INTRODUCTION

This Petition for Review requests that this Court clarify and make more uniform how state courts adjudicate a common scenario in California Public Records Act ("PRA") cases. Many times, as in the instant case, documents that could be responsive to a PRA request are not covered by any statutory exemption, and eventually are released only after litigation commenced. Whether the documents were rightfully or wrongfully withheld has overriding importance for determining the prevailing party.

The Defendant and Appellant herein requested publication of the Appellate Court's Opinion ("Opinion") in a letter to the panel of the Appellate Court (the "Appellate Court") because "[t]here are no published opinions addressing the questions presented by the legal standard the trial court applied." The same can be said of the "legal standard" applied by the Appellate Court concerning its use of "categories," i.e. in this case, categories not expressly stated in the PRA request but later devised by the trial court and the parties.

Conflicting rulings and reasoning by the appellate courts present this Court with the opportunity to explain whether the "legal standard" applied by the Appellate Court is accurate and universally applicable; or, on the contrary, merely one way of organizing the facts that the trial court, along with the parties, adduced during the long course of the litigation. This Petition also seeks clarification of whether the Appellate Court's purported "legal standard" should be evaluated under a de novo standard of review or under one of the contradictory standards stated by various appellate courts deciding

how much deference to give to factual findings of trial courts in PRA cases.

Additionally, in order to establish uniformity among the lower courts, this Court should issue doctrine concerning the impact of a failure by a public agency to engage in the obligatory collaborative effort to interpret a specific PRA request. The goals should be to optimize the agency's responsiveness and to further PRA's policy of maximizing public agency transparency and accountability. In the same spirit, there should be a uniform burden at trial and on appeal for the public agency that did not collaborate appropriately with the requester. The rulings of this Appellate Court conflict with holdings of appellate courts in other Districts in this respect.

These overlapping issues are fundamental to the operational framework of the PRA. Acceptance of this Petition for Review would lead to valuable guidance for all PRA actors and for all courts tasked with PRA litigation.

ISSUES PRESENTED

1. In PRA litigation, as between the requester and the public agency, does the public agency have the burden of demonstrating to the trial court that it complied with its statutory obligations under Section 6253.1 (subdivision a) to assist the requester to make his request "focused and effective"? And what are the consequences if the agency failed in fulfilling this obligation?
2. What is a trial court's applicable standard under Section 6253.1 for interpreting the meaning and scope of a PR request

for the purpose of deciding whether the requester is a prevailing party? More specifically, must the trial court take into account factors that shed light on the meaning of the request? Such factors might include, without limitation, the requester's purpose, the importance and relevance of the documents released during the litigation, and the conduct of the parties prior to and subsequent to the filing of the Petition. How much deference should an appellate court give to the trial court's findings of fact?

GROUNDS FOR REVIEW

Review is sought on the grounds that it is necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Ct., rule 8.500, subd. (b)(1).)

STATEMENT OF THE CASE

In April 2017, a petition for a writ of mandate was filed in Alameda Superior Court. In 2021, the trial court made factual findings that the filing of the petition had caused most of the productions in various categories in 2018 and 2019. (7 CT 1907-1908, 1914-1915.) The court expressly found the causation test under a catalyst theory was satisfied. (7 CT 1907-1908, 1914-1915.) Referring to what it listed as production numbers 3, 4, 5, and 6, the court correspondingly wrote with respect to each production: "This production was caused by the filing of the petition." (7 CT 1907-1908) The trial court held with regard to some of the released documents: "The production was not clearly the subject of the PRA request but was within a reasonable reading of the subject matter."

(7 CT 1906, 1908, 1913, 1915.) The trial court found that the Petitioner Irvin Muchnick was the prevailing party under the catalyst theory. The Appellant University of California Regents appealed.

The Appellate Court issued a tentative ruling on October 11, 2022, reversing the trial court. At oral argument, Muchnick requested remand to the trial court for a review of released documents for findings on responsiveness to the original PRA request.

In the decision reversing the trial court, on November 1, 2022, the Appellate Court held that the issue "was that the category of records sought was different from the categories later identified during litigation." (The Appellate Court also rejected remanding to the trial court for the aforementioned document review.) In its analysis, the Appellate Court wrote that "…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)." Opinion of the First Appellate District, Division Five, attached (hereinafter the "Opinion") p. 13. In the Appellate Court's refusal to remand the case to the trial court, there was no consideration for various factors concerning the requester's purposes and investigative uses of the released documents.

Neither party requested a re-hearing. On November 16, 2022, the Appellate Court rejected the Appellant's formal request that its decision be published.

STATEMENT OF FACTS

Public controversy and investigative journalism followed an incident in which a student-athlete on the football team at the University of California, Berkeley was hospitalized following a beating by a teammate. (1 CT 16.[1]) The elements of the controversy included:

- whether this incident had been incited by the team's assistant coach for strength and conditioning. (1 CT 16.)
- the death three months later of another student-athlete, Ted Agu. (1 CT 17.)
- the $4.75 million settlement by the Regents of the University of California of a civil lawsuit over Agu's death. (1 CT 17.)
- the question of a cover-up by the University of California of the circumstances of the death. (5 CT 1407-1412.)

According to the PRA requester his request went largely unfulfilled. The public agency did not make an effort to make the request more focused and effective. The public agency wrote a final email declaring the request "closed." (1 CT 21,121.)

At the trial court:

- The public agency asserted that all withheld responsive documents were exempt under the PRA, because they, by definition, were exempt under the Federal Educational

[1] Citations for background facts in this narrative are to the verified petition for a writ of administrative mandate that led to the appealed judgment.

Rights and Privacy Act ("FERPA"), 20 USC 1232g.[2] (See 2 CT 306-307.)

- The requester maintained non-exempt responsive documents were being withheld. (2 CT 306.)
- The trial court ruled that a "Vaughn Index" need not be produced. (2 CT 305-306, 308.)
- As an alternative to the Vaughn Index, the court ordered the parties to identify categories of documents that were responsive and arguably FERPA-exempt. (2 CT 308.) This led to 22 categories being identified in the court order dated June 11, 2018. (2 CT 308-309.)
- As a result further documents were released during the remainder of 2018 and 2019 (7 CT 1905.)
- Multiple published articles based on records released after the filling of the petition were thus enabled, explaining in detail allegations of institutional malfeasance and cover-up. (*See, e.g*. 5 CT 1407-1412.)
- In August 2020, both parties filed motions asking to be declared the prevailing party. (5 CT 1252, 6 CT 1432.)
- On October 16, 2020, the court issued orders denying the public agency's motion and granting the requester's. (7 CT 1904, 1911.) At the court's direction, the parties met and conferred to stipulate the amount. (7 CT 1909, 1915-1916.) The court entered final judgment. (7 CT 1921, 1924, 1930.)

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The First Appellate District, Division Five, reversed the Superior Court and instructed that no attorney fees be awarded.

ARGUMENT

Issue 1

In PRA litigation, as between the requester and the public agency, does the public agency have the burden of demonstrating to the trial court that it complied with its statutory obligations under Section 6253.1 (subdivision a) to assist the requester to make his request "focused and effective"? And what are the consequences if the agency failed in fulfilling this obligation?

1.1 The purpose as well as the content of the PRA request are central to the entire process.

Undeniably, Government Code section 6253.1 obligates an agency to work with a member of the public to better frame a request. This obligation is based on the agency's acknowledged superior capacity to know what is there to be found that could be responsive to the overall *purpose* of the request. Specifically, subdivision (a) of that statute provides: "When a member of the public requests to inspect a public record or obtain a copy of a public record, the 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, *shall* do all of the following, to the extent reasonable under the circumstances: (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…" (Emphasis added.)

Thus, the agency, not the requester, bears the burden of clarifying an unclear request. Under *Belth v. Garamendi*, (1991) 232 Cal.App.3d 896, 902, fee awards that encourage public agencies to seek consent for disclosure of possibly confidential records *before* refusing requests, in turn requiring lengthy and costly litigation, would further the PRA's objective of increasing freedom of information. Production enabled by a privacy waiver obtained during the litigation is one of the elements of the instant case. (7 CT 1905.)

This Petition for Review respectfully submits that failure to attempt pre-litigation meet and confer for the purpose of making a request "focused and effective," and failure to secure helpful privacy waivers pre-litigation, might leave an agency with no safe harbor to claim that it should not be responsible for a requester's attorney fees following litigation that motivated the release of responsive documents.

"Generally, public records must be described clearly enough to permit the agency to determine whether the writings or information of the type described in the request are under its control. *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.*" *Community Youth Athletic Center v. City of National City*, (2013) 220 Cal.App.4th 1385, 1424, citation and quotation marks omitted, emphasis added (hereinafter "CYAC").

1.2 The trial court's task is to cut through possible "feigned confusion," while not abusing its discretion.

In the instant case, the Appellate Court's approach, as articulated at p. 13 of the Opinion ("The University was not obligated under the Act to suggest other categories later identified in the litigation"), conflicts with the holding of *CYAC*, *supra* at p. 1425, a seminal decision of the Fourth District.

The Fourth District in *San Diegans for Open Government v. City of San Diego,* (2016) 247 Cal.App.4th 1306 took a view that followed *CYAC* and is the opposite to the Appellate Court's. It was based on evidence of non-compliance with Section 6253.1:

> This evidence also supports the trial court's finding [the agency] improperly narrowed the request rather than seek clarification as it was obligated to do. (Gov. Code, § 6253.1, subd. (b).) On this record, the trial court did not abuse its discretion in finding [PRA requester] to be the prevailing party and awarding [PRA requester] its attorney fees and costs.

Id. at pp. 1322-23

Thus, the failure of the agency to seek clarification about the scope of the request was an important factor in finding the requester to be the prevailing party.

Another Fourth District court, but this time in the unpublished *Camou v. Superior Court of San Bernadino County*, E066325 (Cal. Ct. App. Jan. 13, 2017) Fourth District, Division Two),[3] held that the agency and not the requester bears the burden of clarifying an unclear request:

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[3] *See Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219-220, holding that it is acceptable to use de-published opinions to illustrate that the question under consideration by an appellant is a recurring issue that requires resolution and therefore may be cited to point out conflicting judicial viewpoints but not as precedent to be relied upon.

> when we keep in mind real party's duty to clarify (Gov. Code, § 6253.1, subds. (a), (b)) and the policy favoring disclosure of public records (*Bernardi v. County of Monterey*, 167 Cal.App.4th, 1392-1393), we cannot say that real party's decision to interpret category 3 more narrowly than necessary was in compliance with the PRA.

Thus, this Fourth District court, in contrast to the Appellate Court, expressly rejected a standard that was based primarily on categories (see section 2.1, i*nfra*) and that does not take into account the agency's responsibility to clarify. The *Camou* court reversed the trial court's decision that favored the agency's more narrow reading of the subject PRA request, like the narrow reading by the Appellate Court of the requests in this case. The lack of state-wide uniformity of standards with respect to this important issue is manifest.

A similar absence of uniformity is seen in *Holman v. Superior Court of San Diego*, No. D041277 (Cal. Ct. App. Jul. 2, 2003) (unpublished), another unpublished decision out of the Fourth District which highlighted that the agency explained its filing system to the requester to assist in making the request more focused. This approach is congruent with the statute's requirements and the holding of *CYAC*, *supr*a at p. 1425, and contrary to the view of the Appellate Court. It deemed critical the evidence that the agency had collaborated with the requester. The *Holman* court concluded: "[Agency] complied 'to the extent reasonable under the circumstances' (§ 6253.1, subd. (a)) with the requirement that it assist [requester] to focus its request." This Fourth District court acknowledged and took into account this statutory obligation in

concluding that the agency had not wrongfully withheld any documents and was therefore the prevailing party.

It is established in California that a "requester, having no access to agency files, may be unable to precisely identify the documents sought." *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165-166. Moreover, "[W]e do not believe an agency's bare conclusion that information is not responsive to a request is any more self-explanatory than its bare conclusion that information is exempt." *Id.*

The *California First Amendment Coalition* court further acknowledged that a precise description of records sought is not always available to a requester. That court used an approach similar to the trial court in the instant case and made its own "reasonable" interpretation of the request's meaning taking into account the request's purpose and further concluded it would be permissible for the requester to describe the records it seeks by describing their content. *Id.* at 166. Although finding in favor of the agency, the court squarely placed the burden on the agency: "Feigned confusion based on literal interpretation of the request is not grounds for denial." *Id.* at pp. 166-167.

Accordingly, the Third District in *California First Amendment Coalition* found facts supporting an approach based on an analysis derived from information that a requester was able to use to narrow the request, particularly seeking a description by subject matter or by person. Demonstrating again that the requester's interpretation of the request is not always vindicated, the court in *Bertoli v. City of*

Sebastopol, (2015) 233 Cal.App.4th 353, 367 [First District, Division Four], while acknowledging the agency's obligation to provide suggestions to overcoming any practical basis for denying access to the records or information sought, noted that a public agency was "not required to fulfill these obligations" where that agency had made available an index of its records.

Juxtaposed against the diverse examples above, the phrase "feigned confusion" as used in *First Amendment Coalition*, *supra* at 167, and quoted in *CYAC*, *supra* at p.1425, dramatically underscores the need for clearer guidelines from this Court as to the allocation and burdens concerning the interpretation of PRA requests.

1.3 Courts have interpreted Section 6253.1 using different approaches and have reached different conclusions.

In *Pacific Merchant Shipping Assn. v. Board of Pilot Commissioners for Bays of San Francisco*, (2015) 242 Cal.App.4th 1043, 1059 (First District, Division 5), the Court found the agency did not fully respond to pre-litigation requests. It held that good faith efforts to fully and timely respond to a records request may be relevant to determining whether litigation was necessary (and thereby potentially an award of attorney fees) to obtain records. The converse conceivably should also apply, namely a lack of objections to a request may also be relevant to determine whether litigation was necessary to compel release of documents withheld based on a reasonable interpretation of the scope or meaning of a PRA request.

American Civil Liberties Union of Northern California v. Superior Court (California Department of Corrections and Rehabilitation), (2011) 202 Cal.App.4th 55, 82 [First District, Division 2], reached into the Federal Freedom of Information Act to look for a working standard for evaluating how parties should collaborate under Section 6253.1. The court further found it did not believe an agency's "bare conclusion that information is not responsive to a request is any more self-explanatory than its bare conclusion that information is exempt." *Id*.

Courts recognize the importance of the plain language of Section 6253.1 to interpret the parties' obligations to collaborate when called upon. Judicial economy would be enhanced by this Court's review and interpretation of the Appellate Court's Opinion on the issues raised by this Petition.

Issue 2

What is the trial court's applicable standard under Section 6253.1 for interpreting the meaning and scope of a PRA request for the purpose of deciding whether the requester is a prevailing party and entitled to attorney fees? More specifically, must the trial court take into account factors that shed light on the meaning of the request? Such factors might include, without limitation, the requester's purpose, the importance and relevance of the documents released during the litigation, and the conduct of the parties prior to and subsequent to the filing of the

Petition. How much deference should an appellate court give to the trial court's findings of fact?

2.1 Reliance on "categories" is an unreasonably ambiguous standard for determining the prevailing party.

The Appellate Court held that the trial court had applied "the wrong legal standard" when holding that the "categories" formulated with the assistance of the trial court were "within a reasonable reading of the subject matter of the PRA request." (Opinion, p. 10.) Some courts elevate "categories," as the Appellate Court did. Others use a standard that emphasizes content and context in answering this question. Again, this Petition for Review is driven by the lack of uniformity for trial courts to apply in such situations.

Various courts, led by the Fourth District in *Community Youth Athletic Center v. City of National City ("CYAC")* (2013) 220 Cal.App.4th 1385, have used a different approach or "standard" heavily based on the purposes of the PRA request and the conduct of the parties, particularly the public agency, to collaborate to interpret and release documents to the requester. For these courts, the legal standard lies not in a "categories" structure, whether devised by the trial court, by the requester, or by the public agency. Rather, for these other courts the inquiry and the legal standard lies within the meaning and purpose of the PRA request as best determined by the trial court in the course of the litigation. This split can be maintained only to the detriment of the requesters and agencies interpreting and responding to PRA requests with diverging fact patterns.

American Civil Liberties Union of Northern California v. Superior Court (California Department of Corrections and Rehabilitation) (2011) 202 Cal.App.4th 55, 82 has explained the crux of the problem:

> "the unusual nature of the statutory processes renders enforcement of the statutory requirements difficult. As pointed out by the D.C. Circuit in its seminal opinion in *Vaughn v. Rosen* (D.C.Cir.1973) 484 F.2d 820, in a typical FOIA case, as also in a typical PRA case, the plaintiff must argue that the agency from which information is sought has improperly withheld requested documents, even though only the agency knows their actual content, and the plaintiff's lack of knowledge 'seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.'" (citation*)* Because of this, the agency must be required to provide the requesting party "adequate specificity ... to assur[e] proper justification by the governmental agency.' (citation)"

The Appellate Court Opinion substitutes a novel "standard" based on categories; is it the best one?

Fredericks v. Superior Court (City of San Diego) (2015) 233 Cal.App.4th 209, 217 (Fourth District, Division 1), disavowing a trial court's reliance on a categories approach, suggests an answer in the negative: "In construing such disclosure requests, the policy of the PRA requires the courts to consider the information that is being requested, not only the precise type of records that must be provided.", citing *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072.

Pacific Merchant, supra at p. 1060, relied on by the Appellate Court for a different purpose, uses an approach that does not

conform to a purported "legal standard" concerning categories. Rather, the court there evaluated the responsiveness of released documents utilizing a semantic approach unrelated to a "categories" concept: "... as a matter of basic common sense, the records were responsive because they provided information relevant to [requester's] concerns about pilot schedules and related safety." *Id.* This approach is identical to that of the trial court in the instant case, which the Appellate Court rejected.

The Fourth District in an unpublished opinion, *Camou v. Superior Court*, *supra*, delved into the documents whose relevance to the PRA request were in dispute, including analytical interpretations of the subject requests. This again illustrates the approach opposite to that of the Appellate Court. For the court in *Camou*, it was primarily a factual inquiry.

To allow the embrace of "categories" as a "legal standard," rather than as fact findings to which a trial court is owed deference, leads to a legal issue viewed de novo. Thus, there are complementary prongs of this issue meriting consideration under this Petition for Review. One is the uniformity prong. The other is the slippery slope of facts morphing into a determination of a legal standard and undermining the arduous fact-specific work of the trial court.

2.2 General PRA principles and multiple factors should drive the legal standard for prevailing party.

Nothing seems more important than the purpose for which records were sought and perhaps for this reason, this Court has

previously stepped in when that is a key issue. In *Block v. CBS* (1986) 42 Cal.3d 646, 656, the trial court granted the request for certain pilot licenses but would not permit release of the applications for those licenses. This Court noted that the licenses, minus the applications, would not give the public crucial context for determining whether the sheriff had properly exercised his discretion in issuing some licenses and denying others.

One court has held that the requirement for specificity must be tempered by the recognition that a "requester, having no access to agency files, may be unable to precisely identify the documents sought." *California First Amendment Coalition. v. Superior Court*, (1998) 7 Cal.App.4th 159, 165-66. The *First Amendment Coalition* court, acknowledging that a precise description of the records sought might be problematic, did not wholly excuse the requester from a requirement of specificity, because the court concluded it would be permissible for the writing to be described by its content. (*Id.* at p. 166.) Under this reasoning, determining whether a document is responsive to a request is a factual inquiry, not a legal inquiry.

Uniformity of standards, under the guidance of this Court, forestalls public agency gamesmanship and prevents outcomes that retard, rather than implement, the PRA statutory and California Constitutional imperative of, as a general principle, expanding the citizenry's access to and understanding of the actions of government and public agencies.

2.3 Appellate courts should respect that PRA cases are inherently and fundamentally fact-based.

It is established generally, and with particular regard to PRA cases, that whether an issue is factual or legal is often determinative of the level of review and the burden at the trial level and at the appellate level.

The court in *CYAC, supra* at p. 1420, explained this clearly:

> In this light, we examine the statutory requirements on a de novo basis, and then evaluate the record for any substantial evidence support for the trial court's conclusions. (*San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1237, 1241–1242 [statutory interpretation issues are questions of law subject to independent review, while the reviewing court accepts as true any trial court findings of the "facts of the particular case," where supported by substantial evidence]

A key component of this Petition for Review is the ambiguity of whether to characterize the Opinion's "categories"-based "standard" as genuinely legal as opposed to factual. Without providing an answer to this query, this Petition respectfully suggests that the question is legitimate and important. As noted in the preceding section 2.1, it is not clear whether to characterize the Appellate Court's "categories" "standard" as a factual inquiry or a legal inquiry.

2.4 Deference to the trial court's factual findings is likewise not uniform.

There are conflicting views among the appellate courts as to how to define the level of deference accorded to the factual findings of a lower court in PRA cases. This case presents this Court with an opportunity to clarify the standard.

On the one hand, some appellate courts use an "abuse of discretion" standard vis-à-vis the trial court's factual findings. The Fourth District's *San Diegans for Open Government v. City of San Diego,* (2016) 247 Cal.App.4th 1306, 1322 is one of multiple examples. Another, also involving an attorney fee award, is *Garcia v. Governing Board of Bellflower* (2013) 220 Cal.App.4th 1058, 1064 in which the court held, specifically in the PRA context: "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason …" quoted with approval in *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1077 (requiring a "manifest abuse of discretion"). Exceeding the bounds of reason is a high bar, not one expected to be invoked in less than extraordinary circumstances.

On the other hand, there are numerous courts that hold that the standard is "substantial evidence." *See e.g. Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 913 (a PRA case – "This court 'conduct[s] an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.'") *See also CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 650–651 ("this court must conduct an independent review of the trial court's statutory balancing analysis. Factual findings made by the trial court will be upheld if based on substantial evidence").

The standard for review on appeal of a trial court's factual findings in PRA cases determining adherence to Section 6253.1 should not be only "substantial evidence" in some cases, and the more stringent standard of "abuse of discretion" in other cases. The

stakes for the judicial road maps for PRA are too great to allow such ongoing inconsistency. This Petition for Review respectfully submits that the search for uniformity be guided by Cal. Const. art. I, § 3(b)(2): "A statute … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

CONCLUSION

For the reasons stated above, the Court is urged to grant this Petition.

December 8, 2022 Respectfully submitted,

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