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

COUNSEL

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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