SUPREME COURT OF ARIZONA

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, Petitioner, v. ARIZONA DEPARTMENT OF CHILD SAFETY, Respondent.	)	No. CV-20-0030-PR Arizona Court of Appeals, Div. One No. 1 CA-CV 18-0486 Maricopa County Superior Court No. CV2014-007505

COMBINED PETITION FOR REVIEW AND APPENDIX

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Introduction

¶1 Arizona's Public Records Law ("PRL") requires public entities to disclose public records and pay attorneys' fees when a requestor (1) is forced to sue and (2) "substantially prevail[s]." This case raises a critical issue of statewide importance: whether the PRL's fee-shifting provision may be rewritten by the judiciary to apply narrowly – in stark contrast with the balance of the statute – to preclude trial courts from considering all relevant factors in determining whether a requesting party "substantially prevailed."

¶2 The history of this case dates back to 2013, when the Department of Child Services' ("DCS") predecessor was in the midst of a crisis that had not yet gone public.[1] The number of abused and neglected children grew dramatically, the State cut funding for those children, and many suffered while their cases went uninvestigated.

¶3 Cognizant of systemic problems within DCS but lacking the specifics necessary to hold the agency to account, the American Civil

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[1] Ariz. Auditor General, *Arizona Department of Child Safety Independent Review*, at ii, 6-7, 20 (June 26, 2015), *linked via* https://cutt.ly/cr1TkWv.

Liberties Union of Arizona ("ACLU-AZ") requested public records. When DCS didn't respond, ACLU-AZ was forced to sue. DCS produced approximately 500 pages of documents over the next two months. On appeal, the court of appeals held that: (1) DCS's database ("CHILDS") is a public record; and (2) the PRL requires a public entity to "search its electronic database for public records." *Am. Civ. Liberties Union v. Ariz. Dep't of Child Safety* ("*ACLU-AZ I*"), 240 Ariz. 142, 147 ¶ 13 (App. 2016).

¶4 The court of appeals remanded for a reconsideration of, among other things, whether ACLU-AZ "substantially prevailed" and should be awarded fees. The trial court held that it had because DCS failed to promptly respond to ACLU-AZ's requests (to which DCS had "no meritorious defense"), and because of "the significance of finding CHILDS is a public record."

¶5 The court of appeals reversed. *Am. Civ. Liberties Union v. Ariz. Dep't of Child Safety* ("*ACLU-AZ II*"), 248 Ariz. 26 (App. 2020). While in one breath purporting to preserve the trial court's "broad discretion" to determine if a party "substantially prevailed," in another, the court gutted that discretion. It effectively rewrote the PRL by announcing a new limiting principle: a party "may only 'substantially

prevail' based on the documents they receive," and related "legal determination[s]" or other "factors" – no matter how important – are irrelevant. *Id.* at ¶¶ 22, 31.

¶6 The opinion below reduces the supposedly-discretionary test for whether a party "substantially prevail[s]" under the PRL into a pseudo-mathematical equation. It has no basis in the PRL's text. It is inconsistent with the "discretion" that trial courts purport to retain. And its casting aside of "legal determinations" and other factors in PRL cases will have a chilling effect on the enforcement of the PRL.

¶7 By any reasonable measure, ACLU-AZ "substantially prevailed" in this litigation. This Court should grant review, reverse the opinion below, and restore the PRL's status as a meaningful tool to ensure that "[s]unlight [remains] the best of disinfectants." Louis Brandeis, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

Issues Presented for Review

¶8 This Petition presents two issues:

1. Did the court of appeals err by restricting the fee-shifting provision of the PRL such that a party "may only 'substantially prevail'

based on the documents they receive," rendering irrelevant all other factors, including results achieved by the litigation?

2. Did the court of appeals ignore its own remand on the question of whether ACLU-AZ "substantially prevailed" based on DCS's failure to promptly provide public records?

Material Facts

¶9 In 2013 and 2014, ACLU-AZ submitted public records requests to DCS. *ACLU-AZ II* at ¶ 2. After initially providing documents, DCS "abruptly halted production." *Id.* at ¶ 3. ACLU-AZ filed suit, and within two months, DCS produced nearly 500 pages of documents (the "post-litigation documents"). *Id.* at ¶ 4.

¶10 During the bench trial below, DCS officials testified that the "entire CHILDS database" in which DCS records were stored was not a public record and thus not subject to the PRL. [APP047, 048]. As to the unanswered public records requests, the trial court also ruled against ACLU-AZ, finding that those requests would require DCS to create new documents. *ACLU-AZ II* at ¶ 4.

¶11 ACLU-AZ appealed. The court of appeals first agreed with ACLU-AZ on the seminal question, that "CHILDS [is] a public record."

ACLU-AZ I, 240 Ariz. at 146-147 ¶¶ 8-12. The court further agreed with ACLU-AZ that DCS "must query or search CHILDS to comply with its obligations under Arizona's public records law." *Id.* at 148 ¶ 16.[2]

¶12 The court of appeals agreed with ACLU-AZ on two other critical points. It held that the superior court erred by not deciding whether DCS had "promptly furnished" the post-litigation records as required by the PRL and remanded on that issue. *Id.* at 152-53 ¶¶ 31-36. And because the court of appeals "ruled, in part, in [ACLU-AZ's] favor," it also reversed the trial court's denial of ACLU-AZ's request for attorneys' fees and remanded for reconsideration. *Id.* at 153 ¶ 37.

¶13 The trial court then issued a detailed ruling finding that:

- "DCS took the position that CHILDS was not a public record" [APP038];
- DCS failed to "promptly" furnish the post-litigation records, and had "no meritorious defense" for its failure to do so [APP041-043];
- "[T]he significance of finding CHILDS is a public record cannot be understated," because "[i]f ACLU-AZ had not prevailed on this core issue . . . the appellate court would have had no need to remand" [APP043]; and

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[2] The court also held that DCS was not required "to tally or compile previously untallied and un-compiled information or data." *Id.* at 148 ¶ 17.

- "ACLU-AZ substantially prevailed" [APP043].

¶14 DCS appealed, and the court of appeals reversed the trial court's core holding that ACLU-AZ "substantially prevailed" in the litigation. Though purporting to confirm that trial courts have "discretion" and "wide latitude" to determine whether a party "substantially prevails," *ACLU-AZ II* at ¶¶ 21, 23, 34, the court in fact deprived trial courts of any of semblance of discretion, relegating them to the role of bean counters:

> A party cannot be considered to have substantially prevailed based on factors unrelated to the documents they have received. Determining if a party has substantially prevailed must be based on whether the records provided were substantial to the underlying request or whether a party has received responses to a request which, by its nature, was substantial to the action.

Id. at ¶ 31. The court based this holding on its "plain language" reading of the statute and decisions of courts in two other states. *Id.* ¶¶ 25-26, 29-30. And it proceeded to, quite literally, count and compare the number of individual requests made by ACLU-AZ to what DCS was actually required to produce, and established that ratio ("13 of the 77 outstanding requests") as the "context to determine whether ACLU-AZ 'substantially prevailed.'" *Id.* at ¶ 33. Notwithstanding the court's platitudes about the

discretion of trial courts, it held that the trial court abused its discretion by finding ACLU-AZ substantially prevailed.

Reasons the Petition Should Be Granted

¶15 The PRL is a broad statutory scheme intended to "open agency action to the light of public scrutiny" and "allow citizens 'to be informed about what their government is up to.'" *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302 ¶ 21 (1998) (citations omitted). In light of this important public policy, Arizona courts have – for decades – broadly construed the PRL to encourage access to public records. *See, e.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91 (1984) (describing a "clear policy favoring disclosure").

¶16 Here, the court of appeals rejected that historical construction where it matters most: in the PRL's fee-shifting provision, which serves as its enforcement mechanism. The result is a PRL that must be broadly construed, with the sole exception of the provision that gives it any teeth. This incongruity cannot stand.

¶17 Eligibility for recovering attorneys' fees under the PRL is an issue of statewide importance that is likely to recur. This Court should grant review to provide lower courts with guidance, restore those courts'

discretion under the PRL, and in the process, restore the efficacy of the PRL itself.

I. The Court of Appeals Misinterpreted the PRL's Plain Language.

¶18 ***First*,** the court of appeals turned the PRL on its head based on a novel and improperly-narrow reading of A.R.S. § 39-121.02 that ignored the realities of public records litigation in Arizona and its own precedent. This is reason enough to grant review and reverse.

¶19 A.R.S. § 39-121.02 provides, in pertinent part:

> A. Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court[.]
>
> B. The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed. [….]

The court of appeals held that "[r]eading subsections A and B together, the 'action' referred to in the fee provision necessarily refers to a special action appealing the denial of access to records. The foundation of the 'action' is the improper denial of access." *ACLU-AZ II* at ¶ 25 (emphasis added). This interpretation was the basis of the court's holding that "the statute provides that fees may be awarded only to the extent that specific

documents were sought, that request was denied, and the superior court ultimately grants access as sought in the original request." *Id.*

¶20 "A statute's plain language best indicates legislative intent," *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016), yet the court of appeals' reading of A.R.S. § 39-121.02 finds no support in its plain language. Though A.R.S. § 39-121.02(A) does specifically authorize a person "who has been denied access to" public records to file a statutory special action, it says nothing about the scope of relief or success a party might achieve in such an action or how that might factor into whether a party "substantially prevail[s]." But more than that, the universe of "actions under" Article 2 of Title 39 is diverse, and many do not result in the actual release of public records.[3] That reality has never tied the hands of courts to find that a party "substantially prevailed" for purposes of awarding fees.

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[3] A.R.S. § 39-121.02(B) permits a party to recover fees "in any action under this article," (*i.e.*, Article 2 of Title 39). The court's narrow reading of A.R.S. § 39-121.02(B) would also have the effect of denying fee recovery to, for example, a crime victim required to bring a declaratory judgment action to determine whether she is entitled to a free copy of a police report (A.R.S. § 39-127).

¶21 Consider *LaWall v. Robertson*, 237 Ariz. 495 (App. 2015), where a party requested public records, and a dispute between the requestor (R3) and the Pima County Attorney over whether the request was for a "commercial purpose" resulted in the filing of a declaratory judgment action against the requestor. *Id.* at 497 ¶ 5. R3 prevailed and was awarded fees under A.R.S. § 39-121.02(B). *Id.* at 499 ¶ 14. The court of appeals affirmed the fee award under that statute even though R3 did not file a special action under A.R.S. § 39-121.02(A), and the result of the litigation was not the release of public records. *Id.* at 502 ¶ 28; *see also Congress Elementary Sch. Dist. No. 17 of Yavapai Cty. v. Warren*, 227 Ariz. 16, 20-21 ¶ 20 (App. 2011) (awarding fees under the PRL to serial requestors against whom a school district sought prospective injunctive relief, and who received no public records).

¶22 These decisions highlight the fallacy of the "illustrat[ion]" provided by the court of appeals to justify its interpretation of the statute: specifically, a person who submits a public records request, receives all requested documents, but is told that the agency "will not honor subsequent requests from the same individual." *ACLU-AZ II* at ¶ 27. In the court of appeals' view, "the requesting party could not then file an

action under A.R.S. § 39-121.02(A) because the requestor has not been denied access to any records sought." Perhaps, but the requestor would absolutely have standing to bring an action for declaratory or injunctive relief in an "action under" the PRL, and should be entitled to recover fees under the PRL if they "substantially prevail[]." Under *ACLU-AZ II*, however, they could not.

¶23 As best evidenced by *LaWall* and *Warren*, the court of appeals' newfound, restrictive interpretation of A.R.S. § 39-121.02(B) has no basis in that statute's plain language. *ACLU-AZ II* thus created significant discord between decisions from different departments of the court of appeals, making it impossible for trial courts to know which to apply. This Court should grant review to resolve this dispute within the court of appeals' jurisprudence.

II. The Court of Appeals Ignored Important Public Policy.

¶24 ***Second***, the court of appeals' interpretation of A.R.S. § 39-121.02 ignored strong public policy favoring a broad interpretation of the PRL, and in the process created tension between the PRL's purpose and enforcement mechanism.

¶25 Any interpretation of the PRL's fee-shifting provision must be consistent with the statute's fundamental purpose; to permit the public – often through watchdogs and the media – to "monitor the performance of government officials and their employees." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶ 33 (App. 2001) (citation omitted). More than a decade ago, the Legislature made it easier for parties to recover fees under the PRL, transitioning from a strict requirement that the public entity have "acted in bad faith, or in an arbitrary or capricious manner" to the more relaxed and liberal requirement that the party merely "substantially prevail[]." Laws 2006, Ch. 249, § 1 (S.B. 1225). Congress enacted a nearly-identical fee-shifting statute under the Freedom of Information Act ("FOIA") because "[t]oo often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law." *Fenster v. Brown*, 617 F.2d 740, 742 (D.C. Cir. 1979) (citation omitted).

¶26 As a consequence, the court of appeals' refusal to even acknowledge this important public policy while placing severe new constraints on trial courts' discretion to determine if a party has

"substantially prevailed" is a serious issue of statewide importance. It creates an inappropriate dichotomy in the interpretation of the PRL. More fundamentally, it places artificial barriers on trial courts' discretion to consider the totality of the PRL litigation they oversee in deciding whether to award fees, substantially undercutting public policy.

¶27 In the spirit of the PRL, the court of appeals' interpretation of A.R.S. § 39-121.02(B) makes no sense. If trial courts have "broad discretion" and "wide latitude" to determine whether a party "substantially prevailed,"[4] the only proper course is to allow them to consider all of the facts related to litigation absent a clear directive to the contrary from the Legislature. That is precisely what the trial court did here, considering both DCS's failure to promptly respond (*see* Section III, *infra*), and the fact that ACLU-AZ's efforts led to a reported opinion holding that CHILDS – the database in which all DCS records were stored – is a public record. And even beyond that, it would have been

[4] The court of appeals had previously held – in one of many decisions implicitly overruled by *ACLU-AZ II* – that a trial court "has broad discretion to award or deny attorney fees, and we will not reverse its decision unless there is no reasonable basis for it." *Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 548-49 ¶ 12 (App. 2012).

entirely appropriate for the trial court to have considered the fact that the litigation brought by ACLU-AZ established, as a matter of first impression, that electronic databases maintained by public entities must be queried for public records.

¶28 The Court can and should reach this result based purely on Arizona law and policy. In the alternative, however, it could look to FOIA.[5] There, a party has "substantially prevailed" and is eligible for fees if it "obtains relief through either . . . a judicial order, or an enforceable written agreement or consent decree; or . . . a voluntary or unilateral change in position by the agency." 5 U.S.C. § 552(a)(4)(E)(ii). Then, the court may decide whether to award those fees in its discretion, considering among other things: "(1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting from disclosure, (3) the nature of the plaintiff's interest in the disclosed records, and (4) whether the government's withholding of the records had a reasonable basis in law." *Long v. I.R.S.*, 932 F.2d 1309 (9th Cir. 1991). And with respect to "public benefit," courts may consider the impact that a

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[5] *See, e.g.*, *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538 (1991) (looking to FOIA to interpret the PRL).

particular requestor's case may have going forward. *See, e.g.*, *Negley v. F.B.I.*, 818 F. Supp. 2d 69, 74 (D.D.C. 2011) (highlighting that a FOIA case "disclose[d] information about . . . databases which must be searched" to comply with FOIA and "provided extremely significant and useful information for" future requestors). This is true even where "only a modest amount of information" is produced, because "it is the public value of the *request* that courts evaluate for significance, not the actual *results* of the search." *Mattachine Soc'y of Washington, DC v. United States Dep't of Justice*, 406 F. Supp. 3d 64, 68-69 (D.D.C. 2019). If the Court adopts this standard, the trial court's ruling in favor of ACLU-AZ would surely stand.

¶29 Cases arising under the PRL build upon one another, and create precedent on which future requestors can rely. Trial courts should not – as the court of appeals mandated here – be willfully blind to these facts. Absent this Court's intervention, *ACLU-AZ II* will have a chilling effect on future PRL litigation and the development of the law.[6] This

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6 This concern is real; ACLU-AZ is a party to PRL litigation where the trial court raised *ACLU-AZ II* in considering a fee request. *See ACLU-AZ/Holstege v. William Montgomery*, No. CV2019-007636 (Ariz. Superior Court, Maricopa Cty.).

Court should thus grant review, and restore trial courts' discretion to ensure that the Legislature's intent in enacting the PRL and relaxing the requirements for fee recovery is carried out.

III. The Court of Appeals Disregarded Its Own Remand.

¶30 ***Third***, in reversing the finding that ACLU-AZ "substantially prevailed," the court of appeals paid no heed to its own remand in *ACLU-AZ I*. This is yet another reason to grant review and reverse.

¶31 In *ACLU-AZ I*, the court of appeals remanded

> [T]o determine whether DCS promptly provided the ACLU with the post-litigation documents. . . . Given these circumstances, we reverse the superior court's denial of the ACLU's request for an award of fees and costs, and on remand direct the superior court to reconsider whether the ACLU has "substantially prevailed" in this case.

ACLU-AZ I, 240 Ariz. at 153 ¶ 37 (emphasis added). The trial court scrupulously followed directions, and found DCS failed to "promptly" furnish the post-litigation records and had "no meritorious defense" for its failure to do so. [APP041-043] Because ACLU-AZ's litigation forced the release of public records after those requests were denied, the trial court held that ACLU-AZ "substantially prevailed."

¶32 In *ACLU-AZ II*, however, the court of appeals said nothing about the scope of its prior remand, and focused entirely on whether the

trial court could consider the finding that CHILDS is a public record. Inherent in *ACLU-AZ I*'s remand was that it was possible for ACLU-AZ to have "substantially prevailed" given the release of the post-litigation records merely if that release was not "prompt." That's exactly what the trial court found, and should have been the end of the story. If nothing else, the court of appeals erred by disregarding its own mandate. Demanding consistency between departments of the court of appeals is another reason to grant review.

Rule 21(a) Notice

¶33 ACLU-AZ seeks its fees and costs incurred with respect to the appeal in this matter and this Petition under A.R.S. §§ 12-341, 12-342, 12-348, 12-2030, and 39-121.02(B), as well as the private attorney general doctrine.

Conclusion

¶34 ACLU-AZ filed this litigation six years ago, secured the release of 500 documents, and established new precedent that will help future public records requestors. On these undisputed facts, the trial court did not abuse its discretion by finding that ACLU-AZ substantially prevailed, and the court of appeals' conclusion to the contrary has no

basis in the PRL's text or underlying public policy. This Court should grant review, and reverse the opinion below.

RESPECTFULLY SUBMITTED this 6th day of March, 2020.

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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA,

Plaintiff/Appellee,

v.

ARIZONA DEPARTMENT OF CHILD SAFETY,

Defendant/Appellant.

No. 1 CA-CV 18-0486
FILED 1-14-2019

Appeal from the Superior Court in Maricopa County
No. CV2014-007505
The Honorable David B. Gass, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

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OPINION

Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Randall M. Howe and Judge Joshua D. Rogers[1] joined.

M O R S E, Judge:

¶1 The Arizona Department of Child Safety ("DCS")[2] appeals the superior court's order in which it awarded attorney's fees to the American Civil Liberties Union of Arizona ("ACLU-AZ") pursuant to A.R.S. § 39-121.02(B). DCS argues that the superior court erred when it found that DCS failed to promptly produce certain documents and that ACLU-AZ had "substantially prevailed" in the litigation. For the reasons outlined herein, we affirm the superior court's order as to the prompt production of documents but vacate the order as to whether ACLU-AZ had substantially prevailed, the grant of attorney's fees, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is the second appeal in this matter. A detailed summary of this case's background is provided in *American Civil Liberties Union of Arizona v. Arizona Department of Child Safety*, 240 Ariz. 142, 145-46, ¶¶ 2-7 (App. 2016) ("*ACLU-AZ I*").

¶3 In May 2013, ACLU-AZ contacted DCS and requested copies of certain public records. *ACLU-AZ I*, 240 Ariz. at 145, ¶ 2. After initially providing responsive documents, including documents derived from data contained in DCS's case management system, called the Children's Information Library and Data Source ("CHILDS"), DCS abruptly halted

[1] The Honorable Joshua D. Rogers, Judge of the Maricopa County Superior Court, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution. Ariz. S. Ct., Admin. Order No. 2019-96.

[2] Unless otherwise noted, "DCS" refers to the Arizona Department of Child Services as well as its predecessor entities, including the Arizona Department of Economic Security's Division of Children, Youth, and Families and the interim Department of Child Safety and Family Services.

production and ceased communicating with ACLU-AZ. *Id.* at ¶ 3. A few months later, ACLU-AZ submitted additional sets of public-records requests, which DCS left unacknowledged and unanswered. *Id.* at 145-46, ¶¶ 4-5. During this time, DCS was attempting to address thousands of cases that had been resolved improperly without investigation (the "Not Investigated" cases), while also navigating a significant organizational restructuring resulting from the failure to investigate those cases.

¶4 Dissatisfied with the lack of document production, ACLU-AZ sent DCS a pre-suit demand letter about its outstanding public-records requests. DCS "acknowledge[d] the delay that [had] occurred in providing" responses to the remaining requests and said it would begin determining "what data [could] still be produced without creating an undue burden[.]" ACLU-AZ then filed this action. *Id.* at 145, ¶ 6. Within two months, DCS provided approximately five-hundred pages of documents to ACLU-AZ. *Id.* at 152, ¶ 31. After producing these records, DCS objected to the remainder of the requests, arguing that those requests required the creation of new documents using the data contained in CHILDS. *Id.* at 148, ¶ 13. Ultimately, DCS prevailed on this issue before the superior court and ACLU-AZ appealed, resulting in *ACLU-AZ I*.

¶5 In *ACLU-AZ I*, we agreed that ACLU-AZ's outstanding requests asked "DCS to tally and compile aggregate information contained in CHILDS" and therefore affirmed the superior court's ruling that DCS was not required to provide any additional documents. *Id.* at 151, ¶ 27. However, we reversed the superior court to the extent it failed to answer the threshold question of whether the non-confidential information in the CHILDS database was a public record. *Id.* at 146, 150, ¶¶ 9, 23. We additionally remanded to the superior court to decide the promptness of the documents produced after ACLU-AZ filed suit ("post-litigation documents").[3] *Id.* at 151, ¶ 31. As a result, we also reversed the superior

[3] More specifically, the post-litigation documents include the responses to the following of ACLU-AZ's requests: May 2013 Request, Nos. 19-22, 28; January 28, 2014 Request, Nos. 24-25, 35-37; and, January 31, 2014 Request, Nos. 23. In *ACLU-AZ I*, we did not identify all these requests within this definition. *See ACLU-AZ I*, 240 Ariz. at 152, ¶ 31 n. 6 (defining "post-litigation records" as "records responsive to 'items 19-21, 22(b) and (c) of the May 2013 request, item 25 of the January 28 request, and item 23 of the January 31 request to the extent that it possessed responsive existing records'") (quoting the superior court's order). However, on remand the superior court considered the promptness of all documents provided after

court's denial of ACLU-AZ's attorney's fees and directed the superior court to "reconsider whether ACLU-AZ ha[d] 'substantially prevailed' in this case." *Id.* at 153, ¶ 37.

¶6 On remand, the parties agreed to proceed on the existing record and relied on the transcript and exhibits from the September 30, 2014, hearing. ACLU-AZ argued that the records produced were not promptly provided and the delay in production was substantial, particularly considering that the records provided were not complex. ACLU-AZ further asserted that DCS's reasons for delaying production amounted to nothing more than inattentiveness. On whether it had substantially prevailed, ACLU-AZ claimed that this Court's determination that CHILDS was a public record, along with DCS's provision of the requested post-litigation documents, was sufficient evidence that ACLU-AZ had "substantially prevailed."

¶7 In response, DCS argued that it was suffering from significant administrative burdens while the requests were pending and had focused its resources on addressing the crisis arising out of the 6,500 "Not Investigated" reports. DCS also claimed that the organizational restructuring that stemmed from that crisis had created internal confusion. DCS argued that these burdens, combined with the breadth and complexity of ACLU-AZ's requests, showed that the post-litigation records had been produced promptly. DCS also advanced several arguments that ACLU-AZ had not substantially prevailed. First, ACLU-AZ could not have substantially prevailed because both parties had prevailed in part. Second, ACLU-AZ did not prevail because DCS would have provided the post-litigation documents without the lawsuit. Finally, ACLU-AZ did not "substantially prevail" on appeal on the CHILDS database issue because DCS had always maintained that the information in the database was a public record and objected to ACLU-AZ's requests only to the extent they required DCS to create new records and programs to parse that information, an issue *ACLU-AZ I* resolved in DCS's favor.

¶8 The superior court heard oral argument, analyzed the evidence and transcripts of the original hearing, and ultimately awarded ACLU-AZ $239,842.21 in attorney's fees and costs. DCS timely appealed. This Court has jurisdiction over this appeal pursuant to A.R.S. § 12-120.21.

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the litigation began. No party has objected to the superior court's order on this basis and, in any event, the term "post-litigation documents" necessarily refers to all documents provided subsequent to litigation.

DISCUSSION

¶9 DCS argues that the superior court erred in: (1) holding that the production of the "post-litigation" documents was not prompt; (2) holding that ACLU-AZ substantially prevailed; and (3) awarding ACLU the entire amount of its requested attorney's fees. We discuss each of these arguments in turn.

I. Promptness of the Production of the Post-Litigation Records

A. Standard of Review

¶10 We review the promptness of a response to a public-records request *de novo*, but defer to the superior court's factual findings unless they are clearly erroneous. *Hodai v. City of Tucson*, 239 Ariz. 34, 39, 45, ¶¶ 8, 35 (App. 2016) (citing *Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, ¶ 18 (App. 2001) and *McKee v. Peoria Unified Sch. Dist.*, 236 Ariz. 254, 258, ¶¶ 14-15 (App. 2014)).

B. The Post-Litigation Records Were Not Promptly Produced.

¶11 In *ACLU-AZ I,* we remanded and ordered the superior court "to decide whether DCS promptly furnished the post-litigation records." 240 Ariz. at 152, ¶ 31. Though the timeframe to produce responsive documents is not fixed, Arizona public record law requires prompt disclosure. *See id.* (citing A.R.S. § 39-121.02(D)(1)). We have defined "prompt" as "being 'quick to act' or producing the requested records 'without delay.'" *Id.* at 152, ¶ 32 (quoting *Phx. New Times, LLC v. Arpaio*, 217 Ariz. 533, 538, ¶ 14 (App. 2008)). We noted that "on remand DCS [would] bear the burden of showing that ACLU-AZ's request for the post-litigation documents posed an unreasonable administrative burden" and that DCS would need to "articulate sufficiently weighty reasons to tip the balance away from the presumption of disclosure and toward nondisclosure." *Id.* at 153, ¶ 36 (quoting *London v. Broderick*, 206 Ariz. 490, 493, ¶ 9 (2003)). We additionally explained that:

> [I]n deciding whether DCS has met this burden, the court should consider the resources and time it took to locate and redact, as necessary, the requested materials; the volume of materials requested; and the extent to which compliance with the requests disrupted DCS's ability to perform its core functions.

ACLU-AZ I, 240 Ariz. at 153, ¶ 36 (citing *Hodai*, 239 Ariz. at 43, ¶ 27). Applying the standards we set forth, the superior court held that DCS had not met its burden and ruled that the post-litigation documents were not promptly provided.

¶12 We accept the superior court's findings of facts and apply those facts in conducting our review.[4] The superior court found that DCS was well aware of ACLU-AZ's pending requests when it halted production of responsive documents. Despite this, and even after ACLU-AZ inquired about the status of its requests, DCS failed to provide any communication or responsive documents to ACLU-AZ for over six months. DCS claims that it did not know who was responsible for responding to ACLU-AZ's requests because of its restructuring, but DCS knew who was responsible for responding to records requests submitted by governmental entities during that time. Moreover, DCS managed to find the time and resources to produce the post-litigation documents "once ACLU-AZ filed this case[,]" undermining DCS's claim that production of the post-litigation documents posed an unreasonable administrative burden. The superior court found that DCS was strained during the time in question because DCS had taken an "all hands on deck" approach to dealing with the backlog of "Not Investigated" cases, and diverted substantial resources to resolving those matters. But even so, the superior court also found that DCS had not met its burden because it had not presented evidence to establish "the resources and time it took to locate and redact, as necessary, the requested materials."[5] *ACLU-AZ I*, 240 Ariz. at 153, ¶ 36.

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[4] The superior court adopted its findings of fact issued before *ACLU-AZ I* to the extent they did not conflict with our prior decision, and we conduct this review based on those facts as well as the superior court's supplemental findings of fact.

[5] DCS argues that it did present evidence on this point, pointing to certain information contained within a tracking log that contained estimations of the time and manpower necessary to respond to some of ACLU-AZ's various requests. However, when a DCS employee who had helped create the document was asked about the amount of time his unit actually spent on producing the post-litigation documents, he stated that he would "just have to kind of guess" about the time spent because that information was not tracked. So while it is incorrect to say that DCS failed to provide "any evidence" as to the burden of producing the documents, we cannot say that the superior court was clearly erroneous in valuing the live witness's testimony over the estimates provided within the tracking logs.

¶13 DCS had the burden to articulate "sufficiently weighty reasons" to justify its claim that the "ACLU's request for the post-litigation documents posed an unreasonable administrative burden." *ACLU-AZ I*, 240 Ariz. at 153, ¶ 36 (quoting *London*, 206 Ariz. at 493, ¶ 9). We agree with ACLU-AZ and the superior court that DCS failed to meet its burden of showing that the post-litigation documents were promptly produced.

¶14 DCS likens this case to *McKee v. Peoria Unified School District*, 236 Ariz. 254 (App. 2014). It argues that, as in *McKee*, the superior court "incorrectly assessed the promptness of production" of the post-litigation documents "in isolation[.]" *Id.* at 259, ¶ 19. The comparison to *McKee* is inapt. DCS's shortest delay here was one-hundred and fourteen days, far more than the longest delay of 41 days in *McKee*. *See id.* at 257, ¶¶ 3, 8. Further, in *ACLU-AZ I*, we specifically instructed the superior court to analyze the "breadth and complexity of the ACLU's requests for *the post-litigation records*, and the availability of those records," in conducting its analysis. 240 Ariz. at 152, ¶ 32 (emphasis added). The superior court did not err in following our instruction and focusing on the post-litigation documents. While "[t]he fact one document may be easily accessed does not create an obligation to immediately turn over the document without waiting to compile other requested documents and without allowing time for review and redaction," *McKee*, 236 Ariz. at 259, ¶ 19, DCS presented no evidence to show that the post-litigation documents were delayed because of a need to review, redact, or resolve other portions of ACLU-AZ's requests. On this record, the superior court did not err in determining that DCS failed to promptly provide the post-litigation documents.

¶15 Next, DCS argues that because the pre-litigation records were promptly produced, the documents produced in response to the January 2014 requests were also prompt because both sets of records were completely provided within five months of being requested. We disagree. Whether a document has been promptly produced is fact specific, and the circumstances surrounding the pre-litigation documents and the post-litigation documents are dissimilar. *See ACLU-AZ I*, 240 Ariz. at 152, ¶ 32 (emphasizing that promptness turns on a case's particular facts and circumstances). DCS provided its initial acknowledgement of ACLU-AZ's request for the pre-litigation documents within eleven days. The first pre-litigation documents were sent within a month of ACLU-AZ's request, and supplemental records were provided on average every month and a half. In comparison, DCS did not even acknowledge ACLU-AZ's January 2014 requests for approximately three months. The first documents responsive to the January 2014 requests were not provided until nearly five months after those requests were sent. The circumstances surrounding the pre-

litigation documents and the post-litigation documents are not analogous and ACLU-AZ's failure to object to the promptness of the pre-litigation documents cannot be said to bar their argument as to the January post-litigation documents.[6]

¶16 DCS also argues that the administrative strains of the "Not Investigated" crisis, combined with the scope of ACLU-AZ's requests, established that the post-litigation records were unduly burdensome and, therefore, DCS's delayed production should be considered prompt. We reject this argument.

¶17 "[U]nreasonable administrative burden[s]" may excuse delays in production. *ACLU-AZ I*, 240 Ariz. at 152, ¶ 33 (quoting *Hodai*, 239 Ariz. at 43, ¶ 27). However, the governmental entity must show that the requests created such a significant burden that "the best interests of the state in carrying out [the governmental entity's] legitimate activities outweigh the general policy of open access." *Id.* at 153, ¶ 35 (quoting *Hodai*, 239 Ariz. at 43, ¶ 27). As to the first factor listed in *ACLU-AZ I*, "the resources and time it took to locate and redact […] the requested materials[,]" DCS conceded to the superior court that the record showed nothing about how long producing the post-litigation documents actually took. *Id.* at 153, ¶ 36. The second factor was "the volume of materials requested[.]" *Id.* Here, the post-litigation records indisputably amounted to approximately five-hundred pages of documents, though the volume of all materials requested would necessarily be larger. The third and final factor was "the extent to which compliance with the requests disrupted DCS's ability to perform its core functions." *Id.* DCS presented evidence of the burden that would have resulted had it been forced to tally and compile aggregate information from CHILDS, but that evidence does not show the burden actually suffered by DCS from the production of the post-litigation documents or that such production substantially interfered with DCS's ability to function.

¶18 Nor do we find any evidence that the production of the post-litigation documents hindered DCS's ability to address the "Not Investigated" cases or perform its other duties. DCS's internal confusion about who bore the responsibility to resolve records requests during its

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[6] We recognize that the superior court found that the delayed acknowledgement was "excusable under the circumstances," but that does not establish that the production of the January 2014 post-litigation documents was sufficiently prompt. *See ACLU-AZ I*, 240 Ariz. at 152, ¶ 31 (noting the superior court's finding regarding DCS's delayed acknowledgment of the January requests).

restructuring is functionally indistinguishable from inattentiveness, which we have held is insufficient to justify delays. *See id.* at 152, ¶ 32 (citing *Phx. New Times*, 217 Ariz. at 541, ¶ 27). To hold otherwise would shield governmental entities from their statutory duties simply by virtue of their own disorganization. No reason appears on the record, other than DCS's own internal confusion, to explain the delay in producing the post-litigation documents. Given that some of the requests were pending for over a year and DCS provided all documents within six weeks after ACLU-AZ filed suit, production of the post-litigation documents was not prompt.

¶19 Applying these factors to the record, we hold that DCS failed to meet its substantial burden to prove that the post-litigation records represented an undue administrative burden. We similarly hold that DCS failed to meet its burden of proving that, given the circumstances, the post-litigation documents were promptly provided.

II. "Substantially Prevailed"

¶20 Because a records request is deemed denied if the custodian fails to promptly respond to the request, we now turn to whether the superior court erred in holding that ACLU-AZ "substantially prevailed" in its action to obtain records. *See* A.R.S. §§ 39-121.01(E), -121.02(C).

A. Standard of Review

¶21 If a plaintiff is found to have substantially prevailed, the trial court may exercise its discretion in determining whether to award attorney's fees. A.R.S. § 39-121.02(B); *Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 547-58, ¶¶ 8, 9 (App. 2012). We review questions of statutory interpretation *de novo*. *Paradigm DKD Group, LLC v. Pima Cty. Assessor*, 246 Ariz. 429, 433, ¶ 11 (App. 2019) (citing *Ford*, 228 Ariz. at 547, ¶ 6) (review denied Sept. 23, 2019). We review a court's determination that a party has "substantially prevailed" under A.R.S. § 39-121.02(B) for abuse of discretion. *Hodai*, 239 Ariz. at 46, ¶ 41 (citing *Ford*, 228 Ariz. at 547-48, ¶¶ 8-10). However, "when the court commits an error of law in the process of reaching a discretionary conclusion, it may be regarded as having abused its discretion." *State v. Johnson*, 247 Ariz. 166, 194, ¶ 93 (2019) (citing *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253-54, ¶ 10 (2003)).

B. The Superior Court Misconstrued What is Required to "Substantially Prevail" Under A.R.S. § 39-121.02(B).

¶22 DCS argues the superior court erred in finding that ACLU-AZ "substantially prevailed" in this action based on this Court's holding

that CHILDS was a public record in *ACLU-AZ I*, 240 Ariz. at 147, ¶ 12. Specifically, DCS asserts that it never disputed the fact that CHILDS was a public record, meaning ACLU-AZ can't have "prevailed" over DCS on this point. In response, ACLU-AZ maintains that the status of CHILDS was a point of contention throughout this litigation. After analyzing the plain language of the statute, we find that *ACLU-AZ I*'s holding that CHILDS is a public record is not dispositive, because a party may only "substantially prevail" based on the documents they receive in an action brought under A.R.S. § 39-121.02. The superior court erred when it based its ruling on a legal determination that did not result in the production of additional documents, and therefore we vacate the superior court's grant of attorney's fees and remand for redetermination of whether ACLU-AZ substantially prevailed as a result of the post-litigation documents.

¶23 "Substantially prevailed" is not specifically defined in A.R.S. § 39-121.02(B), and the closest Arizona's courts have come to defining the phrase is to specify that "a party may 'substantially prevail' . . . for the purposes of attorney fees and costs only to the extent an action is necessary to accomplish the purpose of an original records request." *Paradigm DKD Group*, 246 Ariz. at 437, ¶ 27. A plaintiff may not "prevail" over a governmental entity when the entity ceases to act "adversarially" toward the requesting party. *Id.* The phrase "substantially prevailed" is "broad and flexible so as to provide the [trial] court with wide latitude in making its determination." *Ford*, 228 Ariz. at 548, ¶ 9.

¶24 But wide latitude is not the same as unlimited discretion. The superior court, in its otherwise well-reasoned decision, relied on language in *Ford*, 228 Ariz. at 549, ¶ 14, to find that ACLU-AZ had "substantially prevailed" because this Court's holding that CHILDS was a public record was the "cornerstone or crux of [ACLU-AZ's] case." That was error. In *Ford*, even though documents were ordered to be produced, the requestor was not entitled to fees because the county treasurer was vindicated in "the crux of the case," and the requestor was required to follow certain procedures in opening ballot boxes. *Ford*, 228 Ariz. at 546-47, 549, ¶¶ 2-4, 13-14. *Ford* does not vary from the statute's plain language, which tells us that a party may only "substantially prevail" based on documents received as a result of the action.

¶25 A.R.S. § 39-121.02 provides, in relevant part:

> A. Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or right to copy such records, may appeal the denial

> through a special action in the superior court, pursuant to the rules of procedure for special actions against the office or public body.
>
> B. The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking records has substantially prevailed. […]

Reading subsections A and B together, the "action" referred to in the fee provision necessarily refers to a special action appealing the denial of access to records. The foundation of the "action" is the improper denial of access. Thus, the statute provides that fees may be awarded only to the extent that specific documents were sought, that request was denied, and the superior court ultimately grants access as sought in the original request. *See Paradigm DKD Group*, 246 Ariz. at 437, ¶ 27 (noting that success in an action is measured against the pre-action requests that were wrongfully denied).

¶26 Notably, the statute specifies that the party must "*substantially* prevail" in an action. A.R.S. § 39-121.02(B). "A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 9 (2019). "Substantial" means: "[i]mportant, essential, and material; of real worth and importance" or "[c]onsiderable in extent, amount, or value; large in volume or number[.]" *Substantial*, Black's Law Dictionary (11th ed. 2019). Accordingly, one cannot substantially prevail if documents received are not "of real worth" to the underlying request, either by their quality or their quantity. This is not to say that one must receive a salacious or scandalous document to substantially prevail. The pertinent question is whether the documents received were material to the request at issue or whether the request to which the government was forced to respond is significant or substantial.

¶27 To illustrate, suppose an individual submits a records request and receives all documents requested. But with the documents, the hypothetical requestor receives a notice that the agency will not honor subsequent requests from the same individual. Despite that presumably unlawful notice, the requesting party could not then file an action under A.R.S. § 39-121.02(A) because the requestor has not yet been denied access to any records sought. It is the denial of records, and not the governmental entity's misguided policy position, that provides a basis to file an action under A.R.S. § 39-121.02(A). Therefore, overturning such a policy cannot

provide a basis to "substantially prevail" under A.R.S. § 39-121.02(B) except to the extent that wrongfully-denied records are produced.[7]

¶28 This does not mean that a party may only substantially prevail based upon the number of documents the requestor received relative to the total documents it sought to obtain through its action. The inquiry must focus on the requesting party's degree of success in an action, either by obtaining documents or by obtaining responses to significant requests at issue. Ultimately, the foundation of this analysis is whether the party has substantially obtained the information sought by the underlying requests. This question is a matter of discretion for the trial court, who is in a better position to understand what information the requestor primarily sought. *See Hodai*, 239 Ariz. at 46, ¶ 41 (citing *Ford*, 228 Ariz at 548, ¶¶ 8-10).

¶29 Other jurisdictions take a similar approach. The Maryland Court of Special Appeals interpreted the meaning of "substantially prevailed" in the context of its then-effective public record laws to require a showing that "prosecution of the lawsuit could reasonably be regarded as having been necessary in order to gain release of the information and that there was a causal nexus between the prosecution of the suit and the agency's surrender of the requested information." *Kline v. Fuller*, 496 A.2d 325, 330 (Md. Ct. Spec. App. 1985).[8] But the *Kline* court also made clear that "it is not necessary for a litigant to recover all the documents at issue, but rather key documents." *Id.*; *but see Competitive Enter. Inst. v. Att'y Gen. of N.Y.*, 76 N.Y.S.3d 640, 643 (N.Y. App. Div. 2018) ("A petitioner 'substantially prevail[s]' under [New York public record law] when it 'receive[s] all the information that it requested and to which it is entitled in response to the underlying [public records] litigation[.]'") (citation omitted). The Maryland

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[7] As DCS noted at oral argument, a party may be able to seek attorney's fees for obtaining favorable changes to governmental policy under the private attorney general doctrine. *See Arnold v. Ariz. Dep't of Health Services*, 160 Ariz. 593, 609 (1989). But ACLU-AZ has not asserted this doctrine, and we have no occasion to consider whether it could apply here.

[8] Maryland's law at the time allowed trial courts to "assess against any defendant governmental entity or entities reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the court determines that the appellant has substantially prevailed." *Kline*, 596 A.2d at 327 (citing Md. Ann. Code art. 76A, § 5(b)(6) (repealed 1984)).

Court of Appeals later endorsed this view of the phrase "substantially prevailed" in the context of another attorney fee provision. *Caffrey v. Dep't of Liquor Control for Montgomery Cty.*, 805 A.2d 268, 284 (Md. 2002) (favorably quoting *Kline*, 596 A.2d at 330).

¶30 The Supreme Court of Virginia also adopted a similar interpretation in the context of its own public record law. *Hill v. Fairfax Cty. Sch. Bd.*, 727 S.E.2d 75, 80 (Va. 2012). Virginia law mandates a grant of attorney's fees if a denial of access to records was improper and "the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust." Va. Code Ann. § 2.2-3713(D). Analyzing this provision, the Supreme Court of Virginia explained:

> If the purpose of the action is merely to force compliance with [Virginia's public record law] by requiring the public body to produce the requested documents, then a finding by the trial court that some documents were wrongfully withheld may satisfy the statute's requirement that the party "substantially prevails on the merits."

Hill, 727 S.E.2d at 80 (citing *RF & P Corp. v. Little*, 440 S.E.2d 908, 917 n.5 (Va. 1994)). However, in *Hill*, the court affirmed that the petitioner had not substantially prevailed because the "object of [that petitioner's action] was not to obtain the small number of documents that the court found should have been disclosed." *Id.*

¶31 The approaches of the Maryland and Virginia courts are consistent with our approach. A party cannot be considered to have substantially prevailed based on factors unrelated to the documents they have received. Determining if a party has substantially prevailed must be based on whether the records provided were substantial to the underlying request or whether a party has received responses to a request which, by its nature, was substantial to the action. This is a question of fact for the trial court to determine.

¶32 Standing alone, the determination that CHILDS was a public record is not sufficient to support the finding that ACLU-AZ substantially prevailed in the action. Even if we assumed that the public-record status of CHILDS was important, DCS did not take a contrary position. ACLU-AZ disputes this, pointing to statements made by the then-director of DCS and DCS's trial counsel at a hearing in 2014. But taken in the context of the entire hearing, those statements merely reflected DCS's position that it was not required to create new methods of searching and compiling information

from CHILDS, not that the information on CHILDS was categorically immune from public-records requests. Moreover, DCS responded to a number of ACLU-AZ's requests with documents and information from CHILDS, *see ACLU-AZ I*, 240 Ariz. at 145, ¶ 3, and did not argue in its briefs in *ACLU-AZ I* that CHILDS was immune to all public-records requests. Because DCS was not adversarial on this issue, our ruling in *ACLU-AZ I* that CHILDS was a public record cannot provide a basis for finding that ACLU-AZ substantially prevailed. *See Paradigm DKD Group*, 246 Ariz. at 437, ¶ 27 (stating that "a party substantially prevails only so long as the entity tasked with disclosure opposes such disclosure or otherwise acts adversarially toward the party seeking records."). Further, because no additional documents were produced as a result of the finding that CHILDS was a public record, that determination cannot provide a basis for determining that ACLU-AZ was successful in achieving the goals set forth in its original requests. *Id*.

¶33 To determine whether ACLU-AZ "substantially prevailed" in this action the trial court must consider both the scope of relief sought and the scope of the documents produced. The public-record requests at issue in this case consisted of three letters sent by ACLU-AZ in which it requested public records from DCS. The first letter, of May 2013, contained "30 separate requests with multiple subparts . . . ." *ACLU-AZ I*, 240 Ariz. at 145, ¶ 2. "Many of the separate requests required [DCS] to tally or compile numerical or statistical information and percentages." *Id*. The second and third letters, both in January 2014, contained a combined 61 additional separate requests, "also with multiple subparts," and "again required [DCS] to tally or compile numerical or statistical information and percentages." *Id*. at ¶¶ 4-5. Before this action was filed, DCS had provided responsive documents for 14 of the 30 requests in the May 2013 letter. *Id*. at 152, ¶ 13. Accordingly, 77 of ACLU-AZ's total of 91 requests remained at issue when ACLU-AZ filed this action. After the action was filed, DCS provided responsive documents for 13 of the remaining 77 requests. *Id*. The superior court declined to order DCS to respond to ACLU-AZ's remaining requests and we affirmed that decision on appeal. *Id*. at 151, ¶ 30. Thus, DCS's response to 13 of the 77 outstanding requests, the post-litigation documents, provides the context to determine whether ACLU-AZ "substantially prevailed" in the underlying action.

¶34 On remand, the superior court must determine whether ACLU-AZ substantially prevailed, and focus on whether the post-litigation documents were sufficient, measured against ACLU-AZ's overall requests, to find that ACLU-AZ obtained a substantial victory against DCS. We emphasize that the superior court retains its "broad discretion" to determine

whether ACLU-AZ has substantially prevailed. *Ford*, 228 Ariz. at 548, ¶ 9. Nothing herein should be taken to suggest a particular outcome on remand.

III. ACLU-AZ's Award of Attorney's Fees at trial and in *ACLU-AZ I*

¶35 Considering our remand of this matter to the superior court for redetermination of whether ACLU-AZ has "substantially prevailed," we must vacate and remand ACLU-AZ's award of fees and costs for reconsideration. *See* A.R.S. § 39-121.02(B) (noting that a grant of attorney's fees is appropriate only if a party has substantially prevailed). If, on remand, the superior court holds that ACLU-AZ has substantially prevailed then it may exercise its discretion to award an appropriate amount of attorney's fees.

IV. ACLU-AZ's Attorney's Fees on Appeal

¶36 ACLU-AZ requests its attorney's fees and costs on appeal pursuant to A.R.S. § 39-121.02(B). Although ACLU-AZ has partially prevailed on appeal, it was unsuccessful in defending the fees awarded by the superior court. We hold that ACLU-AZ has not substantially prevailed on appeal and is ineligible for its fees and costs on this appeal. This ruling is not meant to suggest that the superior court should reach any particular outcome on remand and is solely limited to whether ACLU-AZ substantially prevailed in this appeal.

CONCLUSION

¶37 For the foregoing reasons, we affirm in part, vacate in part, and remand for further proceedings as instructed in this opinion.

AMY M. WOOD • Clerk of the Court
FILED: AA

Chris DeRose, Clerk of Court
*** Electronically Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-007505 06/18/2018

HONORABLE DAVID B. GASS

CLERK OF THE COURT
L. Stogsdill
Deputy

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA — SHELLEY TOLMAN

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, et al. — DAWN RACHELLE WILLIAMS

PHILIP R WOOTEN

UNDER ADVISEMENT RULING

Statement of the Case

This case arises out of several public records requests the American Civil Liberties Union of Arizona (ACLU-AZ) served on the Arizona Department of Child Safety (DCS) and its predecessor agencies in 2013 and 2014. Following a trial in 2014, the 2014 trial court found ACLU-AZ did not substantially prevail. ACLU-AZ appealed.

The crux of the case was whether Children's Information Library and Data Source (CHILDS) system was a public record. The 2014 trial court did not resolve the issue. The appellate court did and agreed with ACLU-AZ's position, finding CHILDS was a public record. *See Am. Civil Liberties Union of Ariz. v. Ariz. Dep't of Child Safety* (*ACLU*), 240 Ariz. 142, 146-47, ¶¶ 7-12 (App. 2016), *review denied* (Apr. 18, 2017). The appellate court also ruled in DCS's favor, finding DCS was not obligated to "tally or compile previously untallied and un-compiled information or data to respond to a public records request." *See id.* at 148, ¶ 17.

As a result, the appellate court acknowledged it "ruled, in part, in the ACLU[-AZ]'s favor." *See id.* at 153, ¶37. The appellate court then remanded the case "to determine whether

DCS promptly provided the ACLU[-AZ] with the post-litigation documents." *See id.* The term "post-litigation documents" refers to four categories of records ACLU-AZ requested. DCS did not provide the post-litigation documents until after ACLU-AZ filed this case.

Summary of Decision

ACLU-AZ prevailed on the crux of the case. DCS did not meet its burden of showing it promptly furnished the post-litigation documents to ACLU-AZ. ACLU-AZ, therefore, has substantially prevailed and is entitled to an award of attorneys' fees and costs under A.R.S. § 39-121.02(B).

Issue and Burden of Proof

Did DCS promptly furnish the post-litigation documents to ACLU-AZ if DCS was inattentive in responding to ACLU-AZ's requests for the post-litigation documents and DCS failed to establish responding to the requests posed an unreasonable administrative burden on DCS?

Did ACLU-AZ substantially prevail because ACLU-AZ prevailed on appeal on the issue of whether CHILDS was a public record and DCS failed to furnish the post-litigation documents promptly?

DCS bears the burden of showing it promptly furnished the post-ligation records "in the context of the particular facts and circumstances of this case." *See ACLU*, 240 Ariz. at 152, ¶ 32.

Findings of Fact

The parties agreed to proceed on the record from the 2014 trial. Before the appeal, the 2014 trial court made specific findings of fact. The 2014 trial court's prior findings of fact stand to the extent they are not inconsistent with the appellate court's opinion. The following facts are consistent with the 2014 trial court's findings of fact. When necessary to resolve the present issues, the following supplements the 2014 trial court's findings.

Promptly Furnishing Documents

On May 6, 2013, ACLU-AZ submitted public records requests to DCS. From May 6, 2013 through October 22, 2013, DCS responded in part to the requests. DCS stopped furnishing documents after October 22, 2013.

Three months later, on January 24, 2014, ACLU-AZ sent a letter asking DCS for a status update. On January 28, 2014 and January 31, 2014, ACLU-AZ submitted two additional public

records requests. DCS did not acknowledge ACLU-AZ's January 24, 2014 letter or the two new ACLU-AZ public records' requests until three months later, after ACLU-AZ sent yet another letter on April 23, 2014.

DCS responded to ACLU-AZ's April 23, 2014 letter, but DCS furnished no additional public records until after ACLU-AZ initiated this case. The 2014 trial court found DCS's delay in acknowledging ACLU-AZ's January 28 and 31, 2014 requests was reasonable under the circumstances.

The 2014 trial court did not address whether DCS was prompt in furnishing the responsive public records, specifically the post-litigation documents. With regard to the post-litigation documents, DCS's shortest delay was 114 days (Items 35, 36, and 37 of the January 28, 2014 request). DCS's longest delay was 402 days (Item 28 from the May, 2013 request).

ACLU-AZ filed this case on May 2, 2014 and served it on May 5, 2014. Within 25 days of filing, on May 27, 2014, DCS began to furnish responsive records. By June 12, 2014, within 6 weeks of filing, DCS furnished all of the post-litigation documents, approximately 500 pages of records. The post-litigation documents were responsive to four of the ACLU-AZ's requests: Item 28 from ACLU-AZ's May 6, 2013 request and Items 35, 36, and 37 from ACLU-AZ's January 28, 2014 request.

The Reports and Statistics Unit at DCS (the RSU) was responsible for extracting responsive data from CHILDS, including the post-litigation documents. Mr. Nicholas Espadas managed the RSU. The RSU had no staffing changes from the time of ACLU-AZ's initial May 6, 2013 request through May 25, 2014. On May 25, 2014, RSU lost one employee.

Despite the RSU's staff reduction, two days later, on May 27, 2014, RSU began furnishing the post-litigation documents. Two days after that, on May 29, 2014, Governor Brewer signed legislation creating DCS. Despite the enactment of major legislation affecting DCS, the RSU continued furnishing the remaining post-litigation documents. The RSU furnished the balance of the 500 pages of post-litigation documents within 17 days.

DCS produced no evidence of the burden created by furnishing the post-litigation documents. Instead, DCS produced evidence showing the burden of furnishing records in response to ACLU-AZ's remaining requests. It would have taken one DCS employee upwards of 22 weeks to respond to the remaining responses to ACLU-AZ's requests. *See* Exh. 51, at p. 10; *see also* Exh. 44.

Mr. Espadas developed the 22-week estimate. He based the estimate on his review of all ACLU-AZ's requests. *See* Exh. 44. Mr. Espadas created Exhibit 44 to show his review. *See id.*

Mr. Espadas testified about his review in Exhibit 44. *See* Trial Transcript, p. 115, l. 2 through p. 117, l. 21); *see also* Exh. 51.

In Exhibit 44, Mr. Espadas addresses the requests in three ways. For some, Mr. Espadas gives the time and the number people needed to respond. For some, Mr. Espadas says N/A. For some, Mr. Espadas simply shows question marks. As to the post-litigation documents listed in Exhibit 44: Item 28 of the May, 2013 request shows N/A; and Items 35, 36, and 37 from the January 28, 2014 request show question marks.

The post-litigation documents were not on the list Mr. Espadas included in the 22-week calculation. *See* Exh. 51, at p. 10. Mr. Espadas testified he could not say how much time DCS spent on furnishing the post-litigation documents. *See* Trial Transcript, p. 121, 1, l. 10 through p. 121, l. 7.

DCS Position on CHILDS as a Public Record

During the 2014 trial, ACLU-AZ argued the non-confidential data in CHILDS was a public record. DCS took the position CHILDS was not a public record. *See* Trial Transcript, at p. 171, ll. 7-10. In its closing argument, DCS argued the point, saying: "Is this [CHILDS] a public record? That's the first decision. If it's not a public record, case is closed. See you later. Our position, your Honor, is it is not a public record." *See id.*

The 2014 trial court did not resolve the issue. DCS did not concede the issue in its appellate briefing. Ultimately the appellate court resolved this significant issue in ACLU-AZ's favor. The appellate court recognized in doing so, it was ruling, in part, in the ACLU-AZ's favor.

Principles of Law
Prompt Response

A.R.S. § 39–121.01(D)(1) says:

> 1. Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person. The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. **The custodian of such records shall promptly furnish such copies, printouts or photographs** and may charge a fee if the facilities

> are available, except that public records for purposes listed in § 39-122 or 39-127 shall be furnished without charge.

(Emphasis added).

Nature deplores a vacuum. Writers deplore really long block quotes. But here, the appellate court gave specific directions in what to consider on remand with regard to whether DCS promptly responded to ACLU-AZ's request. The specific directions were:

> The ACLU argues on appeal that although the superior court found DCS's delay in acknowledging receipt of the January 2014 requests "was excusable under the circumstances," it failed to decide whether DCS had "promptly furnish[ed]" the post-litigation records as required by A.R.S. § 39–121.01(D)(1) (upon request, custodian "shall promptly furnish" records), and A.R.S. § 39-121.01(E) (access to public record deemed denied if custodian "fails to promptly respond" to public record request). We agree with the ACLU that the superior court did not, but should have, decided this issue. Therefore, we remand to the superior court for it to decide whether DCS promptly furnished the post-litigation records. On remand, the superior court should consider the following principles.
>
> Although neither our public records statutes nor interpretive case law fixes a timeframe for an agency to produce documents, "prompt" for purposes of our public records law is "being 'quick to act' or producing the requested records 'without delay.'" On remand, consistent with the statutory obligation imposed on it, DCS will bear the burden of showing its production of the post-litigation records was prompt in the context of the particular facts and circumstances of this case. These circumstances include whether any delay was caused by inattentiveness. These circumstances also include the breadth and complexity of the ACLU's requests for the post-litigation records, and the availability of these records. These circumstances further include whether the best interests of the state outweighed any delay in disclosing these records.
>
> In evaluating the best interests of the state against any delay in producing the post-litigation records, the court should consider

> whether the ACLU's requests for the post-litigation records posed an "unreasonable administrative burden."
>
> . . .
>
> Consistent with the foregoing authorities, on remand DCS will bear the burden of showing that the ACLU's request for the post-litigation documents posed an unreasonable administrative burden. As in *London*, DCS must "articulate[ ] sufficiently weighty reasons to tip the balance away from the presumption of disclosure and toward nondisclosure." And, as recognized in *Hodai*, in deciding whether DCS has met this burden, the court should consider the resources and time it took to locate and redact, as necessary, the requested materials; the volume of materials requested; and the extent to which compliance with the requests disrupted DCS's ability to perform its core functions.

ACLU, 240 Ariz. at 152-53, ¶¶ 31-36 (citations, internal references, and footnotes deleted).

Substantially Prevailed

Access to public records is a foundation of Arizona government. *See Phx. Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81, 927 P.2d 340, 347 (App.1996). But Arizona law gives the courts wide latitude in determining whether a party substantially prevailed in a public records request case. *See Democratic Party of Pima County v. Ford*, 228 Ariz. 545, 548, ¶ 9 (App. 2012). If the government actor prevails on an issue that constitutes the "crux of the case," even if collateral, Arizona's public records laws do not call for an award of attorneys' fees and costs. *See id.* at 549, ¶ 14.

Arizona's appellate courts have looked to factors identified in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) when evaluating requests for attorneys' fees and costs in public records cases. *See Democratic Party*, 228 Ariz. at 548, ¶ 9. *Associated Indem.* identified the following factors:

> 1. The merits of the claim or defense presented by the unsuccessful party.
> 2. The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.

3. Assessing fees against the unsuccessful party would cause an extreme hardship.
4. The successful party did not prevail with respect to all of the relief sought.

143 Ariz. at 570.

Analysis

DCS Did Not Promptly Respond.

The burden is on DCS to show "its production of the post-litigation records was prompt in the context of the particular facts and circumstances of this case." *See ACLU*, 240 Ariz. at 152, ¶ 31. If DCS does not meet its burden, ACLU-AZ prevails on the issue.

DCS Was Inattentive.

DCS acknowledges its delays, but tries to place them at the ACLU-AZ's feet because ACLU-AZ was not more aggressive in seeking a response. The argument carries little weight.

DCS was well aware of the May 6, 2013 requests when it stopped furnishing responsive records on October 23, 2013. DCS was well aware its response was not complete at that point. ACLU-AZ sent DCS a reminder letter after a few months. DCS did not acknowledge ACLU-AZ's reminder letter, let alone promptly furnish the remaining responsive documents. DCS's lack of responsiveness is equally true of both of ACLU-AZ's January, 2014 requests.

DCS says it stopped furnishing responsive records because of internal confusion about who was responsible. The evidence defeats DCS's argument. During the same time, DCS knew who was responsible for responding to requests from the Governor's Office and the Legislature and DCS continued responding to them. DCS further could not say if it stopped responding to other public records requests during this time or just ACLU-AZ's request.

DCS says its own confusion about who should respond justifies the lack of prompt production. It does not. DCS is responsible for determining who will respond to public records requests it receives.

DCS's inattentiveness "does not establish the promptness of a response." *See Phoenix New Times*, 217 Ariz. at 541, ¶ 27.

Furnishing the Post-Litigation Documents Did Not Constitute an Unreasonable Administrative Burden.

DCS argues "compliance with the requests disrupted DCS's ability to perform its core functions." Assessing the administrative burden involves considering three factors: "[1. T]he resources and time it took to locate and redact, as necessary, the requested materials; [2] the volume of materials requested; and [3] the extent to which compliance with the requests disrupted DCS's ability to perform its core functions." *See ACLU*, 240 Ariz. at 153, ¶ 36.

The parties do not dispute the second factor. "[T]he volume of materials requested" for the post-litigation documents was about 500 pages of records.

DCS presented no evidence to establish the first factor, "the resources and time it took to locate and redact, as necessary, the requested materials," specifically the post-litigation documents. Mr. Espadas acknowledged he could not say how much time it took to furnish them once DCS began to do so.

Other facts do not support DCS's position with regard to the first factor. DCS was able to produce the post-litigation documents within six weeks of ACLU-AZ initiating litigation. It was able to do so despite a significant staff reduction and enactment of major legislation, both of which occurred after DCS started working to furnish the post-litigation documents.

DCS presented insufficient evidence on the second factor. DCS was under great pressure during the relevant time. DCS's resources were limited and stretched thin because of external and internal pressures. Those pressures do not carry the day. DCS was responding to other external requests for information. And DCS found the resources to furnish the post-litigation documents once ACLU-AZ filed this case.

With no evidence on the first factor and weak evidence on the second factor, it would be speculative at best to find DCS met its burden. Ultimately, DCS did not articulate "sufficiently weighty reasons to tip the balance away from the presumption of disclosure and toward nondisclosure." *See ACLU*, 240 Ariz. at 153, ¶ 36.

DCS did not timely furnish the post-litigation documents.

ACLU-AZ Substantially Prevailed

DCS argued it prevailed on appeal and the ACLU-AZ did not. The appellate court saw it differently. *See ACLU*, 240 Ariz. 142, 153, ¶37 ("We have, however, ruled, in part, in the

ACLU's favor, and we are remanding to the superior court to determine whether DCS promptly provided the ACLU with the post-litigation documents.").

On appeal, both parties prevailed on significant issues of statewide importance. With this ruling, ACLU-AZ also has prevailed on an additional significant issue in this case, DCS's failure to furnish responsive documents to its requests promptly, specifically the post-litigation documents.

On the prompt furnishing issue, several factors weigh strongly in favor of ACLU-AZ. As to the post-litigation documents, DCS did not have a meritorious defense. DCS could have avoided the litigation as to the post-litigation documents if it had promptly furnished them to ACLU-AZ. Assessing attorneys' fees and costs against DCS will not cause DCS extreme hardship. On the prompt furnishing issue, ACLU-AZ has prevailed in all respects with regard to the post-litigation documents.

On the CHILDS's issue, the factors are not as clearly defined. DCS did not have a meritorious defense to its position CHILDS was not a public record but had a meritorious defense on ACLU-AZ's claim DCS had to tally and to compile information and data even if DCS had not previously tallied or compiled it. DCS likely could not have avoided the litigation on the issue. Assessing fees will not cause DCS extreme hardship, and ACLU-AZ has not prevailed in all respects with regard to the CHILDS issue.

Still, the significance of finding CHILDS is a public record cannot be understated. It is the cornerstone or crux of this case. As DCS argued in closing, "Is this [CHILDS] a public record? That's the first decision. If it's not a public record, case is closed. See you later. Our position, your Honor, is it is not a public record." *See Trial Transcript*, at p. 171, ll. 7-10. If ACLU-AZ had not prevailed on this core issue, no further discussion would have been necessary. Indeed, the appellate court would have had no need to remand.

Given the above, ACLU-AZ substantially prevailed and has been damaged as a result of DCS's failure to promptly furnish the post-litigation documents. *See* A.R.S. § 39-121.01(D) and (E). ACLU-AZ's damages include the attorneys' fees and costs. ACLU-AZ's requested attorneys' fees and costs are reasonable. In the exercise of the Court's discretion, ACLU-AZ is awarded its reasonable attorneys' fees of $237,338.96 and its reasonable taxable costs of $2,503.25.

Conclusions of Law

DCS did not promptly furnish the post-litigation documents to ACLU-AZ because DCS was inattentive in responding to ACLU-AZ's requests for the post-litigation documents and DCS failed to establish responding to the requests posed an unreasonable administrative burden on DCS.

ACLU-AZ substantially prevailed because ACLU-AZ prevailed on appeal on the issue of whether CHILDS was a public record and DCS failed to promptly furnish the post-litigation documents.

Order/Ruling

IT IS THEREFORE ORDERED signing a separate judgment in conformance with the above.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, Plaintiff, vs. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, et,al., Defendants.	CV 2014-007505

Phoenix, Arizona
September 30, 2014

BEFORE THE HONORABLE ROBERT OBERBILLIG

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

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BY: G. Michael Tryon
Stephanie Elliott
Lauren Lowe

***

community college in Cochise County, I've had exposure to the requirement and our responsibility to provide public records as needed.

Q. Sir, the ACLU, in their legal briefs, the innuendo is that the entire CHILDS Database is a public record. Do you believe that?

A. I do not. I believe that is a stretch, at best. That is data. That is not a report. I've never been required to produce a report, create a report, and then to, in essence, do that tailored for a specific request as a priority from the agency.

And I should point out that this is a very time intensive, difficult process that takes an enormous amount of staff time. And it's not just Nick's time. It's not his staff, who are difficult to find, by the way, because there are very few people we can find that can manipulate data the way we need for these reports to be created.

Q. Sir, you heard Plaintiff's counsel talk about openings in the agency and in Nick's unit, in particular.

Is that still a problem?

A. It absolutely is. In fact, Nick's unit is 25 percent vacant.

Q. Can you tell your Honor why that is problematic?

A. Yes. Because it's been difficult, if not impossible, to find the people who are capable of doing

have been filed in this case are very well written and they do detail all of the issues. But what counsel is forgetting, there's a case called *Griffis*, G-r-i-f-f-i-s, in Pinal County. It's cited in our papers, your Honor. And it sets forth the two prongs necessary for you to reach.

And the first prong, you've addressed. Is this a public record? That's the first decision. If it's not a public record, case is closed. See you later. Our position, your Honor, is it is not a public record. Arizona has 100 agencies, I learned when I went in the AG's office. All of these agencies either have or will have these kinds of issues. The more digital agencies, DPS, for instance, DOC, DECS, everything is going or will be in the computer; and this issue will come up.

The State certainly isn't saying, if we're putting it in the computer, you don't have access to it. The issue is, are we forced to create records. The law hasn't changed from the old days. Here's our shelves of public records. Which one do you want? It's the same thing. We have public records available digitally. Which one do you want? But you cannot force us to go into any database and create a record. And what counsel, what they --

THE COURT: Well, I guess that's the question,

C E R T I F I C A T E

I, MICHELE KALEY, do hereby certify that the proceedings had upon the hearing of the foregoing matter are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED this 7th day of October, 2014.

MICHELE KALEY, RPR
CERTIFIED REPORTER
CERTIFICATE NO. 50512