred when it said "speculative concerns may be sufficient" to justify nondisclosure. APP.015. *Mitchell* requires real "probability" of harm, 142 Ariz. at 335, and that requirement alone can ensure that the government does not effectively nullify the public records laws by appealing to speculative possibilities or guesswork to justify withholding.

The word "reasonable," even if it were added to the operative word "probability," doesn't help the City.[4] The Supreme Court has interpreted the phrase "reasonable probability" to mean "less than 'more likely than not' but more than 'a mere possibility.'" *State v. Vickers*, 180 Ariz. 521, 527 (1994) (citation omitted). In other words, "reasonably probable," is more than "possible" but less than "probable," and *Mitchell* and its progeny say the standard is "probable."

The City also uses formulae such as "reasonably foreseeable" and "reasonable predictions," Ans. Br. at 22, 25, but these are not substitutes for the *specific probability* that *Mitchell* requires. As every torts student knows, "reasonable foreseeability" only means "more than a possibility," *In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006); something is reasonably foreseeable if a reasonable person "could anticipate that [the thing] might occur under certain conditions," *Samson v. Saginaw Pro. Bldg., Inc.*, 224 N.W.2d 843, 849 (Mich. 1975), which is not the same as *probable*. Probable means more likely than not. *Dillingham*, 23 Ariz. at 605.

The difference is that probability requires specifics—especially in a public records case, where the state policy favors disclosure unless the government gives

[4] The City repeatedly obscures the *Mitchell* standard by cleverly deploying softer terms, such as "potential," Ans. Br. at 19, "reasonably foreseeable," *id.* at 22 "reasonable predictions," *id.* at 25, etc. *See also* APP.226 at 210:5–15; APP.231 at 215:1–2; APP.233 at 217:4. But none of these are the binding legal standard: *probable*.

strong, specific reasons against it. *Cox*, 175 Ariz. at 14. *See also* *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 373, 376 (Pa. Cmwlth. 2013) ("conjecture" or "speculation" insufficient to prevent disclosure). Yet, the City only offers this Court various formulations that mean something *less than* probable.[5]

Whatever terms are used, the City's position is simply that it can withhold documents based on *speculation* about *possible* harm resulting from disclosure. But one thing that's absolutely clear is that speculation alone, untethered to past experience with or analogous examples of the predicted harm, is insufficient to justify withholding presumptively open records. *Smith v. Town of Marana*, 254 Ariz. 393 (App. 2022), for example, said that "the [governmnent's] speculation … does not create a cognizable privacy interest that overcomes the 'statutory policy favoring disclosure," because such mere possibility did not amount to the "'specific, material harm'" required by the *Mitchell* test. *Id.* at 399 ¶19 (citing *Mitchell*). *See also* *Star Publ'g*, 181 Ariz. at 434 (speculation insufficient).

It is possible for the government to satisfy the specific-probability requirement by showing previous instances of harm. For instance, in *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 255 (1991), the Board of Regents satisfied its burden and could therefore withhold the names of a

[5] One might fairly call that "speculative," which means "*theoretical* rather than *demonstrable*." Merriam-Webster.com (emphasis added).

vast pool of university president prospects by showing that ASU and the public previously experienced harm stemming from analogous disclosure. *See* *id.* ("In one of [the prior] searches, two of six finalists withdrew their names from consideration after their names were leaked to the press and published.") But the City gave no such proof here.

Bizarrely, the City cites this case, Ans. Br. at 26, to support its claim that it "need not" "produce evidence of actual consequences from disclosure," *id.* at 25 n.4, or that "the concerns or problems created by disclosure have already occurred," *id.* at 25—whereas *Board of Regents* shows that the opposite is true.

Note, however, that the *Board of Regents* court found the Board's previous negative experience *in*sufficient to overcome the public's interests in knowing the names of 17 finalists for the position (even though some finalists had previously withdrawn their names due to disclosure). 167 Ariz. at 258. The court's reason for that distinction is instructive: regarding the finalists, whose identities the court said *did* have to be disclosed, the court said (a) "those interested will already know who is being considered," (b) "the fact that the final candidates have an express desire for the job[] should militate against maintaining confidentiality," and, (c) unlike mere prospects, finalists "must expect that the public will, and should, know they are being considered." *Id.*

The same reasoning points to disclosure here. The records at issue concern terms and conditions of *public* employment. APP.004–05 ¶¶6–10. The unions and their members—all public employees—consented to public employment and "must expect that the public will, and should, know" the terms and conditions thereof, as well as proposals to alter them. *See* *Bd. of Regents*, 167 Ariz. at 258. And those interested—including *other* public-sector unions[6]—already know what's being considered and negotiated. Only the financier of the negotiations (and the final MOU) and the ultimate employer of both parties—the taxpayer—remains in the dark. And unlike prospective *employees*, prospective *employment terms* (i.e., bargaining proposals) have no personal privacy[7] interests to protect.[8]

[6] *See* APP.162–63 at 146:7–147:3; APP.169–70 at 153:22–154:15; APP.268–69; Op. Br. at 25; *infra* at n.13.

[7] *Non-privacy* "interests of private parties," Ans. Br. at 30, will only defeat disclosure if those interests benefit the public, *see*, *e.g.*, *Bd. of Regents*, 167 Ariz. at 255. *Special* interests that otherwise harm *public* interests cannot count because that would undermine the core reasons for public transparency and accountability laws. *See* IR.1 ¶¶1, 59. Likewise, threatened misbehavior such as extreme "labor unrest," Ans. Br. at 22, or unethical negotiation tactics, *id.* at 20, on the part of private parties who seek to prevent disclosure, does not render their interests "interconnected," *id.* at 31 with the "best interests of the state" for purposes of the exception. To hold otherwise would be to reward unclean hands.

[8] *Scottsdale Unified School District v. KPNX Broadcasting Co.* is similarly distinguishable because the records custodian there met its burden by demonstrating that personal privacy information was imminently at risk, and the requester failed to rebut that showing. 191 Ariz. 297, 303 ¶ 23 (1998). That is not true here.

In any event, the City here presented witnesses that testified to what the City *anticipates* or thinks might happen. But those opinions were baseless,[9] and testimony concerning *possible* harm[10] simply doesn't establish a *probability* of *specific*, *material* harm such as *Mitchell* requires. Moreover, controverting evidence[11] must be accounted for when determining whether such a probability exists.

B. The City failed to show *specific* harm.

Not only did the Court fail to find *probable* harm, it failed to find *specific* harm, which *Mitchell* requires. Specificity is necessary to prevent the government evading public disclosure laws by merely employing a "you never know"-type assertion as an excuse for withholding documents. Thus, *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268 (App. 2007), found "the *general* interest of protecting the privacy of *a* minor crime victim" insufficient to prevent disclosure of redacted records where the custodian did not "specifically demonstrate *how* production of

[9] *See, e.g.*, APP.142–43 at 126:1–127:22; APP.145–46 at 129:7–130:21; APP.149 at 133:4–15; APP.178–79 at 162:18–63:24; APP.181–82 at 165:23–166:18; APP.184–85 at 168:18–169:13; APP.198–200 at 182:21–184:15.
[10] *See, e.g.*, Ans. Br. at 43–45; APP.060–66 at 44:22–50:13; APP.071–72 at 55:16–56:14; APP.100–02 at 84:24–86:4; APP.110–11 at 94:20–95:3; APP.113 at 97:5–25; APP.114–15 at 98:6–99:19; APP.127–29 at 111:16–113:14; APP.283 ¶14; APP.285–86 ¶7.
[11] *See e.g.*, APP.074–78 at 58:20–62:6; APP.102–04 at 86:14–88:6; APP.120–22 at 104:20–106:17; APP.126–29 at 110:8–113:9; APP.211–12 at 195:3–196:4; APP.252–55; APP.261–77.

the [specific redacted record at issue] would *cause* harm." *Id.* at 274 ¶25 (emphasis added). If the privacy interests of a specific minor—a sexual assault victim, at that—were insufficiently specific to justify blanket nondisclosure, then *none* of the City's interests here in protecting labor negotiations from general concerns of possible "political pressure, collusion, and … impasse" are "particularized" enough. *See* APP.015. The trial court committed legal error by failing to apply the *Mitchell* requirement for a *specific* showing as to how production of the records would probably lead to a *particular* harm.

C. The City failed to show *material* harm.

The Superior Court also erred in failing to adequately apply the *materiality* requirement of the *Mitchell* test. *See* Op. Br. at 24. The City contends that "people behave differently under a spotlight as compared to their behavior in private." Ans. Br. at 20. Maybe so,[12] but a core purpose of the Public Records Law is that the public has a right to know how its business is being conducted and how taxpayer money is spent, unless the government proves that a specific, *material* harm will probably result. That special-interest negotiators and City representatives may "behave differently" in some alternative situation falls far short of the specificity and materiality required by *Mitchell*—and, in fact, is precisely an example of why the public records laws exist.

[12] *See* APP.114–115 at 98:1–99:19; APP.129–30 at 113:10–114:17.

D. The City failed to establish that the alleged possible harms would *result from* disclosure because the harms are preexisting.

The Superior Court further erred by failing to apply *Mitchell*'s *causation* requirement. The government must prove not only that a specific and material harm is probable, but that the harm will *result from* the disclosure. But the record shows that politicization, collusion, and impasse already occur *now*, without public disclosure of the records, *see* Op. Br. at 7, 23–26, and neither the City nor the Superior Court ever causally connected the risks of collusion, impasse, or politicization to disclosure itself as *Mitchell* requires. *Id.* at 7–8.

Instead of finding causation, the Superior Court candidly resorted to pure "speculat[ion]," APP.015, finding that there is "potential for" these harms. *Id.* But since the record revealed that the City's labor negotiations are inherently politicized and *already* collusive, *see* Opening Brief (at 24–26),[13] it's not logically

[13] The City contends that unions only discuss negotiations at "high-level," and claims that the units "never share specific proposals." Ans. Br. at 18. But the record contradicts this. As one union president testified, discussions between union leaders can be as "*specific*" as proposing "to increase the amount of bulletproof vests" for *both* "PLEA … officers" and "detention officers" represented by AFSCME. APP.170 at 154:10–12 (emphasis added). That's far from a "high-level" discussion; it's a specific demand referring to a specific contract term sought by two specific bargaining units for a specific bargaining cycle—i.e., collusion. And collusion that preexists disclosure cannot be *caused by* disclosure. Additionally, the unions have their own "COPCU" group of the unions that "meet and confer" with the City. *See* Op. Br. at 25. So, union leaders can and do speak with one another all the time, including about each others' bargaining proposals and tactics. Disclosure of negotiation records would not change that fact.

possible for these things to *result from* disclosure—and the Superior Court made no effort to find that they would. That was reversible legal error.

II. The trial court erred in effectively fashioning a blanket rule protecting all draft negotiation materials and allowing the City to avoid any attempt at narrowing the scope of nondisclosure.

To meet its burden, the City must tie its showing of probable, specific, material harm to *each particular record withheld*. *Bolm*, 193 Ariz. at 40 ¶13; *Cox*, 175 Ariz. at 14; *Star Publ'g v. Pima Cnty.*, 181 Ariz. at 434. It did not do that, and the Superior Court committed legal error in not holding the City to that burden.

The City does not address *Bolm* in its brief, nor its requirement to conduct a case-by-case balancing test for particular records. And the City's discussion of *Cox* makes no mention of *in camera* inspections or redactions. *See* Ans. Br. at 28. Nor did the City provide any rebuttal or explanation in the trial court as to why it failed to seek these alternatives to "blanket" nondisclosure, *see Bolm*, 193 Ariz. at 40 ¶13; *Cox*, 175 Ariz. at 14, despite this issue being raised repeatedly below, IR.1 at ¶¶70–76; IR.18 at 9; IR.35 at 9 & n.11; APP.216 at 200:12–17; APP.217 at 201:6–10; APP.239–40 at 223:8–224:13. *See also* Op. Br. at 16, 33–34.[14]

[14] It was the City's—not the Institute's—burden to make redactions and/or seek an *in camera* inspection. *Hodai v. City of Tucson*, 239 Ariz. 34, 43 ¶27 (App. 2016) ("Our public records statutes evince a clear policy favoring disclosure, and the burden of proving that redaction would be so unduly burdensome that inspection is not warranted rests with the party opposing inspection." (cleaned up)); *see also Bolm*, 193 Ariz. at 37, 40 ¶¶4, 14. Should Goldwater prevail on appeal, the City has waived both alternatives to full disclosure. Just as the records custodian in *Cox*,

The City's failure to seek a narrower scope of confidentiality through redactions or an *in camera* inspection, *see* Op. Br. at 33–34, and the trial court's error in finding the City met its burdens under *Mitchell*, *Carlson*, etc. in light of such sweeping nondisclosure and without examining the records, are fatal to the City's efforts to maintain secrecy.

A. The trial court erred in fashioning a blanket rule covering *all* draft negotiation materials.

If sensitive records such as investigatory police reports,[15] or law enforcement agency personnel records and internal affairs documents,[16] or signed petitions for a controversial annexation,[17] or autopsy reports,[18] or computer backup tapes potentially containing nonpublic or privileged information,[19] or documents regarding an Attorney General investigation,[20] or notices of claim involving minor crime victims,[21] may not be categorically withheld from the public, then neither can the labor negotiation records here. *See* Ans. Br. at 30. That's because "the

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175 Ariz. at 15, who "acted in an arbitrary and capricious manner" by "neither produc[ing] the records for an *in camera* review, nor offer[ing] a redacted version to the court" or to Goldwater, the City "cannot [subsequently] complain."

[15] *Cox*, 175 Ariz. at 14; *see also Church of Scientology*, 122 Ariz. at 340 (finding no statutory exemption for investigative materials).

[16] *Bolm*, 193 Ariz. at 40 ¶13.

[17] *Moorehead v. Arnold*, 130 Ariz. 503, 504–05 (App. 1981).

[18] *Star Publ'g Co. v. Parks*, 178 Ariz. 604, 605 (App. 1993).

[19] *Star Publ'g Co. v. Pima Cnty.*, 181 Ariz. at 433–34.

[20] *Mathews v. Pyle*, 75 Ariz. 76, 77–78, 80–81 (1952).

[21] *Ellis*, 215 Ariz. at 269, 269, 274 ¶¶1, 25–26.

public interest in disclosure and nondisclosure may vary depending on the circumstances of the [negotiation] and the nature of the [particular] documents produced." *Bolm*, 193 Ariz. at 40 ¶13 (cleaned up). And "sweeping exemption[s] from the public records laws" and "blanket rule[s]" of nondisclosure "contravene[] the strong policy favoring open disclosure and access, as articulated in Arizona statutes and caselaw." *Cox*, 175 Ariz. at 14. *See also* Op. Br. at 12–16.

In short, if the City wants to shield *all* "draft negotiation materials," APP.015, from disclosure under the Public Records Law, it should seek a legislative solution rather than ask the judiciary to "carve[] out such a broad exception." *Cox*, 175 Ariz. at 14. Certainly the trial court should not have legislated such a "blanket rule" from the bench. *Id.* Doing so was reversible error. *See also Bolm*, 193 Ariz. at 40 ¶13; *Ellis*, 215 Ariz. at 274 ¶25.

B. No *in camera* inspection was requested or conducted.

Creation of a categorical exemption from disclosure is particularly egregious where **none of the records were examined by the court.**[22] *Star Publ'g*, 181 Ariz. at 434 (although certain concerns "might on occasion permit secrecy … [n]o one has examined the actual records in this case to demonstrate why any particular

[22] *See* APP.217 (THE COURT: "[I]n-camera review … [has] not been presented. And 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.").

individual record ought not be revealed," and "since no records have been produced, it [was] impossible to say" whether particular documents should be withheld).

In camera inspections, like the "best interests" exception and other fundamental aspects of Arizona public records law, date back at least to the seminal case of *Mathews*, 75 Ariz. at 81. There, the petitioner sought materials associated with an Attorney General investigative report requested by the Governor. *Id.* at 77–78. The trial court dismissed the case after the government claimed the records were confidential and disclosure would be detrimental to the state's best interests. *Id.* at 78. On appeal, the Supreme Court rejected the notion that the Governor was "the sole judge as to what information regarding the affairs of his office should be made public." *Id.* at 80. To allow him to determine for himself of what to disclose was "inconsistent with all principles of Democratic Government." *Id.* at 80–81. Instead, whether the documents were rightly withheld was a question for the courts, *id.* at 81, and a trial court should make that determination through, where necessary, a "private examination" that will enable the judge to "determine … whether their disclosure would be detrimental to the best interests of the state." *Id.* The *Mathews* court declared, without reservation: **"In no other way** can such questions be determined." *Id.* (emphasis added).

Since *Mathews*, Arizona courts have routinely used *in camera* inspections to conduct the balancing test for disclosure. *See, e.g.*, *Church of Scientology*, 122 Ariz. at 339; *Carlson*, 141 Ariz. at 491[23]; *Mitchell*, 142 Ariz. at 334–35; *Ellis*, 215 Ariz. at 274 ¶¶25–27; *Hodai*, 239 Ariz. at 38, 40 ¶¶5–6, 14; *Schoeneweis v. Hamner*, 223 Ariz. 169 ¶¶22–23 (App. 2009). Here, however, the Superior Court allowed the City to withhold an entire category of records under the "best interests" exception without conducting an *in camera* inspection, based on what the court itself admitted was mere speculation about potential harms (somehow) resulting from disclosure.

What's more, the City could not meet its burden under the "best interests" exception where it did not seek the "practical alternative" of providing redacted versions of the records. *Carlson*, 141 Ariz. at 491. It had a duty to do so if possible because "qualifications as to public access do not preclude inspection entirely even where the competing interests … override the public's right to inspect certain documents." *Id.* If the City was not sure whether redaction was possible, the court should have pursued *in camera* inspection, because that would enable it to know

[23] *Carlson* discusses *Mathews* and cites another case where Division Two approved *in camera* inspection. 141 Ariz. at 491 (citing *Little v. Gilkinson*, 130 Ariz. 415 (App. 1981)). And while it notes that "[t]he **court of appeals** did not **order** *in camera* inspection of the police investigative reports in *Church of Scientology*," the Court apparently missed that the **trial court** in that case **did** conduct an inspection prior to the appeal. *Id.* at n.2.

what should be redacted. *Ellis*, 215 Ariz. at 274 ¶26. *See also Hodai*, 239 Ariz. at 40 ¶15 (criticizing trial court for "not address[ing] the possibility of redacting documents to protect the interest of the state," and ordering disclosure of a redacted PowerPoint that had been provided for *in camera* inspection). *Cf. Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348 ¶13 (App. 2001) (affirming order to disclose "some but not all of the document" at issue).

C. The City's withholding of public records should not extend through an entire subsequent negotiation cycle.

Another troubling aspect of the "blanket rule" imposed by the trial court is that now, all "draft negotiation materials" may be withheld under the "best interests" exception not only until negotiations conclude, but for an entire *additional* "meet and confer" cycle. This will thus operate to categorically shield public-sector labor negotiation records for up to *four years or more*. Ans. Br. at 33 (the "lifespan of an MOU … usually ranges from 2 to 4 years). This is precisely the kind of outcome Arizona courts have repeatedly rejected.

Like all applications of the *Carlson* test, the trial court's determination regarding the period of nondisclosure is subject to *de novo* review because it creates a continuing denial of access to records. *See, e.g., Cox*, 175 Ariz. at 14 ("Whether the denial of access to public records is wrongful is an issue of law which we review de novo.").

Here, a ruling in favor of Appellant would negate any categorical delayed disclosure rule for materials exchanged during "meet and confer" negotiations. That's because if City interests do not outweigh public interests now (or during negotiations), they certainly won't in the future, as negotiations become an increasingly distant memory. *See* *Church of Scientology*, 122 Ariz. at 339–40 (prohibiting permanent nondisclosure). But if this Court determines that any portion of the records is shielded under the "best interests" exception, it should narrow the window of confidentiality to terminate when the parties reach a final agreement.

The City baselessly argues that Goldwater waived this argument "based on its non-opposition in the Superior Court," Ans. Br. at 46, but Goldwater's position is—and always has been—that the requested documents (and others like them) are subject to disclosure *now* (and were at the time of the request), not one or two or four or however many years down the road. *See, e.g.*, IR.1 ¶77 (arguing "the public is entitled to open access to … [the] responsive records"); *id.* at 14 ¶A (requesting the trial court to compel *immediate* production). To claim that Goldwater did not oppose nondisclosure—for *any* length of time—is plainly contradicted by the record.

When the City first brought up[24] the argument that the records should be withheld until approval of the next succeeding MOU, Goldwater squarely addressed it in its subsequent filing.[25] Goldwater cited *Church of Scientology*, 122 Ariz. at 339–40, for the proposition that records cannot be permanently concealed (because that contradicts public policy favoring disclosure), which was subsequently discussed in the trial court's rulings. IR.30 at 4–5; APP.015. *See also* Ans. Br. at 45–46.

Further, at the evidentiary hearing, Goldwater pressed two City witnesses, Messrs. Perkiser and Kriplean, regarding whether old bargaining proposals are relevant in negotiations. APP.144–45 at 128:9–129:6; APP.179–80 at 163:25–164:16. Neither answered "yes"; rather, they both said it *"depend(s)*." APP.144 at 128:23; APP.180 at 164:16. This highlights the trial court's error in shielding *all* proposals from disclosure, even if for a "limited duration." Ans. Br. at 46. "It depends" is just the kind of speculation that *Mitchell* does not allow; it's precisely why courts require *specificity:* a record-by-record analysis, preferably through *in camera* inspection, *Bolm*, 193 Ariz. at 40 ¶14, and why judge-made "sweeping exemption[s]" and "blanket rule[s]" are inappropriate in the public records context. *Cox*, 175 Ariz. at 14; *see also* Op. Br. at 13–16 & n.16.

[24] IR.21 at 17–18.
[25] IR.23 at 6. *See also* IR.33 at 6; IR.35 at 3.

As to the length of any nondisclosure period, even *one* month after MOU finalization would be too long for a categorical rule. *Parks*, 178 Ariz. at 605, rejected a similar argument that autopsy reports should be kept confidential for up to 35 days after a public records request so that relatives of a decedent could have time (15 days) to object to disclosure and additional time (20 days) to sue to prevent disclosure. *Id.* Pima County and its medical examiner claimed that "the presumption in favor of free access to such records [was] overcome by its interest in insuring that the privacy interests of relatives of a decedent are protected, *thus protecting itself* from lawsuits by those relatives for the release of the report." *Id.* (emphasis added). But the court held that the county could *not* "keep all autopsy reports secret for up to an extra month on the proposition that some few reports might be legitimately kept secret." *Id.* (citing *Carlson*). That is because "[i]f 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.* (emphasis added). *See also Mitchell*, 142 Ariz. at 335 (holding nondisclosure order "void *to the extent that it enacts a general rule* keeping *all* presentence reports confidential even after sentencing" (emphasis added)); Op. Br. at 15–16 & n.16.

The same is true here. If the City wants to withhold specific proposals even after negotiations conclude, it must make the required showing for each individual record (or redaction). *See* *Smith*, 254 Ariz. at 399 ¶18 (rejecting a blanket policy of redacting names from police reports produced to the public because it "defeats the burden *Carlson* places on public entities to presumptively disclose information unless a specific privacy interest outweighs that disclosure" and because "automatic redaction can potentially create a 'black box' of information that might render government activity impervious to public scrutiny"). *Cf.* A.R.S. § 39-121.01(D)(2) (requiring records custodian to "if requested … furnish an index of records or categories of records that have been withheld and the reasons [they] have been withheld").

The trial court therefore erred in concocting a wholesale exemption from this requirement for all "negotiation drafts"—even "for a limited period (i.e., until the next MOU is finalized)"—and then declaring it "consistent with the application of the best interests exception." APP.015. Contrary to the City's assertion, mere acknowledgment that records may not be shielded in perpetuity is insufficient and does not dispel the problems created by a "*general rule*," even one "of limited duration." *See* Ans. Br. at 46 (emphasis added).

III. By misapplying *Mitchell* and ignoring *Bolm*, the trial court also erred in conducting the *Carlson* balancing test for all labor negotiation records, improperly crediting the City's generalized claims of potential, non-material, preexisting harm and discounting significant public interests in the requested records.

The "central question" in an appeal involving the "best interests of the state" exception is whether the court below properly conducted the *Carlson* balancing test. *Keegan*, 201 Ariz. at 348 ¶12. As with the *Mitchell* standard, application of the *Carlson* test is subject to *de novo* review. *Cox*, 175 Ariz. at 14; *see also* Op. Br. at 9. As *Board of Regents* made clear, in conducting *de novo* review, "[t]he 'unless clearly erroneous doctrine' … does not apply to the trial court's conclusions of law *nor does it apply to findings of fact that are induced by an erroneous view of the law nor to findings that combine both fact and law when there is an error as to law*." 167 Ariz. at 257 (emphasis added, citation omitted).

A. The trial court failed to reject the City's speculative excuses for nondisclosure.

The *Carlson* test requires the court to presume in favor of disclosure unless the government demonstrates that "countervailing interests of confidentiality,[26] [personal] privacy[,] or the best interests of the state … in carrying out its legitimate activities outweigh the general policy of open access." 141 Ariz. at 491.

[26] This really means information or records made confidential by statute. *See Carlson*, 141 Ariz. at 490; *Scottsdale Unified*, 191 Ariz. at 300 ¶9; Op. Br. at 10. General assertions of confidentiality fall under the "best interests" analysis, not the confidentiality exception.

Although the City offers various excuses as to why labor negotiation records should be withheld, *see* Ans. Br. at 1, 11, the trial court considered most of these, APP.012, and rejected all except for "undue pressure, impasse, and collusion." APP.015. *See also* Op. Br. at 21–22.

Nevertheless, the City seeks to reiterate asserted interests that the Superior Court rightly rejected: the protection of certain "straw man" bargaining tactics, Ans. Br. at 20; avoiding having to explain proposals to "potentially unhappy constituents," *id.*; preventing "labor unrest," *id.* at 22; *et cetera*. None of these considerations warrants withholding the documents because they are entirely speculative and do not meet the probability, specificity, causation, or materiality requirements of *Mitchell* and *Carlson*.[27]

The City points to confidentiality agreements contained in some of its written "Ground Rules" documents, Ans. Br. at 7 & n.2; D.APP.002–016, but these agreements—the details of which vary from union to union and do not even cover all of the bargaining units, *see, e.g.*, APP.146–49 at 130:22–133:3—are irrelevant to the disclosure analysis. That's because *Moorehead*, 130 Ariz. at 505, already held that the government's desire to avoid breaching a promise of confidentiality "is not a sufficient harm to the public interest to prevent disclosure" under the

[27] To reiterate, none of these alleged consequences is attached to "any *particular* individual record," which the City must show to justify withholding. *Star Pub. Co.*, 181 Ariz. at 434.

Public Records Law. The reason is obvious: if the mere existence of a confidentiality agreement were sufficient to justify withholding, "a city official [could] eliminate the public's rights under [the Public Records Law]" by simply getting an agreement signed. *Id.* The Public Records Law cannot be so easily evaded.

Yet, in direct contradiction to *Moorehead*, the trial court concluded that "the City has a strong interest in maintaining the confidentiality of the records at issue" in part because "the documents at issue are created and exchanged as part of a confidential negotiation process." APP.012. That was reversible legal error.

The trial court also improperly credited the City's "compressed time frame for labor negotiations," *id.*, and simultaneous negotiations. APP.014. But these are conditions *created by the City itself* in its "meet and confer" ordinance. *See* Ans. Br. at 4–6, 16, 29, 41. And just as the City cannot *contract* away its statutory transparency obligations, neither can it *codify* them away.

The same is true for the Ordinance's so-called "blackout period"[28] that the trial court afforded little weight below. APP.012 n.3. That the City now tries to rebrand this "blackout period" as simply a "guardrail[] to minimize the possibility

[28] The Ordinance attempts to prevent negotiators from talking about negotiation matters with members of the City Council during certain points in the process, particularly if impasse is declared. P.C.C. ch. 2 art. XVII §§ 2-220(A)(6), (B)(8). But this rule doesn't seem to keep the elected officials from being well-apprised of negotiations anyway. *See, e.g,* IR.21, IR.23.

of political influence," Ans. Br. at 6, does not change the legal analysis. *See also id.* at 20 (repeating the "blackout negotiation period" argument); IR.23 at 1–2 (discussing the City's mischaracterization of the "blackout period" in its preliminary briefing).

In short, the Superior Court reversibly erred by failing to apply *Mitchell*, *Carlson*, and *Moorehead*, allowing the City to escape its duties under the Public Records Law by self-serving means.

B. The trial court inadequately considered the public's interests in the specific records at issue.

Although it does not matter why a requester seeks public records if they are subject to disclosure, *Hodai*, 239 Ariz. at 38 ¶7, this case, and the records requested, involve significant issues of public policy in the City. Here, the public was deprived of information contained in draft MOUs and responses that are required to be open to the public under the City's *own Code*. *See* Op. Br. at 4, 32. That unlawful lack of disclosure should be addressed by a straightforward application of the Public Records Law through the disclosure of the requested records.

The City claims its Ordinance "effectively balances public transparency with the integrity of the meet and confer process." Ans. Br. at 15. But the "integrity" of the process was violated once PLEA and the City failed to produce a draft MOU or a response for public comment. Even had a draft been produced, citizens deserve

to know what proposals publicly funded employees are exchanging so the public can meaningfully weigh in on those proposals. If they don't have access to this, the cake is already baked once an agreement is reached, and access to the documents comes too late for the public to do much about it. APP.042 at 26:1–26, APP.044–53 at 28:3–37:1. The trial court erred in failing to weigh these realities. Yet they go to the heart of the public's interest in the documents in question.

Consider, for example, the City's false claim that "[n]ot one penny is expended based on the exchange of a draft [MOU]." Ans. Br. at 24. Actually, both sides of the drafting process are being paid by taxpayers. APP.005 ¶¶12–13. *See also id.* ¶¶9–10. Those taxpayers have a presumptive right to know about the process, and the purpose of the Public Records Law is to give them the information they need to determine whether those costs are well spent. And, of course, taxpayers have an ongoing interest in anticipated or threatened expenditures, which they will ultimately bear the burden of financing if inserted into the agreed-upon MOU. *Cf.* *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979) (taxpayers have standing to question expenditures made **"or threatened"** by a public agency).

Moreover, even *non*-taxpayers have significant interests in public accountability laws, including preventing conflicts of interest and self-dealing. *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 526 ¶33 (2021). Those

concerns pervade public-sector union negotiations, where politically powerful unions engage in political activities supporting and opposing the political campaigns of City leaders. *Cf.* Ans. Br. at 19 ("both sides of the negotiating table" complained about the possibility of disclosure).

As one public-sector union leader famously stated, "We have the ability, in a sense, to elect our own boss."[29] The record here shows that the unions were in the process of doing just that: they actively electioneered during a runoff election for two City Council positions *while negotiations were ongoing*. APP.010 ¶47; APP.163–67 at 147:4–151:10; APP.278; Op. Br. at 30–31 & n.23. But although undisputed in the record, that fact was ignored by the trial court in its analysis—and it demonstrates the perversity of its conclusion that *disclosure* of the documents may lead to "political pressure" and "collusion." APP.015. Where residents, voters, and taxpayers have no seat at the table, they at least have a right under the Public Records Law to see the documents slid across that table. The Superior Court's contrary conclusion was based on its disregard of the *Mitchell* test and its explicit embrace of speculation as the ground for its ruling.

[29] DiSalvo, *The Trouble with Public Sector Unions*, National Affairs (Fall 2010) (quoting Victor Gotbaum, a 1970s AFSCME leader in New York). *See generally* Howard, *Not Accountable: Rethinking the Constitutionality of Public Employee Unions* (2023).

CONCLUSION

The Court should reverse the judgment and direct the City to produce the requested records.

Respectfully submitted this 11th day of September 2024,

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COURT OF APPEALS
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Pursuant to Rule 14(a)(2) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plaintiff/Appellant's Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 6,963 words, excluding table of contents and table of authorities.

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The undersigned certifies that on September 11, 2024, she caused the attached Appellant's Reply Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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