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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 THE CENTER FOR BIOLOGICAL
12 DIVERSITY, a not-for-profit corporation;
13
14 Plaintiff,

15 v.

16 THE CITY OF PRESCOTT, a municipal
17 corporation of the State of Arizona; JOHN
18 DOES 1-10,
19 Defendants.

No. CV-2009-0596

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Hon. William T. Kiger)

20 Plaintiff, the Center for Biological Diversity (the "Center") brought the instant Special
21 Action against the Defendant, City of Prescott (the "City") to compel the production of public
22 records pursuant to A.R.S. § 39-121, *et seq.* While the Center was attempting to gain access to
23 the documents, other members of the public were also seeking access to the City's public
24 records. In an effort to keep the same documents (regarding the Big Chino Water Ranch
25 Project) confidential, the City filed a declaratory action against the Salt River Project ("SRP")
26 and others. In the SRP matter, Judge Mackey conducted an *in camera* inspection of the
documents and, in pertinent part, ordered the City to produce them. The same records ordered

1 produced by Judge Mackey are responsive to and satisfy the document request(s) made by the
2 Center in the instant case.

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4 There is no genuine issue as to any material fact. The Center is entitled to summary
5 judgment. The requested public documents should be made available for public review and
6 inspection. Whether based on an application of the collateral estoppel doctrine, or on notions
7 of judicial comity, economy, and/or common sense, the *in camera* findings of Judge
8 Mackey's Court in the SRP matter should be dispositive in the instant case.
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10 FACTS AND PROCEDURAL BACKGROUND

11 On May 8, 2008, the Center, pursuant to A.R.S. § 39-121 *et seq.*, requested the
12 following documents from the City of Prescott:
13

- 14 • All documentation regarding the Big Chino Water Ranch Pipeline Project. This
15 should include but not be limited to documentation for Phase II, Design, as well as
16 all drawings, specs and bid documents. This should not including (sic.) Phase I
17 Conceptual Design Report.
- 18 • All documentation and records regarding and related to the acquisition of
19 easements for the Big Chino Water Ranch pipeline. This should include but not be
20 limited to documents identifying the pipeline route(s), the parcels over which
21 easements are needed for right-of-way, the title reports, appraisals, prepared offers
22 and presented offers.
- 23 • The March 2008, 22-page report and digital groundwater flow model input/output
24 files from Southwest Ground-water Consultants provided to Arizona Department
25 of Water Resources in fulfillment of the agency's request identified in
26

1 correspondence received by the City in January 2008 relating to the City's
2 Application for Modification of Designation of Assured Water Supply (ADWR
3 No. 86-401501.0001).

4 Statement of Facts ("SOF") at ¶ 1.

5 On May 21, 2008, Defendant responded with a request for clarification. In addition to
6 stating that the City does not read the public records statute to allow for not-for-profit entities
7 to obtain records at no cost, the Defendant stated that: (a) the Center's request did "not
8 sufficiently describe the documents requested as to items 2 and 3 of the request. . ." and (b)
9 "[t]here may be some other concerns, depending on what documents you are specifically
10 seeking that will become clear when you address our specificity request." SOF at ¶ 2.
11

12 On July 28, 2008, the Center sent a letter to the City clarifying its request. The
13 Center's response letter noted, *inter alia*, that: (a) the City's request for clarification does not
14 request clarification of the documents requested in the first bullet point; (b) the third bullet
15 point, which was specific to begin with, was clarified as re-requesting the 22-page report that
16 was mentioned in the City Council Agenda Memo for May 6, 2008, entitled "Approval of
17 amendment Two to Contract No. 07-235, Big Chino Water Ranch Physical Availability
18 Demonstration . . ."; and (c) with regard to bullet number two, according to the Center "as
19 this is a very broad request of 'all documentation', we would expect that you would provide
20 'all documentation' regarding and related to the acquisition of easements for the Big Chino
21 pipeline for our review. We are specifically interested in knowing the route of the proposed
22 pipeline, the names and addresses of individuals contacted about the possibility of acquiring
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1 easements on their property, any bid and appraisal documents, offers prepared and/or
2 presented. . .” SOF at ¶ 3.

3
4 The City failed to respond to the initial request and/or the requested clarification
5 provided by the Center. On August 22, 2008, the Center requested a response to its July 28
6 clarification and its May 8, 2008, request for production. SOF at ¶¶ 5-6.

7
8 On September 29, 2008, the Defendant indicated that the requested records were
9 available for review. The Center scheduled the review to begin on October 2, 2008. The
10 documents provided were not fully responsive to the Center’s request for production. The
11 City provided documents pertaining to Phase II, Level 1 Pipeline Design and Pump
12 Stations/Reservoir Design. The City, however, withheld documents pertaining to Phase II,
13 Levels 2 and 3 of the Pipeline Design and Pump Stations/Reservoir Design. Notwithstanding
14 the fact that the information request specifically indicated that the documents, “should
15 include but not be limited to documentation for Phase II, Levels 1, 2, 3 of Pipeline Design,
16 Levels 1, 2, 3 Pump Stations/Reservoir Design . . .”. These documents are also referred to as
17 the 50 percent and 90 percent design completion reports. SOF at ¶¶ 7-11.

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19
20 On October 22, 2008, at a meeting with Matt Podracky, Senior Assistant City
21 Attorney, the Center requested to review the withheld documents, including specifically the
22 50 percent and 90 percent design completion reports. In response, Mr. Podracky stated that
23 he had to speak to James Holt, Big Chino Water Ranch Project Manager about providing
24 access to the requested documents. SOF at ¶¶ 12-13.
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1 Shortly after October 22, 2008, the City produced a “log”, dated October 1, 2008. The
2 log purports to identify documents and to explain why they were withheld. On its face,
3 however, the log fails to adequately identify documents and/or categories of documents
4 and/or to justify withholding. SOF at ¶ 14.

6 On November 4, 2008, the Center went to the legal department for the City to ask for
7 access to the 50 percent and 90 percent design completion reports and/or a determination as
8 to why the reports were being withheld. The Center was told that they had to talk to Mr.
9 Podracky, who was unavailable. On November 6, 2008, the Center asked Mr. James Holt for
10 access to the 50 percent and 90 percent design completion reports. Mr. Holt told the Center
11 to discuss the request with Mr. Podracky. On November 7, 2008, the Center received a
12 return call from Mr. Podracky. A meeting was scheduled for November 13 as Mr. Podracky
13 indicated he would need that time to track down the requested 50 percent and 90 percent
14 design completion reports. SOF at ¶¶ 16-18.

18 On November 13, 2008, the Defendant failed to provide access to the requested
19 documents, but rather indicated that the City would produce the requested records on
20 November 17, 2008. No documents and/or access to documents were provided on November
21 17, 2008. SOF at ¶¶ 19-20.

23 On or about February 10, 2009, the Center met with City of Prescott Attorney Gary
24 Kidd to request the 50 percent and 90 percent design completion reports. Mr. Kidd indicated
25 that he would get back to the Center “soon.” The Center did not hear back from Mr. Kidd
26

1 regarding the requested reports. On March 11, 2009, the Center again requested the 50
2 percent and 90 percent design completion reports. The City never produced the requested
3 documents. SOF at ¶¶ 21-25.
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5 At around the same time that the Center was seeking documents pertaining to the Big
6 Chino Water Project, the Salt River Project (“SRP”) and a number of individuals were also
7 seeking access to the same documents. On or about March 9, 2009, the City filed a
8 Complaint for Declaratory Relief against SRP and some individuals. The Complaint sought
9 an *in camera* inspection of the documents the City chose to withhold from production. *City*
10 *of Prescott v. SRP*, CV20090334. On or about April 22, 2009, the Center filed the instant
11 Special Action to compel the City to produce the documents it had requested. On or about
12 November 24, 2009, Judge Mackey, in the SRP matter, completed his *in camera* review of
13 fifteen of the boxes of documents provided by the City and, in pertinent part, ordered that the
14 documents therein be made available for public inspection. SOF at ¶¶ 26-27. On or about
15 December 28, 2009, Judge Mackey completed his *in camera* review of the remaining two
16 boxes and, again, ordered that the vast majority of the contents thereof be made available for
17 public inspection. SOF at ¶ 28.
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22 DISCUSSION

23 The Center is attempting to gain access to public records in the possession of the City.
24 There is no dispute over the fact that the documents at issue are “public records” subject to
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1 disclosure and production under A.R.S. § 39-121, *et seq.* *Cf., e.g. Carlson v. Pima County,*
2 141 Ariz. 487, 490, 687 P.2d 1242, 1245, (1984) (“records” open to public inspection is
3 “broadly define[d]”). Similarly, there is no statutory exemption to the City’s obligation to
4 disclose the public records at issue in the instant matter.
5

6 A.R.S. § 39-121 provides, without limitation, that “[p]ublic records . . . shall be open to
7 inspection . . .” The broad sweep of this statute reflects the paramount importance of making
8 government accountable to the public and ensuring that government operates in the “sunshine.”
9 *E.g., Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004, 1006 (2009) (citations omitted)
10 (“Arizona’s public records law serves to open government activity to public scrutiny.” “The
11 core purpose of the public records law is to allow the public access to official records and
12 other government information so that the public may monitor the performance of government
13 officials and their employees.”)
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16 Notwithstanding the unqualified nature of the statutory obligation, Arizona courts have
17 recognized a limited exception to disclosure based on common law considerations of either
18 “confidentiality of information, privacy of persons, or a concern about disclosure detrimental to
19 the best interests of the state.” *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242,
20 1245 (1984). The City raised each of these common law exceptions to the rule as support for
21 its refusal to produce the requested documents. “The burden, [however], of showing the
22 probability that specific, material harm will result from disclosure, thus justifying an
23 exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather
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1 than on the party that seeks access.” *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d
2 51, 54 (1984); *see also, e.g., Cox Arizona Publications v. Collins*, 175 Ariz. 11, 14, 852 P.2d
3 1194, 1198 (“The burden [falls] squarely upon . . . [the] public official to overcome the legal
4 presumption favoring disclosure.”).

5
6 The City has failed to carry this burden. It cannot overcome the legal presumption in
7 favor of disclosure. Indeed, the City raised these same defenses with regard to the exact same
8 documents in *City of Prescott v. SRP*, Case No. CV20090334. In that case, this Court
9 conducted an *in camera* review¹ of the same documents that are at issue in the instant case.

10
11 Judge Mackey found, in part, that:

12 . . . the City of Prescott has not met its burden . . . The 30%, 50% and 90%
13 Draft Engineering Reports reflect that they are drafts. The City has not
14 established that the draft bid documents are protected by a privacy interest or
15 by the need for confidentiality. In fact, the final bid documents will have to be
16 disclosed publically to potential bidders on the project. The City has not
17 established that it would be in the best interest of the City to prevent
18 Defendants from reviewing the draft bid documents at this time. There is
19 nothing but speculation presented regarding the possible impact upon potential
20 bidders and the bidding process. The Court rejects the City’s argument that the
21 draft bid documents should be protected pursuant to A.R.S. § 41-1803(G).
22 Those documents should be disclosed.

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¹ “. . . the preferred practice is for [the trial] court to make an *in camera* inspection of the relevant documents and balance the rights of the parties. . . Depending on the nature and volume of the documents at issue, an *in camera* inspection may further the interest of judicial economy . . . by obviating the need for lengthy evidentiary hearings.” *Bolm v. Tucson Police Dep’t.*, 193 Ariz. 35, 40-41, 969 P.2d 200, 205-206 (Ariz. App. Div. 2 1998) (Citations omitted); *see also, e.g., Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984) (*in camera* inspection appropriate to balance the interests at issue in public records context).

1 SOF at ¶ 26.

2 Judge Mackey went on to order the production of:

- 3
- 4 1. The 30%, 50%, and 90% Draft Engineering Reports.
 - 5 2. The files for the Big Chino Water Ranch Easement for property that is subject to an
 - 6 agreement to sell in the unnumbered box.
 - 7 3. The Big Chino Water Ranch Easement Files for properties that have not yet been
 - 8 acquired in Boxes 1 of 8, 2 of 8, 3 of 8, 4 of 8, 5 of 8, 6 of 8, 7 of 8, and 8 of 8.

9 *Id.* SOF at ¶ 27. Production of these same documents would be responsive to and would

10 satisfy the public records request made by the Center.

11 On December 28, 2009, Judge Mackey completed his review of the two remaining

12 boxes of documents and issued a “Further Ruling”. The Court ordered the production of

13 additional documents that the City sought to withhold and held, in part, that:

14 The Court finds that only a small percentage of the documents the City of

15 Prescott sought to protect should be withheld from disclosure. The Defendants

16 have substantially prevailed in their action regarding the City of Prescott’s

17 denial of access to public records. Therefore, the Court finds that the

18 Defendants are entitled to an award of their attorneys’ fees and costs against

19 the City of Prescott pursuant to A.R.S. § 39-121.02(B).

20 SOF at ¶ 28.

21 There is no genuine issue as to any material fact in the instant case. The Center is

22 entitled to summary judgment. The requested public documents should be made available for

23 inspection. Whether based on an application of the collateral estoppel doctrine,² or on

24

25 ² The offensive use of collateral estoppel or “issue preclusion” occurs when the party

26 making the claim, as in the instant case, asserts a ruling against its opponent made in a prior

judgment to which the asserting party was not a party. In Arizona, the offensive use of

1 notions of judicial comity, economy, and/or common sense,³ the *in camera* findings of the
2 Court in the SRP matter should be dispositive in the instant case.
3

4 CONCLUSION

5 As discussed above, there is a “strong policy” and “legal presumption” favoring open
6 disclosure and access to public records. *E.g., Cox Arizona Publications, Inc.*, 175 Ariz. at 14,
7 852 P.2d at 1198. This presumption cannot be overcome by generalized claims of broad state
8 interest. Indeed, the City must “articulate specific circumstances of potential harm which
9 would result from disclosure.” 175 Ariz. at 14, 852 P.2d at 1197. In the instant case, as
10 confirmed by Judge Mackey in CV20090334, the City has not, and cannot, articulate such
11 harms with the necessary specificity. The City cannot overcome the presumption favoring
12 disclosure. There are no genuine issues as to any material fact and the Center is entitled to
13 summary judgment as a matter of law. The requested records should be made available for
14 public review and inspection.
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20 collateral estoppel against a government entity is generally precluded on policy grounds – “it
21 would be bad policy to require the government, in every instance, to appeal every adverse
22 decision for fear of being foreclosed from relitigating the same issue against a different party
23 in the future. . .”. None of the policy considerations for discouraging the use of offensive
24 collateral estoppel against the City are, however, present here. Indeed, application of the
25 doctrine to the instant case would serve the doctrine’s intended purpose and be in furtherance
26 of a just and reasonable process and outcome. *See, First Interstate Bank of Arizona v. State
Dep’t of Revenue*, 185 Ariz. 433, 436, 916 P.2d 1149, 1152 (Ariz. App. Div. 1, 1996).

³ The only alternative being that this Court would have to conduct the same *in camera*
review of the same documents that have already been reviewed by Judge Mackey.

1 Respectfully submitted this 11th day of January, 2010.

2 THE SHANKER LAW FIRM, P.L.C.

3
4
5 By 

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11 ORIGINAL filed this 11th day
12 of January, 2010 with the Clerk
13 of the Court via hand delivery:

14 Clerk of the Court
15 Yavapai County Superior Court
16 120 South Cortez Street
17 Prescott, AZ 86303

18 Copy of the foregoing delivered
19 via hand-delivery this 11th day of January, 2010 to:

20 Hon. William T. Kiger
21 Yavapai County Superior Court
22 120 South Cortez Street
23 Prescott, AZ 86303

24 Copy of the foregoing sent via USPS
25 And email this 11th day of January, 2010 to:

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