No. A162259

IN THE
COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
Division Five

IRVIN MUCHNICK,
Petitioner & Respondent,
vs.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent & Appellant.

Appeal from the Superior Court of California,
County of Alameda
The Hon. Jeffrey Brand (Case No. RG17857115)

APPELLANT'S OPENING BRIEF

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(FEE EXEMPT – GOV. CODE SECTION 6103)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This form is submitted on behalf of The Regents of the University of California.

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

DATED: January 3, 2022

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Michael Goldstein
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Michael R. Goldstein

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Other Authorities

INTRODUCTION

The Public Records Act provides for attorney's fees and costs "should the requester prevail in litigation filed pursuant to this section." (Gov. Code, § 6259(d).)[1] Unless the case ends in a judgment expressly ordering an agency to release a previously withheld record, a requester "prevails" under section 6259(d) only if the petition was a "catalyst." A petition is a "catalyst" if it "motivated defendants to provide the primary relief sought or activated them to modify their behavior, or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result."

The Act defines the phrases "the primary relief sought" and "the desired result" albeit not in so many words. Section 6253 provides in pertinent part that "each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available." And section 6253.1 provides in pertinent part that, "[w]hen a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency . . . shall . . . [a]ssist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated." In other words, an agency's obligation is to provide records responsive to "a request . . . that reasonably describes an identifiable record or records" and to identify

[1] Unless expressly indicated otherwise, all statutory citations are to the Government Code.

"records and information that are responsive to the request or to the purpose of the request, if stated." In a word, *responsive*.

This is precisely where the court below erred. The court was forced to engage in judicial sorting because Petitioner's overly broad April 6, 2016, Public Records Act request—one of a dozen he submitted to UC Berkeley's Public Records Act office over an 11-month period—posed a challenge to case management by expressly identifying several current or former UC Berkeley students and thereby preventing The Regents from furnishing a Vaughn Index due to its obligations under the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of their information. (Petitioner rejected The Regents' offers in the alternative to permit Petitioner and his attorney personally to simply inspect all of the records themselves under a protective order.)

To overcome this hurdle, the court created a sorting framework in which it proposed, and then Petitioner expanded, a list of what ultimately numbered 22 categories that, in the court's view, "were either subsets of the PRA request or logical extensions of the PRA request." The court then "directed the Regents to provide a response on a category by category basis whether it had produced all responsive public records. This was intended to help the parties and the court clarify the issues." *It did*. And Petitioner thereupon filed four separate motions on the merits of The Regents' exemption claims. The court ruled against Petitioner on all of them. For its part, after repeating its collection efforts based on the 22 categories, The Regents located

records responsive to four of them—categories 3, 10, 12, and 17—and released them to Petitioner.

The court and the parties then proceeded to the final stage of the litigation, a bifurcated process to determine, first, whether either party was entitled to attorney's fees and costs under section 6259(d); and second, if either party were successful at the first stage, then to determine the amount of the award. At the first stage, the court found Petitioner "prevailed" and granted his motion. (The court denied The Regents' motion.) The court based its finding on that fact that the records responsive to categories 3, 10, 12, and 17—the only records releases on the basis of which the court found Petitioner "prevailed"—were responsive to categories that were "not expressly in the PRA request, but reasonably related to the PRA request."

This was error. As explained above, the benchmark under sections 6259(d) and 6253.1 is whether records are "responsive," not the more forgiving standard the court employed to credit records responsive to categories that are "not expressly in the PRA request, but reasonably related to the PRA request."

In the course of straying from the standard governing whether Petitioner "prevailed" under section 6259(d), the court materially altered the careful balance of competing interests the Legislature struck in 1968 when it enacted the Public Records Act. In addition, the court denied The Regents a full and fair opportunity to defend the adequacy of its collection efforts in response to Petitioner's one dozen Public Records Act requests and deprived the Court of an adequate record on appeal to

scrutinize whether The Regents met its obligations and Petitioner "prevailed." All of this was error, reviewable de novo here.

By virtue of its error, the court employed the wrong standard to determine whether Petitioner "prevailed" and erroneously granted his motion for attorney's fees and costs. Under the correct standard, Petitioner did not "prevail." Consequently, the foundation on which the court based its decision that the Petition was not frivolous under 6259(d) and its ruling denying The Regents' motion also were erroneous.

For these reasons, The Regents respectfully requests that the Court reverse the judgment and order the trial court to vacate its October 16, 2020, orders granting Petitioner's Motion for Attorney Fees and denying The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees and issue a new order and judgment consistent with the Court's opinion.

STATEMENT OF FACTS

A. Over an Eleven-month Period, Petitioner Submits One Dozen Overlapping Public Records Act Requests to Multiple UC and UC Berkeley Officials, Including the April 6, 2016, Request at Issue in this Appeal, and the Campus Diligently Undertakes to Fulfill All of Them

On April 6, 2016, Petitioner emailed the following California Public Records Act request to UC Berkeley's Public Records Act office:

> I seek any and all written records, reports, or emails dealing with any internal investigation within the University of California-Berkeley of the facts surrounding:

> (a) the death of Ted Agu; and
> (b) an altercation between football players J.D. Hinnant and Fabiano Hale, which occurred on or around November 1, 2013.
> This request includes, but is not limited to, any document with a general review of the strength and conditioning program for Cal football players. (I CT 46 [Petition, Exhibit F].)

It was not the first, nor only, request. Between March 30, 2016, and January 2, 2017, he submitted a total of one dozen separate requests. (VI CT 1643-1644, VI CT 1710 – VII CT 1748.) In addition, he sent the same requests to multiple campus and University officials, even though he was admonished that all such communications were being redirected to the campus's Public Records Office and generating additional, unnecessary, and time-consuming work that only slowed and complicated the process of fulfilling his requests. At the time Petitioner filed the Petition, all but two of the numerous requests were fulfilled and closed, and the April 6, 2016, request was not one of the two exceptions. (I CT 209-218 [Declaration of Liane Ko in Support of the Opening Brief by The Regents Re: Suitability Of Vaughn Index in This Action], paragraphs 2-58.)

B. On April 18, 2017, Petitioner Files the Petition for Writ of Mandate in this Action

Dissatisfied with the records he received in response to his requests, Petitioner filed the Petition for Writ of Mandate in this action on April 18, 2017. (I CT 14-127.) The gravamen of the claim was distilled in the final paragraph of the pleading: "any contention that the Regents fully complied with the Public Records Act under the facts described in this Petition is not

plausible." (I CT 23:15-16.) In the disorienting fog created by Petitioner's voluminous communications with the campus and the University, it was challenging to take a bead on the desired target and discern whether, in fact, all of his requests were fulfilled.

C. Beginning in May 2017 and Ending on October 17, 2017, the Parties Engage in a Lengthy and Time-consuming Meet-and-confer Process, at The Regents' Invitation, and Confirm That The Regents Had Fully Complied with the Public Records Act Request Before the Petition Was Filed

In an effort to sort through the confusion created by Petitioner's numerous Public Records Act requests and communications to various campus and University employees in connection with those requests, The Regents initiated a meet-and-confer process after he served the Petition and ultimately asked Petitioner simply to provide The Regents with a list of any and all custodians of records whose emails and other documents Petitioner wanted The Regents to search and a list of search terms to utilize in identifying potentially responsive electronically stored information (ESI), and Petitioner provided such a list of custodian names and search terms. (I CT 218 [Declaration of Liane Ko] at paragraph 59; I CT 221 [Declaration of Michael R. Goldstein] at paragraphs 2-3; I CT 219 [Declaration of Carrie Schmidt] at paragraph 2.) This process would later be identified in the parties' communications and court filings, as well as in the court's orders, as the "Algorithm process." (*See*, *e.g.*, II CT 283-290 [Joint Report of the Parties Re Proposed Categories for CPRA Requests] at 287 line 5.5; II CT 305-311 [Order dated June 11, 2018] at 308.) A sizable number of records

was collected and reviewed but, after removing non-responsive records, exempt records, and records that already had been released before the Petition was filed, the process yielded not a single document, confirming the thoroughness and accuracy of the campus's pre-Petition work. (I CT 219-220 [Declaration of Carrie Schmidt] at paragraphs 2-6; I CT 218 [Declaration of Liane Ko] at paragraphs 59-60; I CT 221-222 [Declaration of Michael R. Goldstein] at paragraphs 2-5.)

D. The Parties' Consideration of a Vaughn Index Leads to the Judicial Sorting Which Prompts the Creation of Materially New Public Records Act Requests and the Discovery and Release of Additional Records

After Petitioner expressed dissatisfaction with the outcome of the "Algorithm" process, the parties discussed, and Petitioner insisted upon, a Vaughn Index. (I CT 181-187 [Petitioner's CM-110 Form] at 186.) Although The Regents initially welcomed the idea of a Vaughn Index (I CT 166-171 [Joint CM-110 Form] at 169 [item no. 16(c)]), it determined upon further consideration that, due to the way in which Petitioner had formulated his April 6, 2016, Public Records Act request, which included the names of specific students, The Regents was prohibited by its obligations under the Family Educational Rights and Privacy Act (FERPA) from furnishing an Index. (I CT 188-195 [Regents' CM-110 Form] at 193-194 [items nos. 15 & 16(c)].) The Regents proposed, as alternatives to a Vaughn Index under the circumstances, not only the possibility of obtaining FERPA waivers from the students, but also an inspection by Petitioner's counsel under an "attorney's eyes only" protective order and, ultimately, an inspection by Petitioner himself under a protective

order. Petitioner rejected The Regents' offer to permit him and his attorney to personally inspect the records. (I CT 222 [Declaration of Michael R. Goldstein] at paragraphs 7-9.)

The court set a briefing and hearing schedule at the February 27, 2018, Case Management Conference (II CT 305 [final paragraph]), with The Regents submitting the opening brief to frame the arguments, and the issue was fully briefed. (I CT 198-224, 225-254, 255-266.) The April 26, 2018, hearing was not the end of the matter but only the beginning of a process that played out over several appearances and involved further work and numerous submissions by the parties. As the court noted in its tentative ruling for a subsequent hearing on the same issue (May 17, 2018),

> On 4/26/18, the court encouraged the parties to develop categories of documents that could serve as [sic] framework for both discussion among counsel and the presentation of the issues to the court. Counsel thereafter engaged in meaningful discussions that have assisted in framing the issues. . . . Following the 4/26/18 hearing the parties eliminated a few categories and added a few categories. . . . Instead of a Vaughn Index, the court will use the above categories to frame the anticipated briefing on the merits and 'give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine . . . whether the exemption applies.' (ACLU, 202 Cal.App.4th at 83.) The court can then apply California and federal law on a category by category basis. (VI CT 1668, 1670, 1671.)

In its tentative ruling for the April 26, 2018, hearing, the court had proposed nine such categories on its own. (II CT 295

[email from Petitioner's counsel].) Significantly for purposes of this appeal, only one of them—category number three: "policies regarding when and how to conduct an internal investigation" (II CT 295)—eventually led to the discovery of new records. During the April 26, 2018, hearing, the court ordered the parties to meet and confer and develop additional categories, and then to report back to the court. (I RT [April 26, 2018, hearing] at 16:12-22:20.)

During the parties' meet and confer process following the April 26, 2018, hearing, Petitioner proposed an additional 10 categories, as Petitioner reported to the court in the parties' Joint Report (II CT 283-303), which were adopted by the court when it expanded the list from nine to 19 in its tentative ruling for the May 17, 2018, hearing. (VI CT 1670-1671.) Significantly for purposes of this appeal, only three of them—categories 10 ("Records to or from administrators identified in the Algorithm regarding the public relations aspects of the player altercation and/or the Agu death incident, including any talking points"); 12 ("Records to or from administrators identified in the Algorithm regarding feedback, advice, or concerns from football program boosters or corporate sponsors regarding the player altercation and/or the Agu death incident"); and 17 ("Records to or from administrators identified in the Algorithm counseling those speaking at the Ted Agu memorial event on campus following his death")—eventually led to the discovery of new records. During the May 17, 2018, hearing, Petitioner added three more requests, so a total of 22 categories were

memorialized in the court's June 11, 2018, order following that hearing. (II CT 308-309 [June 11, 2018 Order following May 17, 2018 hearing].)

The court agreed with The Regents' position and ruled "on the facts of this case that it is not appropriate to require the Regents to prepare a detailed Vaughn index . . . because identification of specific documents in a Vaughn list would potentially reveal FERPA protected information." (II CT 308.) (In other words, The Regents was not being obstructive or secretive; its position was genuine and meritorious.) Instead, as indicated above, the court ordered the parties to use the 22 categories to organize the briefing on The Regents' exemption claims: "Instead of a Vaughn Index, the court will use the above categories to frame the anticipated briefing on the merits and 'give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies.' " (II CT 309.)

In its June 11, 2018, order, the court established a framework to identify any issues on which Petitioner determined further litigation was necessary:

> On or before 8/1/18, the Regents must provide to Petitioner a response on a category by category basis for each of the 22 categories (1) whether it has any responsive public records; (2) whether it is asserting that all of the responsive public records are CPRA exempt and to identify the asserted CPRA exemptions; (3) whether it is asserting that some of the responsive public records are CPRA exempt and to identify the asserted CPRA exemptions; and

(4) whether it has produced all non-exempt responsive documents. (II CT 309.)

The creation of this framework led to two significant outcomes: first, it prompted Petitioner to file four motions to force the release of additional documents, on all of which motions the court ruled against Petitioner; second, and significantly for purposes of this appeal, it led to the discovery and release of additional records (responsive to categories 3, 10, 12, and 17) on the sole basis of which the court ultimately ruled Petitioner "prevailed" under section 6259(d).

E. Petitioner Files Four Motions for Additional Records After the May 17, 2018, Hearing and the Court Denies All of Them

Following the May 17, 2018 hearing, and between June 12, 2018, and February 7, 2020, Petitioner filed a total of four motions seeking the release of additional records. The Regents prevailed on all of them. The first, filed on June 12, 2018, sought an order compelling The Regents to release a UC Police Department Binder and other records. (II CT 320-409, 412-424, 431-444.) After that motion was denied as premature, Petitioner filed a second motion for the Binder, which generated two rounds of briefing. (III CT 557-583, 584-639, 640-660, 661-692, 693-722, 723-756, 757-762.) Petitioner then filed a third motion to compel production of an attorney-client privileged email on the grounds the document was not privileged to begin with or the privilege was waived, a motion which involved not only a deposition, but also extensive briefing. (III CT 824 – IV CT 905, IV CT 906-1087 & 1114-1118, 1088-1113 & 1119-1122.) Fourth, and finally,

Petitioner filed a motion for reconsideration when the motion to compel was denied. (V CT 1150-1162, 1164-1226, 1227-1237.)

The court denied all of Petitioner's motions. (II CT 509-513 [denying premature motion regarding the UC Police Department Binder and other records]; III CT 767-783 [denying Petitioner's second motion for the Binder]; IV CT 1137-1148 [denying Petitioner's motion regarding the attorney-client privileged email]; and V CT 1238-1242 [denying Petitioner's motion for reconsideration].)

F. The Parties File Cross-motions for Entitlement to Attorney's Fees Under Section 6259(d) and the Trial Court Grants Petitioner's Motion Solely on the Basis of Records the Regents Released in Response to the New Requests Created as a Result of the Court's Judicial Sorting

After the court issued its June 11, 2020, order denying Petitioner's motion for reconsideration, and thus all issues relating to the merits of the Petition were adjudicated or otherwise resolved, the focus turned finally to the issue of attorney's fees and costs pursuant to section 6259(d). In the interests of judicial economy, the parties stipulated to, and the court ordered, a bifurcated proceeding to consider both sides' requests for attorney's fees and costs: first, briefing and hearing on the entitlement to fees and costs; and, second, if either party prevailed, then a follow-on "prove up," including appropriate briefing, by that party. (V CT 1243-1251.)

The parties subsequently briefed the initial cross-motions for entitlement to attorney's fees and costs. (V CT 1252-1366 [The Regents' moving papers], V CT 1367 – VI CT 1579 [Petitioner's moving papers], VI CT 1580-1615 & VII CT 1750-

1821 [Petitioner's opposition]; VI CT 1616 – VII CT 1749 [The Regents' opposition]; VII CT 1822-1854 &1890-1901 [Petitioner's reply]; VII CT 1855-1889 [The Regents' reply].) On September 10, 2020, the court held a hearing on the parties' cross-motions. (VII CT 1902-1903; IV RT [September 10, 2020, hearing].) Following the hearing, the court took both motions under submission. (VII CT 1918-1919.) On October 16, 2020, the court entered an order granting Petitioner's Motion for Attorney Fees. (VII CT 1911-1917.) The same day, the court entered an order denying The Regents' Motion for Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees. (VII CT 1904-1910.)

In its order granting Petitioner's Motion for Attorney Fees, the court deemed Petitioner the "prevailing party" under section 6259(d) on the basis of The Regents' discovery and release of additional records after the court issued its June 11, 2018, order establishing the 22 categories by which future work on the case was to be organized. The additional records were responsive to categories 3, 10, 12, and 17, and included heavily redacted versions of attorney-client privileged communications within these four categories in which all but the header information was redacted, with the exception of a handful of such documents, to produce the equivalent of a privilege log (sender, recipient, date, subject). (VII CT 1914-1915 ["PRODUCTION NO. 3" through "PRODUCTION NO. 6"].) The court made this determination despite its recognition that the records were "not expressly in the PRA request:"

> The third component is the records not expressly in the PRA request, but reasonably related to the PRA request. To assist the parties in focusing the issues, the Order of 6/11/18 identified 22 categories of documents that were either subsets of the PRA request or logical extensions of the PRA request. The Regents then produced public records. The Regents produced records as a result of the court's assistance in the Gov Code 6253.l(a) process of defining 'a focused and effective request that reasonably describes an identifiable record or records.' Petitioner technically prevailed on this aspect because the filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which caused the production of the records. Significantly, however, after the Order of 6/11/18 identified 22 categories of documents, the Regents produced records and the Regents prevailed on the merits motions. (VII CT 1912-1913.)

According to the court, the categories represented a "reasonable reading of the subject matter of the PRA request:"

> The production was not clearly the subject of the PRA request but was within a reasonable reading of the subject matter of the PRA request. The filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which caused the production of the records. (VII CT 1914.)

The only other additional records The Regents released after the Petition was filed were two releases the court described this way in the Order: "On 3/25/18, the Regents produced 84 pages of public records because the Regents had obtained a privacy waiver from the Agu family. . . . On 6/1/18, the Regents produced 64 [sic] pages of public records. This was the Agu family lawsuit settlement agreement dated after the PRA

request." (VII CT 1912.) (The June 1, 2018, release was only 6—not 64—pages. [VI CT 1638.]) The court found that the filing of the Petition did not cause either of these two releases. (VII CT 1913-1914 ["PRODUCTION NO. 1" and "PRODUCTION NO. 2"].)

PROCEDURAL HISTORY

The court entered an Amended Judgment, which it signed January 3, 2021, and filed January 15, 2021. (VII CT 1930-1931.) On January 15, 2021, the Clerk mail-served the Amended Judgment. (VII CT 1932.)

On March 16, 2021, The Regents filed a Notice of Appeal. (VII CT 1933-1934.) This is an appeal from a final judgment. (Code Civ. Proc., § 904.1(a)(1).) An order granting attorney's fees under the Public Records Act is reviewable on appeal from a final judgment. (*Butt v. City of Richmond* (1996) 44 Cal.App.4th 925, 929-931.)

DISCUSSION

The judicial sorting undertaken to overcome the procedural logjam created by Petitioner's overly broad April 6, 2016, Public Records Act request, which expressly identified students by name, succeeded in moving the case forward so the merits of The Regents' exemption claims could be adjudicated. None of Petitioner's four motions on the merits was successful.

When case management turned to the final stage of determining whether either party "prevailed" and therefore was entitled to attorney's fees and costs, however, the court committed legal error. The framework it created to manage the case and move it to completion was ill-suited to the task of

adjudicating whether either party "prevailed" under section 6259(d). The Public Records Act, as well as the case law interpreting it, sets the standard for making that determination. The court's formulation based on its case management framework employed a standard that is not sanctioned by any of those authorities.

Consequently, the court used the wrong standard. In addition, even under the court's standard, purely as a matter of interpretation based on the plain language of Petitioner's April 6, 2016, request and the categories populating the court's framework, Petitioner did not "prevail." He certainly did not prevail on the basis of the standard established by the Public Records Act and the case law interpreting it.

For these reasons, the court erred when it granted Petitioner's Motion for Attorney Fees. Consequently, it also erred when it denied The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees.

1. This appeal involves the interpretation of Petitioner's April 6, 2016, CPRA request and whether categories 3, 10, 12, and 17 were "reasonably related to the PRA request," or "were either subsets of the PRA request or logical extensions of the PRA request," or "within a reasonable reading of the subject matter of the PRA request," as well as a determination whether the criteria for an award of attorney's fees and costs were met—de novo review

The court's determinations that the category 3, 10, 12, and 17 "records [were] not expressly in the [April 6, 2016] PRA request, but reasonably related to the PRA request," that they

"were either subsets of the PRA request or logical extensions of the PRA request," and that "[t]he production was not clearly the subject of the PRA request but was within a reasonable reading of the subject matter of the PRA request" involved the interpretation of the plain language of the April 6, 2016, document. The meaning of a disputed writing is a question of law, subject to the Court's independent interpretation. (*Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 865-866.) So too is the application of law to undisputed facts—in this case, what is required for a requester to "prevail" under section 6259(d) and what an agency's obligations are under section 6253.1. (*Boling v. Pub. Emp't Rels. Bd.* (2018) 5 Cal.5th 898, 912-913; *Lorig v. Med. Bd.* (2000) 78 Cal.App.4th 462, 467 [interpretation of CPRA and application of statute to undisputed facts is question of law subject to de novo review].) The court's finding that Petitioner had "prevailed" within the meaning of section 6259(d) because categories 3, 10, 12, and 17 were "within a reasonable reading of the subject matter of the PRA request" was a "determination of whether the criteria for an award of attorney fees and costs . . . have been satisfied [which] amounts to statutory construction and a question of law." (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) For these reasons, review in this case is de novo.

2. Unless a petition ends in a judgment compelling an agency to release records, a petitioner "prevails" under Section 6259(d) only if the petition was otherwise a catalyst for a release of a previously withheld record

Section 6259(d) provides for attorney's fees and costs to a petitioner who "prevails":

> "The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section." (Gov. Code, § 6259(d).)

A plaintiff "has prevailed within the meaning of the statute when he or she files an action which results in defendant releasing a copy of a previously withheld document." (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 898.) "Results in" is more than a matter of timing (the fallacy of *post hoc ergo propter hoc*). It is necessary but insufficient that records were released after the petition was filed. The petition has to have "caused" any such subsequent release:

> A plaintiff is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior, or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result. (*Id.* at p. 901.)

In other words, it must have caused the release of "a previously withheld document." (*Id.* at p. 898.) To qualify under the "catalyst" theory, the petition must be "a catalyst in motivating the defendant *to provide the primary relief sought*." (*Garcia v. Bellflower Unified Sch. Dist. Governing Bd.* (2013)

220 Cal.App.4th 1058, 1066.) (Emphasis added.)

This Division's decision in *Belth* and the Fourth District's decision in *Sukumar v. City of San Diego* (2017) 14 Cal.App.5th 451 illustrate the indicia of "a catalyst in motivating the defendant to provide the primary relief sought." In *Belth*, a Public Records Act request was made to the State's Insurance Commissioner for records relating to Executive Life, an insurance company. As the Court explained, "the Commissioner initially refused Belth's request for documents she claimed were confidential. After he filed a writ petition, she obtained Executive Life's consent to disclosure of the documents and released them to Belth. It is undisputed that she took this initiative in response to, and in hopes of resolving[,] this litigation." (232 Cal.App.3d at p. 902.)

The but-for link was similarly clear in *Sukumar*. The City's Neighborhood Code Compliance Department investigated neighbor complaints about noise at Sukumar's home associated with a business he was operating there. He made a Public Records Act request for records related to enforcement actions against him. The City closed the request and told the trial court, after a writ petition was filed and the case was underway, that all records had been released. The court ordered an entity deposition and additional records were discovered during preparation for the deposition and released. (*Sukumar v. City of San Diego*, *supra*, 14 Cal.App.5th at pp. 456-461, 464-465.)

There was no question in either *Belth* or *Sukumar* that the post-petition releases were not only caused by the filing of the

petition, but also "the primary relief sought." (*Garcia v. Bellflower Unified Sch. Dist. Governing Bd.*, *supra*, 220 Cal.App.4th at p. 1066.) By contrast, and as explained below, that was not the case here. The records released by The Regents in response to categories 3, 10, 12, and 17 were *not* the primary relief Petitioner sought and the filing of the Petition was not the but-for cause. While the court correctly found the Petition was not the but-for cause of the release of records after The Regents obtained a waiver from the Agu family ("PRODUCTION NO. 1"), it erroneously found it was the but-for cause of the release of records responsive to categories 3, 10, 12, and 17 ("PRODUCTION NO. 3" through "PRODUCTION NO. 6"), as explained below.

3. The 22 categories were the result of judicial sorting to facilitate the adjudication of The Regents' exemption claims, hampered by the impact of FERPA on Petitioner's overly broad CPRA request which identified students by name, and this broke the causal chain

Petitioner's April 6, 2016, request was plagued by being both too broad and too narrow and these twin defects put into motion an exercise in judicial sorting which led to the creation of the 22 categories. It was too broad because it generally sought "any and all written records, reports, or emails dealing with any internal investigation within the University of California-Berkeley of the facts surrounding: [¶] (a) the death of Ted Agu; and [¶] (b) an altercation between football players J.D. Hinnant and Fabiano Hale, which occurred on or around November 1, 2013." (The only evidence in the record below of any investigation into "the death of Ted Agu" was a UC Berkeley

Police Department investigation and the court agreed with The Regents' position that all of the records relating to that investigation were exempt under section 6254(f). [III CT 767-783 {Order Denying Motion to Compel Production of 141-Page Police Binder}.] There is no evidence in the record of any investigation into "an altercation between football players J.D. Hinnant and Fabiano Hale, which occurred on or around November 1, 2013.") Aside from the additional sentence in the April 6, 2016, request that it included "any document with a general review of the strength and conditioning program for Cal football players," there was no other specific guidance, apart from the documents expressly requested in Petitioner's 11 other requests submitted between March 30, 2016, and January 2, 2017. (The "general review of the strength and conditioning program for Cal football players" was the subject of Petitioner's December 16, 2016, and January 2, 2017, follow-on requests [VII CT 1733-1743 & 1748] and Petitioner never claimed he failed to receive all records responsive to those requests.)

And it was too narrow because it identified, by name, three current or former University of California students. FERPA bars the University from disclosing records relating to its students. Although the protection does not include deceased students, Mr. Agu's family had privacy rights which afforded the same kind of protection. For these reasons, the court ruled a Vaughn Index was not appropriate in this case, as explained above.[2]

[2] See *ante* pp. 14-17.

As explained above, instead of ordering the preparation of a Vaughn Index, the court proposed a framework in which Petitioner's overly broad April 6, 2016, request was disaggregated into purportedly constitutive elements and those elements would serve as the basis for any claimed exemptions and litigation over the merits of such claims. The court initiated the process by proposing nine categories in advance of the April 26, 2018, hearing. Following the hearing, Petitioner requested an additional 10 categories, memorialized in the Joint Report the parties filed on May 11, 2018. Three additional categories were added during the May 17, 2018, hearing, resulting in the 22 categories listed in the June 11, 2018, order.

The but-for cause of the release of records responsive to categories 3, 10, 12, and 17 was not the Petition. Unlike *Belth* and *Sukumar*, this case does not involve the release of records that the agency withheld and later released as a result of the straightforward progress of the litigation itself—in *Belth*, the filing of the petition prompted the agency to change course and obtain a waiver from the real party in interest; in *Sukumar*, an entity deposition order prompted the agency to redouble its collection efforts.

By contrast, in this case, Petitioner's overly broad formulation of his records request hampered the ability of the court to adjudicate Petitioner's desire to challenge The Regents' exemption claims because FERPA was triggered by his overly specific formulation of that request which identified students by name. To break the logjam, the court created a framework which

provided toeholds to sort and anchor the litigation of specific exemption claims.

The court's framework effectively constituted a brand new records request, as The Regents explained at the May 17, 2018, hearing:

> A number of the categories are seeking documents that the Regents did not and couldn't anticipate and could not have anticipated were encompassed in the albeit extremely broad CPRA request that petitioner made on April 6, 2016. And therefore, in order to comply with the Regents' obligations under the act and to comply with the Court's order, the Regents is going to have to go back and treat this as a new CPRA request and start the process all over again, which includes identifying appropriate custodians so that the Regents can comply with its obligation to diligently comply [gap in transcript][3] May 18 [gap in transcript] and will not be back until May 30. So we will not even be able to begin that process until June 1. (II RT [May 17, 2018, hearing], 6:24-7:17.)

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[3] Volumes I and II of the Reporter's Transcript were transcribed by a different shorthand reporter from the one who reported the proceedings. The former "reviewed the notes [the latter] took down in shorthand and thereafter transcribed said notes into longhand [and the transcript] pages constitute a full, true and correct transcript of the said notes in said proceedings." (See I RT [April 26, 2018, hearing; transcribed September 3, 2021] at 25:6-12; II RT [May 17, 2018, hearing; transcribed September 3, 2021] at 18:6-12.) The Regents understands that, as the appellant, it bears the burden of an inadequate record. (*Humane Society of U.S. v. Super. Ct.* (2013) 214 Cal.App.4th 1233, 1251-1252, 1271, 1272, 1274-1275.) The Regents includes this footnote solely as a courtesy to the Court and Petitioner to explain and apologize for the unfortunate yet hopefully immaterial lacunae in these two volumes of the Reporter's Transcript, including the excerpt quoted above.

After the process was underway, but long before it was completed, because The Regents still needed a waiver from the Agu family before releasing all of the newly discovered records, The Regents confirmed, at the August 1, 2018, hearing, that indeed the categories were so different from the April 6, 2016, request that The Regents had to repeat the entire collection process, including identifying custodians of records anew:

> MR. GOLDSTEIN: I'm mindful of the Court's admonition that the Court is trying to take down the heat here, but I must say in response to counsel's suggestion that the University has not been forthcoming and has not been meeting its legal and other obligations here, the – one of the requirements of the June 11 order, which was our understanding from the hearing on – which that order is based was that the Regents was to undertake and the Regents explained to the Court that it would have to go all the way back to the beginning and start its collection of efforts all over again and the Court suggested, and the parties agreed, to redo Petitioner's request in the form of 22 categories.
>
> I explained to the Court at the time that would take some time because we had to treat that as a new request, and we had to go back and figure out, step one, given that these are now the categories of requests, who are the appropriate custodians of records so we can make sure that we can comply with our legal obligations to collect and review documents that are responsive to these now new 22 categories, which are very different in a material way from the original April 6th, 2016, on the request that Petitioner submitted, so we did that.

> . . . We've now, in response to the 22 categories, completed our search for records as to all 22 categories. We have a number of documents that I cannot disclose at the moment that we are withholding that relate to the Agu incident. We are in the process of sending those to the family's lawyers and asking them the same question. If their answer to the question is, yes, we waive privacy, you may release those records to Petitioner, then we will turn them over immediately to Petitioner. If there are names of other students or any other information that we have to redact, we will redact that, and if we're asked to do so, we will provide a log in which we log that information so it can be litigated. (III RT [August 1, 2018, hearing], 13:8-28, 18:28-19:11.)

The Regents reiterated this concern yet again at the September 10, 2020, hearing on the parties' cross-motions for fees:

> As far as months – finally, as far as Mr. Gordet's comment about having to wait months and months and months until finally we got records. I think it's important, and we may have to renew this on – if there is a prove-up for fees – that it was the issuance by the Court of the categories, the 22 categories to determine by virtue of categories whether there were any applicable exemptions. And those categories, the only ones of which yielded additional records, those categories were not, as I mentioned in our papers, in any way stated or implied in any of the requests that Mr. Muchnick sent us.
>
> And so, those records – the release of those records was not caused by the family providing a release. They did provide a release, only because after the Court issued the categories, and based on those categories we found additional records.

> Before releasing them to Mr. Muchnick we asked the family, here's the records, are you okay with it?
>
> They said, yes, and we released them. But the release was not the but-for cause of our releasing those additional records. It was the Court's categories, which again had nothing to do with the original request. (IV RT [September 10, 2020, hearing], 23:19-24:16.)

Furnished with the 22 new and specific categories, The Regents reached out anew to its custodians and repeated the collection and review process, located records responsive to categories 3, 10, 12, and 17 (but none of the other 18 new categories), and released them. In its October 16, 2020, order, the court found "[t]he filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which caused the production of the records." (VII CT 1914.) The court identified them as "records not expressly in the PRA request, but reasonably related to the PRA request." (VII CT 1912.)

But "reasonably related to the PRA request" is not the standard. Section 6253.1(a)(1) makes clear that an agency's obligation is to "identify records and information that are responsive to the request or to the purpose of the request, if stated." And section 6253(b) similarly limits an agency's obligation to providing records responsive to "a request . . . that reasonably describes an identifiable record or records." Notwithstanding the sensible, creative, and prudent approach conceived by the court to break the case management logjam, by

disaggregating and exfoliating the April 6, 2016, request into bite-sized pieces that were "reasonably related to the PRA request," the court in effect created wholly new requests. As the court recognized in finding that The Regents' release *in bello* of the fully executed Agu family settlement agreement was not caused by the filing of the Petition, because the record did not exist at the time the April 6, 2016, request was opened, fulfilled, and then closed, a writ petition cannot cause a release of records that either were not sought or did not exist before the petition was filed. (VII CT 1914 ["PRODUCTION NO. 2"].) Moreover, based on a plain reading of the categories and the April 6, 2016, request, it is clear that the categories were not "the primary relief sought." (*Garcia v. Bellflower Unified Sch. Dist. Governing Bd.*, *supra*, 220 Cal.App.4th at p. 1066.)

The 22 categories, even if "reasonably related to the PRA request," were not *the* PRA request. They were, in effect, a *new* PRA request. Unlike *Belth* and *Sukumar*, the Petition did not set in motion a series of steps that led to the discovery of indisputably requested but theretofore unreleased records. The court's judicial sorting process led to the creation of requests that, even if "reasonably related to the PRA request," were not called for by that request. The but-for cause of the release of these new records was the court's creative intervention in the face of the overly broad request running headlong into the FERPA impediment. But for this deficiency in the request—*not in The Regents' response to it*—these documents never would have seen the light of day in the case, unless Petitioner had submitted

a new request asking for them. To say the least, the court would never have had occasion for this reason alone to have devised the framework and begun the process of generating the categories. For this reason, the court's judicial sorting framework broke the causal but-for chain between the filing of the Petition and the release of the category 3, 10, 12, and 17 records.

4. "A reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request" is not the correct measure of "the primary relief sought" and whether a party "prevailed" under Section 6259(d)

There was legal error in the trial court's finding that Petitioner "prevailed" for a second reason, in addition to the fact, as explained above, that the court's framework of categories broke the causal chain between the Petition and the release of records. It was also legal error for the court to have found Petitioner "prevailed" on the grounds that the categories that generated newly released records were "a reasonable reading of the subject matter of the PRA request"—(VII CT 1914)—or "reasonably related to the PRA request." (VII CT 1912.) That is not the law.

Only two sections of the Public Records Act define the scope of an agency's obligation to provide "public records." Even those sections only define the scope indirectly. Section 6253 provides in pertinent part that "each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available." (Gov. Code, § 6253(b).) As a counterpart, section 6253.1 provides in pertinent part that, "[w]hen a member of the public requests to

inspect a public record or obtain a copy of a public record, the public agency . . . shall . . . [a]ssist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated." (Gov. Code, § 6253.1(a)(1).) Hence, an agency's obligation is to provide records responsive to "a request . . . that reasonably describes an identifiable record or records" and to identify "records and information that are responsive to the request or to the purpose of the request, if stated."

This is precisely what The Regents did in response to Petitioner's one dozen requests, including the April 6, 2016, request, before he filed the Petition. Furthermore, as explained above, in an effort to resolve the litigation informally as soon as the Petition was filed, by allaying Petitioner's suspicion that the pre-Petition collection effort was inadequate, The Regents repeated the process using a list of custodians and ESI search terms The Regents gave Petitioner the unfettered right to specify. That process yielded the collection and release of no responsive, non-exempt, and non-duplicative records. In other words, The Regents did it right the first time. Both times, The Regents limited its collection and review process to "records and information that [were] responsive to the request or to the purpose of the request, if stated."

The 22 categories imposed in the court's June 11, 2018, order expanded the scope of the search beyond an "identifiable record or records" "reasonably describe[d]" in the April 6, 2016, request and "responsive to the request or to the purpose of the

request." It expanded the search to include 22 specific categories that, in the court's view, as well as Petitioner's, were "a reasonable reading of the subject matter of the PRA request"—(VII CT 1914)—or "reasonably related to the PRA request." (VII CT 1912.)

While this purported deconstruction of the PRA request employing the "reasonable reading of the subject matter of the PRA request" formulation may have facilitated the consideration and adjudication of The Regents' exemption claims, and was commendable and insightful in finally resolving Petitioner's outstanding challenges—as to all of which the court ruled against Petitioner (VII CT 1913 [October 16, 2020, Order: "Significantly, however, after the Order of 6/11/18 identified 22 categories of documents, the Regents produced records and the Regents prevailed on the merits motions."])—it was error to employ that same formulation in assessing whether Petitioner "prevailed" for purposes of section 6259(d). Nothing in the statute or in the cases interpreting it justified such an expansion of section 6259(d) and the associated scope of an agency's obligation to respond to a records request. "The rewriting of a statute is a legislative, rather than a judicial function." (*Cal. State Univ., Fresno Assn., Inc. v. Super. Ct.* (2001) 90 Cal.App.4th 810, 830.)

The Regents fully cooperated with the court's judicial sorting process as a matter of case management and in the interests of judicial economy in order to facilitate the litigation of Petitioner's ultimately wholly unsuccessful challenges to The Regents' exemption claims. It was this same spirit of cooperation

that prompted The Regents to obtain a waiver from the Agu family—characterized by the court as "belated efforts to overcome a practical basis for denying access to the records or information sought. (Gov Code 6253.1(a)(3).)" (VII CT 1913)—and to provide the family's settlement agreement rather than standing on ceremony and demanding that Petitioner submit a new Public Records Act request. As to both of those records releases, the court correctly found that the Petition was not the catalyst. (VII CT 1913-1914 ["PRODUCTION NO. 1" and "PRODUCTION NO. 2"].)

In deferring to the court's efforts to facilitate the litigation of Petitioner's challenges to The Regents' exemption claims, The Regents had no reason to know, when it came time to determine whether Petitioner had "prevailed" under section 6259(d), the court would characterize the events this way: "The Regents produced records as a result of the court's assistance in the Gov Code 6253.1(a) process of defining 'a focused and effective request that reasonably describes an identifiable record or records.' Petitioner technically prevailed on this aspect because the filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which cause the production of records." (VII CT 1913.)

Section 6253.1(a) imposes a particular statutory obligation on an agency. If the agency refuses to meet that obligation, then it makes sense to permit a requester to file a petition for a writ of mandate to seek the court's assistance in bringing the agency into compliance. That is not what happened here. The court

intervened to break a case management logjam created by the overly broad formulation of Petitioner's request and its identification of students by name. Yet, when the court found, under the circumstances, that Petitioner "prevailed," The Regents ended up paying the price.

This not only misreads the statute, but also creates challenging public policy. Public Records Act requesters are incentivized by such a forgiving interpretation of the statute to use litigation as a means, subsidized by agencies through the mandatory fee provision in section 6259(d), to unearth records beyond the scope of the litigated requests. With "reasonably related to the PRA request" as the benchmark, this will be an easy threshold to meet because "reasonably related to the PRA request" is a lower bar than "responsive to the request or to the purpose of the request, if stated:" "related" is an expansive term, while "responsive" is a limiting term. (See Black's Law Dict. (11th ed. 2019 ["related: . . . [c]onnected in some way; having relationship to or with something else" versus "responsive: . . . answering"]; see also *Pacific Merchant Shipping Assn. v. Bd. of Pilot Comm'rs etc.* (2015) 242 Cal.App.4th 1043, 1060 ["the DTB records were arguably responsive to PMSA's 2012 request to the Port Agent as well as the August 2011 request. Although the primary target of the 2012 request was the pilot logs, PMSA actually requested 'all documents . . . *related to'* the pilot logs."] [emphasis in original].) For their part, agencies undertaking to manage such risk will be correspondingly incentivized, at otherwise avoidable expense to the State fisc, to collect and

release more than what is "responsive to the request or to the purpose of the request, if stated."

As this Division has recognized,

> 'The Legislature enacted the CPRA in 1968 to give the public access to information in possession of public agencies in furtherance of the notion that government should be accountable for its actions and, in order to verify accountability, individuals must have access to government files.'

(*Bd. of Pilot Comm'rs v. Super. Ct.* (2013) 218 Cal.App.4th 577, 587 [quoting *Gilbert v. City of San Jose* (2003) 114 Cal.App.4th 606, 610].) By providing a remedy to requesters who fail to receive records "responsive to the request or to the purpose of the request, if stated," this intent by the Legislature is promoted and fully enforced, aided by the favorable fee provision which mandates attorney's fees and costs for a petitioner who "prevails." Expanding the remedies under section 6259(d) to include fee-supported petitions seeking records "reasonably related to the PRA request" materially alters the balance the Legislature struck in 1968 in a direction that significantly favors requesters in ways the Legislature never codified, much less considered.

The court's reliance on the process that framed the issues for litigation of exemptions to find Petitioner "prevailed" under section 6259(d) also deprived The Regents of the ability to fully and fairly litigate the question whether it was appropriate to consider the 22 categories part of the April 6, 2016, request. If the 22 categories had been an outgrowth or basis, instead, of a motion by Petitioner seeking The Regents' compliance with its

obligations under section 6253.1(a), then The Regents could have presented a full record of evidence, as well as argument, on the adequacy of its search. It was inaccurate for the court to have stated in its order that "The Regents produced records as a result of the court's assistance in the Gov Code 6253.1(a) process of defining 'a focused and effective request that reasonably describes an identifiable record or records[]' [and that] Petitioner technically prevailed on this aspect because the filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which cause the production of records." (VII CT 1913.) The court's intervention was required because of the case management logjam created by Petitioner's overly broad request and the limitations created by FERPA in *being able to litigate The Regents' exemption claims* and *not* the result of The Regents' refusal to collect and release records to Petitioner so the court's effort had absolutely nothing to do with section 6253.1.

Cases, including federal cases under FOIA,[4] are legion on the issue of the adequacy of an agency's search in response to a records request. They turn on the reasonableness of the agency's interpretation of the request and the diligence of its collection efforts, which implicates the obligations imposed by section 6253.1. *Motorola Commc'n & Elecs., Inc. v. Dept. of Gen. Servs.* (1997) 55 Cal.App.4th 1340 offers just one example of the benefits

[4] Because the Public Records Act was modeled on FOIA, courts look to that statute and corresponding federal case law to guide the interpretation of the Public Records Act. (See *Am. Civil Liberties Union Found. v. Deukmejian* (1982) 32 Cal.3d 440, 447.)

of affording an agency a full and fair opportunity to make such a presentation of evidence and argument on the issue. A fee request was denied on the basis of a complete record demonstrating the challenges the agency faced interpreting an overly broad Public Records Act request. (*Id.* at pp. 1349-1351.) (See also *City of San Jose v. Super. Ct.* (2017) 2 Cal.5th 608, 628 [endorsing procedure adopted by Washington Supreme Court designed to "give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive [and] the agency has performed an adequate search under the PRA."] [internal quote and citation omitted]; *Cmty. Youth Athletic Ctr. v. City of National City* (2013) 220 Cal.App.4th 1385, 1426 ["the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search. [Citation.] After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."] [internal quote and citation omitted]; *Nat'l Sec. Counselors v. CIA* (D.D.C. 2013) 960 F.Supp.2d 101, 151-157 [adequacy of search].)

Presented to the court in this way, an agency is afforded an opportunity to provide evidence and argument about its interpretation of the request and other indicia of the adequacy of its search. In this case, such evidence would have included declarations explaining why categories such as the 22 in this case were not responsive to the April 6, 2016, request and therefore why its search was adequate. Based on that full showing, the

court could then adjudicate the merits of Petitioner's motion to compel The Regents to expand its search to include those 22 categories of records.

The court's approach to the issue in this case deprived The Regents of that opportunity and the Court of a record on appeal that contains extrinsic evidence further demonstrating why it was error to find that the 22 categories were "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request." As explained in the following section, without the benefit of extrinsic evidence, and based solely on the plain language of the April 6, 2016, request, the categories were not "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request." But, deprived of the ability to create such a record due to the court's error, the plain language of the instrument is the best The Regents has to offer.

5. The court erred in finding Petitioner "prevailed" because categories 3, 10, 12, and 17 were not "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request"

There was legal error in the trial court's finding that Petitioner "prevailed" for a third reason, in addition to the facts, as explained above, that the court's framework of categories broke the causal chain between the Petition and the release of records and that "a reasonable reading of the subject matter of the PRA request" is not the correct measure of "the primary relief sought." It was also legal error for the court to have found—as a matter of interpretation of the April 6, 2016, request itself,

without reference to any extrinsic evidence and on the basis of the undisputed facts presented by the document itself—that categories 3, 10, 12, and 17 were "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request."

Here once again, for the Court's convenience, is the text of Petitioner's April 6, 2016, request:

> I seek any and all written records, reports, or emails dealing with any internal investigation within the University of California-Berkeley of the facts surrounding:
> (a) the death of Ted Agu; and
> (b) an altercation between football players J.D. Hinnant and Fabiano Hale, which occurred on or around November 1, 2013.
> This request includes, but is not limited to, any document with a general review of the strength and conditioning program for Cal football players. (I CT 46 [Petition, Exhibit F].)

Category 3, which was one of the nine categories the court initially proposed on its own, was: "Policies regarding when and how to conduct an internal investigation." (II CT 295, 308.) Among those subsequently proposed by Petitioner and adopted by the court (II CT 287-288, 308-309), and the only categories, besides category 3, that led to the release of records, were:

- Category 10: "Records to or from administrators identified in the Algorithm regarding the public relations aspects of the player altercation and/or the Agu death incident, including any talking points;"

- Category 12: "Records to or from administrators identified in the Algorithm regarding feedback, advice, or concerns from football program boosters or corporate sponsors regarding the player altercation and/or the Agu death incident;" and
- Category 17: "Records to or from administrators identified in the Algorithm counseling those speaking at the Ted Agu memorial event on campus following his death."

Based on an interpretation of the plain language of the April 6, 2016, request and of the categories themselves, none of these four categories was "reasonably related to the PRA request," or "either subsets of the PRA request or logical extensions of the PRA request," or "within a reasonable reading of the subject matter of the PRA request."

First, category 3. The April 6, 2016, request sought "any and all written records, reports, or emails dealing with any internal investigation." Category 3 was "[p]olicies regarding when and how to conduct an internal investigation." By its plain language, the request was seeking records, report, or emails associated with *any* internal investigation, not policies relating to *all* investigations. By the plain language of the request, Petitioner in effect "stated" that "the purpose of the request"—(Gov. Code, § 6253.1(a)(1))—was to obtain records relating to particular investigations, not to policies.

The only relationship between the request and this category was they both included the term "investigation." As

explained above, the only campus investigation into the death of Mr. Agu was conducted by the UC Berkeley Police Department and all records relating to that investigation were exempt under section 6254(f). There is no evidence in the record that any investigation was conducted into the altercation between Messrs. Hinnant and Hale. In the spirit of cooperation to get down to brass tacks, The Regents was over-inclusive in providing any and all policies that would apply to any investigation, regardless of whether any investigation was actually conducted. If "reasonably related to the PRA request" means an agency reasonably should have determined that such a category of records was "related to the PRA request," then category 3 was not "reasonably related to the PRA request." If The Regents made the wrong call here, in hindsight, and this single category turns out to be the exception to the rule that these categories were not "reasonably related to the PRA request," then at best this single release was de minimis and insufficient to find Petitioner "prevailed." (*Sukumar v. City of San Diego*, *supra*, 14 Cal.App.5th at p. 464: "[I]f a plaintiff succeeds in obtaining only partial relief, the plaintiff is entitled to attorney fees unless the plaintiff obtains results 'that are so minimal or insignificant as to justify a finding that the plaintiff did not [in fact] prevail.' " [quoting *Los Angeles Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1391-1392].)

Next, category 10. Category 10 was "Records . . . regarding the public relations aspects of the player altercation and/or the Agu death incident, including any talking points." By

its plain language, the April 6, 2016, request was seeking all written records, reports, or emails dealing with any *internal investigation*. This category focused on "the public relations aspects of the player altercation and/or the Agu death incident." Nothing about investigations at all. The language of the request revealed its purpose, which emphasized *internal investigations*, not public relations concerning the two incidents. There is no evidence in the record below, including in either Petitioner's motion for attorney's fees and costs, or in support of his opposition to The Regents' motion for designation as the "prevailing party," that any of the records released in response to category 10 included records relating to "the public relations aspects of [*any internal investigation into*] the player altercation and/or the Agu death incident." If "reasonably related to the PRA request" means an agency reasonably should have determined that such a category of records was "related to the PRA request," then category 10 was not "reasonably related to the PRA request."

Next, category 12. Category 12 was "Records . . . regarding feedback, advice, or concerns from football program boosters or corporate sponsors regarding the player altercation and/or the Agu death incident." Again, by its plain language, the April 6, 2016, request was seeking all written records, reports, or emails dealing with any *internal investigation*. This category focused on "feedback, advice, or concerns from football program boosters or corporate sponsors regarding" the two incidents. Nothing about investigations at all. As with category 10, there is

no evidence in the record below, including in either Petitioner's motion for attorney's fees and costs, or in support of his opposition to The Regents' motion for designation as the "prevailing party," that any of the records released in response to category 12 included records relating to "feedback, advice, or concerns from football program boosters or corporate sponsors regarding [*any internal investigation into*] the player altercation and/or the Agu death incident." If "reasonably related to the PRA request" means an agency reasonably should have determined that such a category of records was "related to the PRA request," then category 12 was not "reasonably related to the PRA request."

Finally, category 17. Category 17 was "Records . . . counseling those speaking at the Ted Agu memorial event on campus following his death." Again, by its plain language, the April 6, 2016, request was seeking all written records, reports, or emails dealing with any *internal investigation*. This category focused on "counseling those speaking at the Ted Agu memorial event on campus following his death." Again, nothing about investigations at all. If "reasonably related to the PRA request" means an agency reasonably should have determined that such a category of records was "related to the PRA request," then category 17 was not "reasonably related to the PRA request."

6. The court erred in finding Petitioner "prevailed" because categories 3, 10, 12, and 17 were not "responsive to the request or to the purpose of the request"

There was legal error in the trial court's finding that Petitioner "prevailed" for a fourth reason, in addition to the facts,

as explained above, that the court's framework of categories broke the causal chain between the Petition and the release of records, that "a reasonable reading of the subject matter of the PRA request" is not the correct measure of "the primary relief sought," and that the court found—as a matter of interpretation of the April 6, 2016, request itself, without reference to any extrinsic evidence and on the basis of the undisputed facts presented by the document itself—that categories 3, 10, 12, and 17 were "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request." The fourth reason is that, based on a plain reading of the April 6, 2016, request and categories 3, 10, 12, and 17, the categories were not "responsive to the request or to the purpose of the request." (Gov. Code, § 6253.1(a)(1).)

As explained in the preceding section, categories 3, 10, 12, and 17 were not "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request." A fortiori, they were not "responsive to the request or to the purpose of the request." (Gov. Code, § 6253.1(a)(1).) As explained above, "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request" is a more forgiving standard than "responsive to the request or to the purpose of the request."[5] For this reason, even if the court had not erred in failing to recognize that its sorting framework broke the chain of causation, even if the court had employed the correct standard (responsive, not reasonably related), and even if the

[5] See *ante* p. 39.

court had not erred in considering the categories part of the original April 6, 2016, request, then it was still legal error to find Petitioner had "prevailed" under section 6259(d) because the category 3, 10, 12, and 17 records were not "responsive to the request or to the purpose of the request." (Gov. Code, § 6253.1(a)(1).)

7. The court erred in finding Petitioner "prevailed" on the grounds that The Regents' failure to propose categories 3, 10, 12, and 17 or any of the other nine categories pre-Petition constituted a failure to meet its obligations under Section 6253.1

There was legal error in the trial court's finding that Petitioner "prevailed" for a fifth and final reason, in addition to the facts, as explained above, that the court's framework of categories broke the causal chain between the Petition and the release of records, that "a reasonable reading of the subject matter of the PRA request" is not the correct measure of "the primary relief sought," that the court found—as a matter of interpretation of the April 6, 2016, request itself, without reference to any extrinsic evidence and on the basis of the undisputed facts presented by the document itself—that categories 3, 10, 12, and 17 were "a reasonable reading of the subject matter of the PRA request" or "reasonably related to the PRA request," and because, certainly under the appropriate standard, based on a plain reading of the April 6, 2016, request and categories 3, 10, 12, and 17, the categories were not "responsive to the request or to the purpose of the request." (Gov. Code, § 6253.1(a)(1).) The fifth reason is that, in finding the Petition was a catalyst for the release of the category 3, 10, 12,

and 17 records, the court erroneously found that The Regents' failure to propose, before the Petition was filed, categories 3, 10, 12, and 17, not to mention the other 18 categories in the June 11, 2018, order, constituted a failure to meet its obligations under section 6253.1(a)(1) and (a)(3).

In finding that the Petition did not cause the release of "PRODUCTION NO. 1" (84 pages released on March 25, 2018, after obtaining a waiver from the Agu family), the court found "the Regents reasonably complied with Gov Code 6253.1(a)(3) and obtained a waiver from the Agu family after the Regents suggested that a waiver was a practical solution to the privacy issue." (VII CT 1913.) The court rejected Petitioner's argument that *Belth v. Garamendi*, *supra*, 232 Cal.App.3d at p. 896, required more. (VII CT 1913-1914; *cf* VI CT 1439-1440 [Memorandum in Support of Petitioner's Motion for Attorney Fees].)

In finding that the Petition caused the release of the category 3, 10, 12, and 17 records, the court found that The Regents' failure to propose categories 3, 10, 12, and 17 pre-Petition constituted a failure to meet its obligations under section 6253.1(a)(1) and (a)(3). The court made this finding twice: first, in denying The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees; and second, in granting Petitioner's Motion for Attorney Fees. In denying The Regents' motion, the court stated: "The petition was reasonable because before petitioner filed the case the Regents arguably did not ['](1) assist the

member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated [or] (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.' (Gov Code 6253.1(a).)" (VII CT 1915.) Because the category 3, 10, 12, and 17 records ("PRODUCTION NO. 3" through "PRODUCTION NO. 6") were the only releases the court found were caused by the Petition, its finding Petitioner "prevailed" solely on the basis of those records necessarily means the court found The Regents failed to meet its obligations under section 6253.1.

In granting Petitioner's Motion for Attorney Fees, the court repeated this finding: "The Regents produced records as a result of the court's assistance in the Gov Code 6253.1(a) process of defining 'a focused and effective request that reasonably describes an identifiable record or records.' Petitioner technically prevailed on this aspect because the filing of the petition resulted in judicial oversight, which resulted in clarification of the potential categories of records, which caused the production of the records." (VII CT 1913.) As explained above, this misstated the purpose of the court's assistance. Section 6253.1 had nothing to do with it. But the implication, as well as its ultimate impact on the court's determination about whether Petitioner "prevailed" under section 6259(d), is what matters here: in the court's view, The Regents' failure to tease out of the April 6, 2016, request the 22 categories represented a failure to meet its obligations under section 6253.1.

This was error. As explained above, *Sukumar* and *Belth* involved cases in which an agency failed to find records because, in the one case, it failed to look in the right places and, in the other, it failed to obtain a release from the real party in interest. A court-ordered entity deposition in *Sukumar* and the filing of the Petition itself in *Belth* prompted the agency to try harder.

By contrast, in this case, it was The Regents' failure to intuit that Petitioner's overly broad April 6, 2016, request encompassed the disparate subcategories or additional categories the court proposed and Petitioner expanded that led to the omission of those categories from The Regents' collection efforts. By reading into section 6253.1 an obligation on the part of an agency that would have bridged the gap between Petitioner's overly broad request and the 22 categories, the court exceeded the plain language of the statute, the cases interpreting it, and the Legislative intent underlying that section of the Public Records Act. A requester has an affirmative, statutory duty to "reasonably describe[]" the records at issue. (Gov. Code, § 6253(b).) And "an agency processing a FOIA request is not required to divine a requester's intent." (*Landmark Legal Found. v. E.P.A.* (D.D.C. 2003) 272 F.Supp.2d 59, 64.) It is telling that in the meet-and-confer process The Regents initiated and conducted between May 2017 and October 17, 2017, Petitioner never proposed any of the 13 categories he added to the court's list of nine, much less any of the court's. If there was a failure here, then it was both parties' lack of creativity to come up with the categories before the court began the process of generating

them—blame that fairly should be evenly assigned to both parties and not imposed solely on The Regents and deemed a failure to meet its obligations under section 6253.1—but not The Regents' failure of will or willingness to give Petitioner whatever he wanted, as The Regents demonstrated in inviting Petitioner to provide the names of all custodians and the search terms for all ESI Petitioner wanted The Regents to include in its search.

Sukumar and *Belth* draw clear lines that are easy to adhere to and promote the Legislature's intent "to give the public access to information in possession of public agencies in furtherance of the notion that government should be accountable for its actions and, in order to verify accountability, individuals must have access to government files." (*Bd. of Pilot Comm'rs v. Super. Ct.*, *supra*, 218 Cal.App.4th at p. 587 [internal quotation omitted].) In failing to divine that Petitioner's overly broad request included the constellation of categories the court and Petitioner proposed after the Petition was filed incentivizes requesters to stay broad and vague in their requests and leave room to discover additional categories once the section 6259(d) attorney's fee meter begins to run. Without clear limits such as those imposed by *Sukumar* and *Belth*, requesters can always find more categories to read into such broad requests ex post facto and agencies are deprived of meaningful guidelines to manage risk and shine light on their actions on behalf of the public and instead are left to engage in a futile effort to second-guess and preempt the new additional categories requesters will be able to

discover after they have filed their petition. This imposes a burden on agencies beyond what the plain language of section 6253.1 and guidance provided by *Sukumar* and *Belth* require.

8. The court erred in finding the Petition was not "utterly devoid of merit" and therefore should be ordered to reconsider its ruling denying The Regents' motion for an order designating The Regents as the prevailing party and entitled to court costs and attorney's fees

In denying The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees, the court relied on two prongs of section 6253.1(a):

> The petition was not 'utterly devoid of merit.' The petition was reasonable because before petitioner filed the case the Regents arguably did not [']**(1) assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated [or] (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.'** (Gov Code 6253.1(a).) (VII CT 1908.)

As demonstrated above, it was error for the court to find that the Petition led to "the primary relief sought" or "the desired result." Petitioner, therefore, did not "prevail." The "Algorithm" process confirmed The Regents appropriately collected and reviewed records before the Petition was filed. The court denied all of Petitioner's motions on the merits of The Regents' exemptions. The Petition was not a catalyst for any of the records The Regents released after the Petition was filed. The Petition was frivolous as filed and as maintained.

A court always has the authority to revisit its earlier rulings: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order." (Code Civ. Proc., § 1008(c).) A decision by the Court that the trial court's October 16, 2020, order granting Petitioner's Motion for Attorney Fees was error would constitute such a "change of law."

Accordingly, in addition to ordering the court to vacate its October 16, 2020, order granting Petitioner's Motion for Attorney Fees, the Court should also order it to vacate its October 16, 2020, order denying The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees and issue a new order consistent with the Court's opinion.

CONCLUSION

What began as an appropriate and creative judicial sorting process designed to solve a disabling case management problem presented by an overly broad Public Records Act request that implicated The Regents' obligations under FERPA, strayed into legal error when the court used the same framework to determine whether Petitioner "prevailed" under section 6259(d). By virtue of this error, the court employed the wrong standard to determine whether Petitioner "prevailed" and erroneously granted his motion for attorney's fees and costs and denied The Regents' corresponding request. For these reasons, The Regents respectfully requests that the Court reverse the judgment and

order the trial court to vacate its October 16, 2020, orders granting Petitioner's Motion for Attorney Fees and denying The Regents' Motion for an Order Designating The Regents as the Prevailing Party and Entitled to Court Costs and Attorney's Fees and issue a new order and judgment consistent with the Court's opinion.

DATED: January 3, 2022

Respectfully Submitted,

OFFICE OF THE GENERAL COUNSEL
UNIVERSITY OF CALIFORNIA

DocuSigned by:
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By _____
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WORD COUNT CERTIFICATE

Pursuant to California Rule of Court 8.204(c)(1), I certify that the foregoing Appellant's Opening Brief contains 13,012 words (not including the cover, the Certificate of Interested Entities or Persons, Table of Contents, the Table of Authorities, the signature block, and this certificate). In preparing this certificate, I have relied on the word count of Microsoft Office Word 2016, the computer program used to prepare the brief.

DATED: January 3, 2022

DocuSigned by:
Michael Goldstein
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Michael R. Goldstein

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APPELLANT'S OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 3, 2022, at Visalia, California.

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8D15D0A39874438...

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