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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

IRVIN MUCHNICK, Plaintiff and Respondent, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	A162259 (Alameda County Super. Ct. No. RG17857115)

The Regents of the University of California (University) appeals following the trial court's orders regarding fees under the California Public Records Act (Gov. Code, §§ 6250–6276.50[1]; hereafter, PRA or the Act). The court awarded attorney fees to Irvin Muchnick (Petitioner) as the prevailing party on his petition filed pursuant to the PRA and denied the University's fee motion. We reverse the order awarding fees to Petitioner and affirm the order denying fees to the University.

[1] All undesignated section references are to the Government Code.

BACKGROUND

According to news articles attached to the underlying petition, in 2013, two football players for the University of California, Berkeley were involved in a locker room altercation following a team workout, resulting in the hospitalization of one of the players. In 2014, a third football player, Ted Agu, died after an off-season conditioning drill.

On April 6, 2016, Petitioner submitted a PRA request to the University seeking "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." The University released certain records to Petitioner, informed him that other records were exempt from disclosure, and told him it considered this request closed.[2]

In April 2017, Petitioner filed the underlying petition seeking a writ of mandate directing the University to comply with his April 6, 2016 PRA request. The parties met and conferred shortly thereafter, and as a result Petitioner provided the University with a list of individual administrators and specific search terms for the University to conduct a renewed search for responsive documents. The University's search resulted only in nonexempt records that had previously been released to Petitioner and exempt records. The University claimed all of the exempt records were exempt under the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g; hereafter,

[2] Petitioner submitted multiple other PRA requests to the University, none of which are at issue in this litigation.

FERPA). Petitioner wanted the University to provide a *Vaughn* Index[3] but the University asserted it could not do so without violating FERPA, and the parties filed briefs on the issue.

A hearing was held in April 2018. In a tentative ruling issued in advance of the hearing, the trial court proposed a framework for identifying records without violating FERPA, suggesting nine categories of documents.[4] In a subsequent order, the court characterized its approach at the April hearing as "encourag[ing] the parties to develop categories of documents that could serve as [a] framework for both discussion among counsel and the presentation of the issues to the court." The parties subsequently identified 22 categories, including some of the ones suggested by the court. The court ordered the University to state, as to each category, whether it had responsive public records and, if so, whether any of the records were exempt.

After the categories were identified but before the University submitted its response, counsel for the University asserted that the categories were not encompassed by Petitioner's original April 6, 2016 PRA request. At a May 2018 hearing, in explaining why the University needed more time to respond to the new categories, counsel stated, "A number of the categories are seeking documents that [the University] did not and couldn't anticipate and could not have anticipated were encompassed in the albeit extremely broad []PRA request that petitioner made on April 6, 2016. And therefore, in order to comply with [the University's] obligations under the act and to comply with

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[3] A *Vaughn* Index is " 'a list containing the information claimed as exempt and the corresponding exemption under which it is claimed.' " (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 82 (*ACLU*).)

[4] The tentative ruling is not part of the record on appeal.

the Court's order, [the University] is going to have to go back and treat this as a new []PRA request and start the process all over again, which includes identifying appropriate custodians ...." At an August hearing, counsel for the University reiterated that the "new 22 categories ... are very different in a material way from the original April 6th, 2016, ... request that Petitioner submitted."

The University subsequently identified nonexempt records responsive to four of the identified categories and released them to Petitioner. These four categories were: "Policies regarding when and how to conduct an internal investigation," "Records to or from administrators identified [by Petitioner] regarding the public relations aspects of the player altercation and/or the Agu death incident, including any talking points," "Records to or from administrators identified [by Petitioner] regarding feedback, advice, or concerns from football program boosters or corporate sponsors regarding the player altercation and/or the Agu death incident," and "Records to or from administrators identified [by Petitioner] counseling those speaking at the Ted Agu memorial event on campus following his death." The trial court rejected Petitioner's attempts to obtain a *Vaughn* Index and to compel the production of other records.

Petitioner and the University filed cross-motions for attorney fees. The court granted Petitioner's motion and denied the University's motion, and the parties subsequently stipulated to an amount of reasonable fees. This appeal followed.

DISCUSSION

I. *Timeliness of the University's Appeal*

Petitioner argues the University's notice of appeal was untimely and we therefore lack jurisdiction over the appeal. We disagree.

The trial court issued three orders captioned "judgment." All three orders granted the petition, either in part or "to the extent set forth" in the court's prior orders, and awarded Petitioner $125,000 in fees and costs. The first order was filed November 23, 2020, and was served on the parties by the clerk as documented in a declaration of service that was executed on February 18, 2021 but does not indicate the date of service. The second order was filed January 3, 2021, and was served on the parties by the clerk on January 3, 2021. The third order was filed January 15, 2021, and was served on the parties by the clerk as documented in a declaration of service that was executed on January 15, 2021 but does not indicate the date of service. The University filed its notice of appeal on March 16, 2021, identifying the January 15 order as the appealable judgment.

The parties dispute whether the January 15 order or the January 3 order is the operative judgment. They agree the issue depends on whether the January 15 order substantially modified the January 3 order. "When a judgment has been modified, an appeal must be taken from the original judgment if the change was a clerical one, and from the modified judgment if the change was material and substantial. '[I]f a party can obtain the desired relief from a judgment before it is amended, [the party] must act — appeal therefrom — within the time allowed after its entry. If the amendment materially and in a substantial respect affects the judgment and the rights of a party against whom it is rendered, and a party desires relief therefrom, [the party] must appeal from the corrected judgment....' [Citation.] Changes which correct errors, mistakes and omissions made through inadvertence, but do not involve the exercise of the judicial function, are considered corrections of clerical errors that leave the original judgment intact." (*Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 743–744 (*Stone*).)

Petitioner argues the January 15 order did not substantially modify the January 3 order. The University asserts the two orders were substantially different but fails to identify any such differences. We agree with Petitioner there was no substantial modification, as the rights and obligations of the parties remained the same. (Cf. *Stone,* at p. 744 ["The modification [in the judgment] required the [defendants] to pay [the plaintiff's] legal expenses for an additional nine months. That materially affected their rights."].)

However, this does not complete our analysis. Just as the January 15 order did not substantially modify the January 3 order, so the January 3 order did not substantially modify the November 23, 2020 order. Because neither the January 3 nor the January 15 orders substantially modified the prior November 23 order, the effective judgment is the one filed November 23, 2020. Because neither party filed a notice of entry of judgment as to this order and the court's declaration of service did not include the date of service, the time in which to appeal did not expire until 180 days after the judgment was filed. (Cal. Rules of Court, rule 8.104(1)(A) [60-day deadline starts "after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, *showing the date either was served*" (italics added)] & (1)(C); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2022) ¶3:42 ["In order to commence the 60-day appeal deadline, the clerk's notice ... must *show the date on which the clerk served the document.*"].)

Petitioner argues we should not liberally construe the University's notice of appeal as being from the November judgment because once the University was served with the January 3 order, it was "on notice that a judgment was in place." Petitioner's argument defies the " 'one final

judgment rule,' pursuant to which '[o]nly *final* judgments are appealable....' " (*Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1226; see also *Stone, supra,* 77 Cal.App.4th at pp. 743–744 ["When a judgment has been modified, *an appeal must be taken from the original judgment if the change was a clerical one,* and from the modified judgment if the change was material and substantial." (italics added)].) The November 23, 2020 judgment was the one final judgment and the time to appeal this judgment had not expired at the time the University filed its notice of appeal. " '[I]t is, and has been, the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.' " (*In re Joshua S.* (2007) 41 Cal.4th 261, 272.) Such is the case here, and we will therefore liberally construe the University's notice of appeal as appealing from the November 23, 2020 judgment.[5]

II. *Petitioner's Fee Motion*

The University argues the trial court erred in finding Petitioner entitled to attorney fees under the Act. We agree.

A. *Legal Background*

The Act provides, "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." (§ 6259, subd. (d).) "A plaintiff prevails under the Act when it ' "files an action which results in defendant releasing a copy of a

[5] Because we conclude the appeal is timely based on the current record on appeal, we deny as unnecessary the University's motion to augment the record on appeal with documents relating to this issue, which Petitioner opposes.

previously withheld document." ' [Citation.] 'A plaintiff is considered the prevailing party if [the] lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior [citation], or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result.' " (*San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1321–1322.)

" 'We review an attorney fee award generally for abuse of discretion. Whether the statutory requirements have been satisfied so as to justify a fee award is a question committed to the trial court's discretion, unless the question turns on statutory construction, which we review de novo. [Citations.] ... [¶] ... [¶] We defer to any factual findings made by the trial court in connection with the ruling if they are supported by substantial evidence.' " (*Pacific Merchant Shipping Assn. v. Board of Pilot Commissioners etc.* (2015) 242 Cal.App.4th 1043, 1054 (*Pacific Merchant*).)

B. *Analysis*

The University argues Petitioner did not prevail for purposes of section 6259, subdivision (d) because, even if Petitioner's litigation resulted in the production of records, the University had not been obligated to produce those records before the litigation because they were not responsive to Petitioner's April 6, 2016 request.

Fees for a requestor under section 6259, subdivision (d), are only warranted where litigation causes the production of documents *and* the documents were improperly withheld before the litigation commenced. "[A] plaintiff prevails within the meaning of section 6259, subdivision (d), ' " 'when [the plaintiff] files an action which results in defendant releasing a copy of *a previously withheld document.*' " ' " (*Sukumar v. City of San Diego* (2017)

14 Cal.App.5th 451, 463 (italics added).) "Section 6259 expressly applies '[w]henever it is made to appear by verified petition ... that certain *public records are being improperly withheld* from a member of the public,' and a judicial determination is necessary to resolve the issue. (§ 6259, subd. (a), italics added)." (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1087 (*Galbiso*).)

Pacific Merchant, supra, 242 Cal.App.4th 1043, is instructive. In this appeal from a trial court's fee award under the Act, the parties disputed "whether the later-disclosed documents were responsive to a prelitigation request," thereby warranting a finding that the requestor prevailed. (*Id.* at p. 1054.) The prelitigation request sought " 'all documents ... related to' " the defendant's official duties as set forth in regulations. (*Id.* at pp. 1047, 1058.) Because the defendant described the subsequently produced records as containing information that "he '*use[d] ... to make pilot assignments*,'" one of his official duties, we found "[i]t necessarily follows that the documents would have been responsive in the first instance to the [prelitigation] request for 'all documents ... related to' this and other regulatory duties of the [official]." (*Id.* at p. 1058.) Implicit in our analysis in *Pacific Merchant* is the converse: were the records produced postlitigation not responsive to the prelitigation request, their production could not be the basis of a finding that the petitioner was the prevailing party.

This construction is consistent with the purpose of the PRA and its fee provision. "The fee-shifting provision is one of []PRA's 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.' " (*Pacific Merchant, supra,* 242 Cal.App.4th at p. 1053; accord, *Galbiso, supra,* 167 Cal.App.4th at p. 1088.) Where records produced following litigation had not been

wrongfully withheld, there is no basis to conclude judicial enforcement was necessary to enforce the right to inspect public records.

With this understanding of the statute, we turn to the trial court's findings. The trial court found the four categories for which the University produced documents were "not clearly the subject of the PRA request but [were] 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."[6] The court applied the wrong legal standard. The question is not whether the litigation expanded the scope of the request—even if such an expansion related to a similar subject matter—and therefore resulted in production of additional records. Instead, we must decide whether records responsive to the four categories identified during the litigation were improperly withheld by the University prior to the litigation despite being responsive to the April 2016 request.

The parties dispute the latter issue. The April 6, 2016 request sought records "dealing with any internal investigation" about Agu's death and the player altercation. Three of the categories in which the University subsequently provided documents sought records relating to the University's interactions with the *public* regarding the incidents: records regarding "the public relations aspects" of the incidents; "feedback, advice, or concerns from football program boosters or corporate sponsors;" and administrators' "counseling [of] those speaking at" a memorial for Agu. We fail to see how the April 6, 2016 request for records relating to the University's "internal

[6] The trial court also found certain heavily redacted records were produced as a result of the litigation. These records were responsive to the four categories discussed above.

investigation" included documents relating to the University's public relations response. The mere fact that these categories, like the original request, involved the subject of Agu's death and the player altercation is not alone sufficient to bring the categories within the scope of the April 6, 2016 request.[7]

The remaining category sought records relating to investigations but was not specific to Agu's death or the player altercation: "Policies regarding when and how to conduct an internal investigation." The April 6, 2016 request sought records "dealing with any internal investigation ... of the facts surrounding" the Agu death and the player altercation. In other words, the original request sought records about the *process and results* of a specific investigation into the death or altercation, not records about the University's

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[7] Petitioner argues we cannot determine this issue by considering the categories, but instead need the documents produced. The trial court's decision was based on the categories, not the documents, and no party suggests in the briefs on appeal that any particular record produced in response to these categories was also responsive to the April 6, 2016 request independent of the category. Accordingly, we agree with the University that we, like the trial court, can determine this issue based on the categories rather than the documents themselves.

At oral argument, Petitioner complained that he did not advocate for the use of categories below and argued that, if we reverse the trial court's order on his fee motion, we should remand the matter to the trial court so Petitioner can submit the produced records to the trial court and the trial court can determine whether the records themselves were responsive to Petitioner's original request. Petitioner participated in the development of the categories below and benefitted from them; had the opportunity to submit the produced records with his fee motion below, but did not do so; and did not advance this argument in his briefs on appeal. We see no basis to remand the matter to the trial court to permit Petitioner to produce the records on remand.

general policies on investigations. This category is therefore not encompassed by the April 6, 2016 request.

We note that, following the parties' meet and confer at the beginning of the litigation, the University conducted a renewed search using individual administrators and specific search terms *identified by Petitioner,* but this search did not result in the documents produced in response to the four subsequently identified categories. While not conclusive, this fact supports our conclusion that the documents produced in response to the four categories exceeded the scope of the original April 6, 2016 request.

Petitioner argues that, even if the four categories were not encompassed by his April 2016 request, the University was obligated to work with Petitioner to better frame the request and, had it done so, the categories at issue here would have been identified. "[A] person who seeks public records must present a reasonably focused and specific request, so that the public agency will have an opportunity to promptly identify and locate such records and to determine whether any exemption to disclosure applies." (*Galbiso, supra,* 167 Cal.App.4th at p. 1088.) " 'However, the requirement of clarity must be tempered by the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought. Thus, writings may be described by their content. The agency must then determine whether it has such writings under its control and the applicability of any exemption. An agency is thus obliged to search for records based on criteria set forth in the search request.' " (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1424–1425 (*Community Youth*).) "The focus should be on the criteria in the request and the description of the information, as reasonably construed, and the search should be broad enough to account for the problem that the requester may not know what documents

or information of interest an agency possesses. Without certain knowledge of the nature of the documents, the requester may be unable to provide the specificity an agency may require." (*Id.* at p. 1425; see also § 6253.1, subd. (a) [obligating public agency, "in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records," to take the following steps: "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;" "Describe the information technology and physical location in which the records exist;" and "Provide suggestions for overcoming any practical basis for denying access to the records or information sought"].)

Here, the issue was not that Petitioner did not sufficiently describe the type or location of the records sought, it was that the category of records sought was different from the categories later identified during litigation. The University was not obligated under the Act to suggest other categories of records that Petitioner might have been interested in. Similarly, the University was not obligated to search for *all* records relating to Agu's death, the player altercation, or internal investigations generally when this was not Petitioner's request. (See *ACLU, supra,* 202 Cal.App.4th at p. 85 ["[T]he scope of the search is determined by the scope of the request."].)

In sum, because the litigation did not result in the production of records that were improperly withheld before the petition was filed, Petitioner did not prevail for purposes of section 6259, subdivision (d).[8]

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[8] The parties, as well as amicus curie Reporters Committee for Freedom of the Press, dispute whether the University appropriately invoked FERPA as a basis for withholding records. We express no opinion on the issue, which is not before us.

III. *The University's Fee Motion*

The University argues that, if we reverse the trial court's order on Petitioner's fee motion, such an opinion "would constitute ... a 'change of law' " such that we should reverse and remand the court's order denying the University's fee motion. We disagree.

The Act sets forth different standards for a fee award depending on which party seeks it. While a requester need only be the prevailing party, a public agency can obtain a fee award only "[i]f the court finds that the requester's case is clearly frivolous." (§ 6259, subd. (d).) The two standards—whether Petitioner prevailed and whether the petition was clearly frivolous—are entirely different. "The conclusion that an action lacks merit does not determine whether it was frivolous. ... Thus, [a requestor's] failure to prevail on ... PRA claims does not mean [the] case was utterly devoid of merit or brought solely to harass [the defendant public agency]." (*Crews v. Willows Unified School Dist.* (2013) 217 Cal.App.4th 1368, 1382.) Our reversal of the trial court's finding that Petitioner prevailed does not constitute a change of law impacting its finding that the petition was not frivolous and does not warrant remanding the University's motion to the trial court.

The University makes no other argument challenging the trial court's finding that the petition was not frivolous.[9] Accordingly, the University has failed to demonstrate the trial court erred in denying its motion.

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[9] We therefore need not and do not consider arguments supporting the finding raised by amicus curie Reporters Committee for Freedom of the Press.

DISPOSITION

The trial court's order granting Petitioner's motion for attorney fees and awarding fees is reversed and the matter is remanded for the trial court to enter a new order denying the motion. In all other respects, the judgment is affirmed. The parties shall bear their own costs.

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SIMONS, J.

We concur.

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JACKSON, P. J.

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WISEMAN, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.