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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

NEWARK UNIFIED SCHOOL DISTRICT, Plaintiff, v. ELIZABETH BRAZIL, an individual, Defendant.	Case No.: RG14738281 **AMICI CURIAE REPLY BRIEF IN SUPPORT OF DEFENDANT ELIZABETH BRAZIL** Date: March 28, 2018 Time: 9:00 a.m. Dept.: 511 Judge: Hon. Judge Jeffrey Brand

I. INTRODUCTION

The issue before the Court is one of basic statutory interpretation: Does the CPRA permit a government agency to recover attorney fees against a member of the public where, it is undisputed, she did not bring a "clearly frivolous" action? The answer is no. The CPRA's plain language makes this clear. Confronted with a statute that directly refutes their argument, the District in their opposition brief asks the Court to read a single sentence of the CPRA in isolation from everything that precedes and follows it. This is an invitation to clear error the Court should not accept.

But it is not just the CPRA's plain language that requires the motion to be denied. It is also:

- The absence of any authority supporting a fee award where, as here, the records requester did not file a clearly frivolous claim. Nowhere in their 15-page opposition, or in their 15-page motion, does the District cite such a case. There is none to be found.
- The purpose, policy, and plain language of the CPRA. There is a reason the District has failed to find authority supporting their extraordinary request. The Legislature intended to protect the public from precisely the kind of vengeance the District seeks here.

Seeking support outside the plain language of the CPRA, the District's opposition brief repeatedly attempts to conflate its right to *relief* in this action with its right to *recover fees*. The two are distinct. The fact that the Court of Appeal in this case concluded that the CPRA does not *prevent* an agency from filing an action to recover mistakenly released records says nothing about whether the District can *recover fees* against a requester. The CPRA makes clear it does not.

The District's attempt to exact financially ruinous revenge on a member of the public who the District has incorrectly deemed "responsible" for the District's mistake, and for the subsequent litigation, finds no support in the CPRA or related authorities. The motion should be denied.

II. ARGUMENT

A. The CPRA Does Not Permit Fee Recovery by a Government Agency Unless a Requester Brings a "Clearly Frivolous" Lawsuit

The District asserts that because Gov. Code section 6259(d) ("Section 6259(d)") says the court "shall award…reasonable attorney fees to the plaintiff," and it was the plaintiff, it is entitled to fees. This argument asks the Court to wholly ignore the remainder of Section 6259(d), which

makes clear that "plaintiff" and "public agency" are mutually exclusive terms. First, the fees to be paid "to the plaintiff" under Section 6259(d) are to be paid ***only by*** "the public agency:"

> The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. ***The costs and fees shall be paid by the public agency*** of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

(Section 6259(d), emphasis added.)

If "plaintiff" in the first sentence encompassed "public agency," the second sentence of Section 6259(d) would be nonsensical. As would the subsequent sentence of Section 6259(d):

> If the court finds that the ***plaintiff's*** case is clearly frivolous, it shall award court costs and reasonable attorney fees ***to the public agency***.

While it may be true as the District asserts that Section 6259(d) "does not expressly exclude the 'public agency' as the plaintiff in the first sentence" (Opp., 9:21-22), that is irrelevant—the remainder of Section 6259(d) clearly does so. The whole section makes no sense if "plaintiff" and "public agency" can be the same. Thus, under the District's desired reading, the final two sentences are surplusage and must be "read out" of the statute entirely. However, in interpreting a statute, a court must "not examine …language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose." (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-66.)[1] Moreover, in interpreting statutes, courts are to "reject interpretations that render particular terms of a statute mere surplusage," and instead are to "giv[e] every word some significance." (*San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55.)

Disregarding these fundamental precepts of statutory interpretation, the District attempts to brush aside two of the three sentences in Section 6259(d), asserting that "these sentences do not apply here" because they don't address the circumstance of a plaintiff agency seeking fees against

[1] The District incorrectly cites *Sierra Club* for the proposition that the Court should avoid examining language in isolation only to the extent the statute contains some ambiguity. (Opp., 10:23-24.) This is not what *Sierra Club* says, and it is not the law. The rule against reading statutory provisions in isolation is applicable whether there is ambiguity or not—which here there is not. (*See*, e.g., *Coalition of Concerned Communities v. Los Angeles* (2004) 34 Cal.4th 733, 737.)

a defendant requester of records. (Opp. 7:24-8:10.) That is precisely the point. Section 6259(d) does not envision or allow fee recovery by a government agency against the public except in one narrow circumstance that, the District does not dispute, is inapplicable here. Thus, Section 6259(d) "reflects a legislative intent that the ***plaintiff…cannot be the public agency*** from which disclosure is sought, because the provision contemplates that ***the public agency always will pay any costs and attorney fees 'should the plaintiff prevail***.'" (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 431. *See also Fontana Police Dept. v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249 [fees available to prevailing requester, even though public agency was nominally the plaintiff].)

In an attempt to set aside *Filarsky* and related authorities, the District claims "no cases decided prior to *Ardon* and *Newark USD* are instructive or otherwise controlling"—in other words, no cases decided before 2015, three years ago, irrespective of what court issued them. (Opp., 8:9-10.) The District cites no authority for the proposition that *Newark* or *Ardon* overruled the many prior authorities on the CPRA's fee recovery provision.[2] In fact, *Newark* and *Ardon* did not address fees at all. If the issue was never addressed, clearly the courts could not have made any holding on the issue of fees, much less one that overruled years of precedent. The District's argument also violates the California Constitution's mandate that *any authority* "including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Calif. Const., Art. 1, §3(b). Since Newark and Ardon limit the public's right of access to records, they must be read narrowly.

And while the final two sentences of Section 6259(d) make plain that the District's argument fails, the Court need not even look that far to deny the District's motion. The end of the first sentence—on which the District's entire argument depends—states: "The court shall award … attorney fees to the plaintiff ***should the plaintiff prevail in litigation filed pursuant to this section***" (emphasis added). Even accepting that a public agency could be a "plaintiff" pursuant to this section, which it cannot, it is undisputed that the District did not even cite to Section 6259 or

[2] This is not the only instance where the District impermissibly reads into *Ardon* and *Newark* conclusions not reached. Neither case held, as the District asserts, that the CPRA provides a basis for the District's action for injunctive relief. The cases actual conclusions are discussed in more detail below, in Section II.B.1.

any other part of the CPRA in their Complaint, and, thus, did not file litigation "pursuant to this section.[3] Thus, even if the Court were to "read out" the final two sentences of Section 6259(d), as the District invites it to do, the first sentence alone shows why their motion fails.

In the end, what the District asks the Court to do is read Section 6259(d) as follows:

> The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation ~~**filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency**~~.

The Court should not accept the District's invitation to misread the CPRA in this manner. It is not the province of the courts to second guess the mandate of Legislature's judgment. (*Williams v. Sup. Ct.* (1993) 5 Cal.4th 337, 361.) "Unless that judgment runs afoul of the Constitution it is not our province to declare that the … approach the Legislature chose is inferior [ ], or to substitute one approach for the other." (*Id.*; *see also Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1440.) Thus, if the County is unhappy its inability to recovery fees after its mistaken disclosure of public records, those complaints are properly directed to the Legislature, and not this Court. (*N. Cal. Police Practices Project* (1979) 90 Cal.App.3d 116, 124 ["[i]f the burden becomes too onerous, relief must be sought from the Legislature."]

The law is clear—and consistent with the plain language of Section 6259(d): the only instance in which a government agency can recover fees from a records requester is where that requester files an action that is "clearly frivolous," a standard that is not met where the requester asserts colorable legal claims. (See *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427 ["if the defendant public agency prevails, the court lacks the legal authority to award costs to the agency—even though the agency would be entitled to costs in an ordinary action—unless the action is frivolous"]; *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1302.) The District cites no authority for the proposition that a public agency can recover fees under any other circumstance. To amici's knowledge, there is none. Therefore, this Court should reject the

[3] This issue is discussed in more detail below, in Section II.B.1.

District's invitation to invent a right to recover fees against a requester that is not only not present in the plain language of Section 6259(d), but is directly refuted by that language.

B. The District's Ability to Seek Relief Is Irrelevant to Its Entitlement to Fees

Unable to rely on the plain language of Section 6259(d), and lacking any authority holding that a public agency can recover fees other than after prevailing on a "clearly frivolous" case, the District attempts to shift the focus to its entitlement to seek relief, repeatedly insisting that it can "properly be a plaintiff under the PRA." (Opp. 5:17*; see also*, e.g., Opp. 6:22-23; 9:6 ["a public agency may indeed be a plaintiff under the PRA"). In a similar vein, the District claims that the "essential answer" in the *Newark* and *Ardon* cases was "yes" to the following question: Is private information "worthy of protection under the PRA?" (Opp. 4:20-23.) This may or may not be the case, but it is irrelevant here. Whether the District has rights "worthy of protection under the PRA," and/or whether it can "be a plaintiff under the PRA" have nothing to do with the question before the Court on this motion: Does the CPRA provide a right of fee recovery to the District? The District elides the question of fees with its right to bring a claim, claiming that because it has a right to seek relief in court, it necessarily has a right to seek fees from Ms. Brazil. Not so.

Absent an agreement or some specific statutory provision to the contrary, parties are responsible for paying their own attorney fees, irrespective of any entitlement to legal remedy. (Code Civ. Proc. Section 1021 ["Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties"].) The District has not cited any basis other than Section 6259(d) for its motion. As shown above, it has not and cannot demonstrate that this statute gives it the right to seek fees.

1. The District Did Not Bring This Litigation Under the CPRA

At the outset, the District cannot show any right to fees under the CPRA because it did not bring this case under the CPRA and specifically did not cite Section 6259 in its Complaint. And while this Court found the District had an "implied claim" under the CPRA, it did so under a reading of the *Ardon* and *Newark* decisions that amici respectfully contest. (See District RJN, Ex.

R at 188 ["implied claim"].) The District claims that *Ardon* and *Newark* "clearly held that a public agency may be a plaintiff under the PRA." (Opp., 9:6.) This is not true. The Court of Appeal in *Ardon* noted only that the CPRA did not bar the specific action in front of that court. (*See Ardon*, 62 Cal.4th 1176, 1189.) Similarly, the *Newark* court noted it was presented "with no basis for concluding that the current action"—i.e., the District's action, not brought under the CPRA—"is an inappropriate method for" securing the return of documents. (*Newark*, 245 Cal.App.4th 887, 909.)

The fact that *Ardon* and *Newark* observed that the CPRA does not *prevent* an agency from initiating an action to recover records says nothing about whether the CPRA expressly provides for that action, much less whether the CPRA permits the recovery of fees if such an action prevails. However, even assuming as the District contends that their action arises from the CPRA, which it does not, it is at most an "implied right" to bring such an action. Given that Section 6259, including subsection (d), plainly does not envision actions brought by public agencies against records requesters, and that its plain text makes clear that public agencies cannot be "plaintiffs," the Court should not find an "implied right" to fees.

This is all the more true given the twin purposes of the CPRA, discussed in more detail below at Section II.C., to (1) promote access to public records and (2) provide both incentives and protections to requesters of records—not to the government—by way of its fee-shifting mechanism. Finding a right of a government agency to recover fees from an individual requester in an action that resulted in a withholding of documents would directly defeat both purposes.

2. The District's Attempt to Analogize to the Song Beverly Act Fails

The District's attempt to analogize the CPRA to the Song Beverly Consumer Warranty Act ("Song Beverly"), shows why their motion must fail. The District appears to claim that because the court in *Murillo v. Fleetwood Enterprises* (1998) 17 Cal.4th 985, 990 resolved a conflict between Song Beverly and another statute in favor of allowing cost recovery by both sellers and buyers of automobiles (rather than only buyers), the Court must find the CPRA permits fee recovery by the District here. This argument fails for two reasons. First, there is no conflict in

statutes here. Second, the CPRA is clear on its face: government agencies can recover fees only where a records requester files a "clearly frivolous" claim. There is no ambiguity to resolve.

In *Murillo*, the court confronted one statute, Code of Civil Procedure section 1032(b), permitting cost recovery by the "prevailing party," and another statute, Song Beverly, allowing "buyers" to recover costs. (*Murillo*, 17 Cal. 4th at 987.) The issue was whether sellers could also recover costs if they prevailed. The court resolved the conflict by noting that Section 1032 grants a right of cost recovery to either party "except as otherwise provided by statute," and that Song Beverly does not expressly exclude sellers from recovering costs. (*Id*. at 991.) Thus, the court concluded, in the absence of an express statutory statement that sellers may not recover costs, they may do so if they are the prevailing party.

Here, there is no conflict; the District does not claim there to be one. Section 6259(d) does provide for recovery of costs by a public agency—but it limits that recovery to narrow circumstances not present here. Indeed, the *Murillo* decision expressly distinguishes fee recovery under the CPRA, noting that the CPRA "expressly addresses defendant's ability to recover litigation costs," and that for a public agency to do so, it "***must both prevail and have the trial court conclude the plaintiff's case was 'clearly frivolous***.'" (*Id*. at 997, emphasis added.) Thus, not only does *Murillo* explain why Song Beverly is no analog to the CPRA, it underscores that fee recovery is available to public agencies only where they prevail on a "clearly frivolous" claim.

C. Allowing Fee Recovery Here Would Upend the CPRA's Careful Balance of "Protections and Incentives" For Members of the Public

Throughout its opposition brief, the District suggests that Ms. Brazil was somehow outside her rights in refusing to return the records the District released. The District asserts, for example, that the "issue before this court" is whether a member of the public "can drag a school district through three years of litigation with the accompanying expense." (Opp. 4:10-11). Later, the District suggests that its mistake and its decision to litigate are somehow the "responsibility" of Ms. Brazil, asserting that for the Court to deny the District's motion, it would have to "accept that Defendant possesses no agency and assumes no responsibility when she inadvertently receives protected records exempt under the PRA." (Opp., 13:7-8.) In taking this tack, the District betrays

its true motive—to exact revenge upon a member of the public who had the temerity to challenge the District's assertion that it had not waived any claim to exemption under the CPRA.

It is exactly this sort of behavior the Legislature sought to prevent when it instituted the CPRA's fees-shifting regime, which establishes both "incentives" and "protections...for members of the public seeking public records." (*Filarsky*, 28 Cal. 4th at 427.) Specifically, the CPRA's fee-shifting provision is asymmetrical, thus providing incentives for members of the public to enforce their rights in court and—importantly here—protections against efforts by public agencies to seek financial vengeance against those who would attempt to enforce their rights. Thus, fees can be awarded to public agencies only in rare extreme circumstances in which a records requester brought litigation in which no reasonable attorney would consider the issues arguable. (See, e.g., *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648-51.)

Even if Ms. Brazil's claim of waiver were completely without merit, the District's fees motion would fail for all the reasons shown above. But the District's suggestion that Ms. Brazil's legal arguments were meritless is belied by the facts and the court rulings that led to this point. The trial court initially agreed with Ms. Brazil's arguments, concluding that the District had indeed waived any applicable privileges. (*Newark*, 245 Cal.App.4th at 895.) The District's effort to seek fees from the entire scope of this litigation demonstrates how egregiously its misinterpretation of Section 6259(d) offends the purposes and policies behind the CPRA's fee-shifting provision. If the Legislature intended to allow government agencies to recover fees for their own mistake—and for litigating colorable legal claims stemming from that mistake—it certainly would have said so clearly, as such an intention would plainly be at odds with the purposes and policies behind the CPRA. The Legislature did not do so. Indeed, it did the opposite. The District's fees motion should be denied.

D. If the Court Finds, as Ms. Brazil Has Alleged, that the District Provided Records in this Litigation, The Court Should Award Fees to Ms. Brazil

The District's argument for why Ms. Brazil is not entitled to fees for obtaining records essentially boils down to one of timing. The District asserts that because Ms. Brazil brought her claim after remand, she should not be entitled to fees. The District accuses Ms. Brazil of "neglect"

and of bringing her action on a "grossly delayed timeline." (Opp., 18-20.) However, it cites no authority for the proposition that a requester of records must bring litigation within a certain time frame in order to recover fees. To amici's knowledge, there is no such authority.

III. CONCLUSION

For the foregoing reasons, amici respectfully request that the Court deny the District's motion for attorney fees.

DATED: March 16, 2018

Respectfully submitted,

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