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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WENDY NELSON,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO, et al.,

Defendants and Respondents.

D069118

(Super. Ct. No. 37-2013-00074050-
CU-WM-CTL)

APPEAL from a judgment and an order of the Superior Court of San Diego County, Katherine A. Bacal, Judge. Affirmed.

Frank E. Noble for Plaintiff and Appellant.

Jan I. Goldsmith, City Attorney, Daniel F. Bamberg, Assistant City Attorney and Carmen A. Brock, Deputy City Attorney, for Defendants and Respondents.

INTRODUCTION

The question in this appeal is whether Wendy Nelson prevailed under the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.)¹ in a petition for writ of mandate against the City of San Diego, the San Diego Police Department (SDPD), and Chief of Police William Lansdowne (Chief) (collectively, the City) seeking a determination the City failed to produce documents responsive to her CPRA requests related to Nelson's daughter's death. The court determined a writ of mandate would be pointless because there were no existing documents for the City to turn over other than those the City had previously produced and further concluded Nelson was not the prevailing party because Nelson had not shown the City improperly withheld documents. We conclude the court did not abuse its discretion and affirm the judgment and order.

BACKGROUND²

A

Nelson's daughter tragically died in April 2008, apparently as a result of an accidental overdose of alcohol and prescription drugs. She was found dead in a guest bedroom at the home of a friend, who was present in the apartment with a male companion. Nelson requested and obtained a copy of the police report regarding her

¹ Further statutory references are to the Government Code unless otherwise indicated.

² The City's opposed motion to strike Nelson's lodged exhibits is denied. Nelson lodged exhibits with her trial brief, which the court considered in issuing its Statement of Decision. Nelson complied with California Rules of Court, rules 8.122(a)(3) and 8.224(b)(2) in identifying and lodging the exhibits with this court.

daughter's death in May 2008. However, photographs of the scene were not produced. Nelson also requested and obtained information from the San Diego County Medical Examiner. The friend later apparently attempted suicide, stating family members thought Nelson's daughter's death was her fault.

B

Three years later, in December 2011, Nelson sent a letter requesting under the CPRA a copy of the entire investigative file pertaining to the death of her daughter, including "written reports, audio and video recordings of witness interviews, 911 calls, and any polygraph examinations." The City responded stating the records were not within the window of "contemporaneous police activity," which the City stated was defined by "Department[] policy" as "activity documented in the previous sixty days." The City indicated, however, it would provide the incident history in response to a subpoena. It also stated the CPRA does not require disclosure of 911 recordings or other recordings, citing *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, but such recordings may be obtained pursuant to a subpoena duces tecum in a pending case.

In January 2012 Nelson sent a letter to the Chief for the SDPD making a second CPRA request seeking the investigative file pertaining to her daughter's death. The letter challenged the authorities cited in the prior response and stated she requested documents "from one investigative file." Nelson threatened to file suit if the City denied her request.

The City responded to the second request by waiving the exemptions of section 6254, subdivision (f), and providing an additional copy of the investigative report, including a CD with photographs, and an incident printout "as a courtesy" stating there

were "no other additional responsive documents." The City reiterated 911 tapes require a subpoena. It also provided three policies regarding access and release of records, death investigation reports, and crime scene protection. The City informed Nelson by telephone there were no further written or recorded statements regarding her daughter's death beyond those provided.

In February 2012 Nelson sent another letter to the Chief's office summarizing a conversation she had with an officer in the Chief's office and indicating the City would not provide 911 information regarding the friend's suicide attempt because the person was not family and the matter was unrelated to Nelson's daughter's case. Nelson made a third CPRA request for various SDPD's policies, procedures, guidelines, and/or protocols, including "SDPD policy regarding 'Contemporaneous Police Activity'." It does not appear the City directly responded to this request.

An attorney representing Nelson sent another CPRA request on May 16, 2012, seeking a list of records regarding Nelson's daughter's death, records related to the suicide attempt, the second page of a narrative report, internal e-mail communications regarding Nelson's daughter's death, a list of medications found at the scene of Nelson's daughter's death, and policies regarding assignment of a case number beginning with "\$PR." The City denied this request with a form letter nearly identical to its first CPRA response.

Nelson's attorney sent another letter on May 29, 2012, challenging the form letter denial and requesting responses. Nelson's attorney also asked for a copy of the SDPD's policy stating " 'contemporaneous police activity' consists of the activity documents in the previous sixty days."

On July 5, 2012, the City sent a detailed response to the May 16, 2012, request. It included another copy of a procedure regarding records retention (procedure 1.26 access and release of criminal records), correspondence between the SDPD and Nelson, a printout of the incident report related to her daughter's death, which described the substance of the 911 call (but maintaining the audiotape is not required under the CPRA), and denying the request for records related to the suicide attempt because they were not contemporaneous and Nelson was not the subject or the authorized representative of the subject of the suicide attempt report. It explained a pagination discrepancy in the incident report and the designation "\$PR" means a police report followed by a case number. The response indicated there were no further responsive documents.

C

In November 2013 Nelson filed a verified petition for writ of mandate contending the City failed to comply with the CPRA. It sought declaratory judgment declaring the City violated the CPRA, a peremptory writ compelling the City to respond, and attorney fees.

In the course of discovery, the City again produced a complete copy of the death report related to Nelson's daughter, which the City maintained electronically. This included a printout of photographs from a CD, which had already been provided to Nelson. The City explained the death report grew in its digital format over the years from 12 to 24 pages and included "request forms for copies, receipts for copies, CRMS [Computerized Records Management System] digital headers, a business card, etc." It produced a CAD (Computer-aided Dispatch) printout for the death report. The City

confirmed there were no other documents, including audio or video records related to the death report.

In response to discovery requests for all documents related to Nelson's CPRA requests, the City produced a number of documents, including some internal communications regarding the requests, a copy of portions of the death report, and the attempted suicide report regarding the friend who was with Nelson's daughter the night she died. The City produced some additional internal policy documents and confirmed there was "no policy or procedure titled 'Contemporaneous Police Activity.' "

The parties agreed to have a trial by brief for the court to determine the question, "Did the government agency withhold documents?" The court denied the petition having concluded a "writ of mandate would be pointless as there are no existing documents to turn over that petitioner has not already received." The court also concluded Nelson was not the prevailing party because she had not demonstrated the City improperly withheld documents.

The court subsequently entered a judgment denying all relief sought by Nelson. Nelson appealed the judgment and the order. Because we lack jurisdiction to review the trial court's denial of Nelson's petition for writ of mandate to the extent it addresses disclosure of records (§ 6259, subd. (c); *MinCal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 263-264), we directed Nelson to limit her

briefing to the court's denial of the request for attorney fees. (*L.A. Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1388-1389.)³

DISCUSSION

I

General Principles

In a proceeding under the CPRA the court must "award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." (§ 6259, subd. (d).) A plaintiff prevails when he or she " 'files an action which results in defendant releasing a copy of a previously withheld document.' " [Citation.] 'A plaintiff is considered the prevailing party if [the] lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior [citation], or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result.' " (*San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1321-1322 (*San Diegans for Open Government*)).) "Circumstances could arise under which a plaintiff obtains documents, as a result of a lawsuit, that are so minimal or insignificant as to justify a finding that the plaintiff did not prevail." (*L.A. Times v. Alameda Corridor Transp. Auth.*, *supra*, 88 Cal.App.4th at pp. 1391-1392.)

³ Nelson sought attorney fees in her petition under the CPRA and briefed her arguments as to why she was entitled to recover fees in her trial brief. The trial court addressed the issue of entitlement to attorney fees under the CPRA in the statement of decision. Thus, we reject the City's contention Nelson should have filed a separate motion for attorney fees to preserve the issue for appeal.

"We review a trial court's determination of whether a litigant is a prevailing party for abuse of discretion, deferring to any factual findings made by the court that are supported by substantial evidence. [Citation.] We accept the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences that can be drawn from the evidence." (*San Diegans for Open Government, supra*, 247 Cal.App.4th at p. 1322.)

II

Application

In this case, Nelson contended she was the prevailing party because the City released additional documents after her petition was filed and she "finally obtained some answers to her CPRA demands." The court disagreed and we find no abuse of discretion.

The City submitted evidence from an investigator for the City Attorney, who gathered information to respond to the discovery requests related to Nelson's petition. He reviewed each of the items Nelson identified as newly disclosed and explained why various additional documents were produced. Many of the documents produced from the electronic death record and the file regarding the CPRA requests consisted of notes regarding requests for copies of the police report made over the years. They were not part of the investigative file and were not responsive to the CPRA requests. The photographs produced were printed copies of the same ones produced to Nelson on a CD.

The City produced additional guidelines, policies, procedures and/or protocols because the investigator responding to the discovery requests sought to be overinclusive in responding to broad requests. The court determined it could not conclude the failure to

produce the documents earlier was "clearly erroneous." The court also determined the City was not required to produce the actual 911 recording regarding Nelson's daughter's death and properly provided a summary in the death report. (*Haynie v. Superior Court, supra*, 26 Cal.4th at p. 1072.) We conclude there was no abuse of discretion in these determinations.

We turn to the final two items Nelson contends she obtained as a result of the litigation: a statement indicating there was no written policy defining "Contemporaneous Police Activity" and a copy of the incident report regarding the friend's suicide attempt.

The court did not address the issue of the policy in its statement of decision. This court has noted police departments frequently limit information under the CPRA to that which is 30 to 60 days old.⁴ (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 221-222 (*Fredericks*), citing *MinCal Consumer Law Group v. Carlsbad Police Dept., supra*, 14 Cal.App.4th at pp. 262-263.) However, we have also concluded even though "section 6254, subdivision (f)(2) imposes no time limitation on disclosure of information sought, not all such requested disclosures must be granted if the trial court is appropriately presented with relevant competing public interest factors, which may properly include considerations about a fiscal and workload burden being imposed upon a public agency by a particular request. (§ 6255, subd. (a).)" (*Fredericks, supra*, at p. 235.) In this case, the issue of the City's policy regarding contemporaneousness was irrelevant because it waived that exemption numerous times in producing documents to

⁴ We note the City did produce to Nelson a policy indicating arrest reports may be released within the past 60-day period.

Nelson over the years. Therefore, we conclude the failure to respond to Nelson's request for a policy was not so significant as to require us to conclude Nelson was the prevailing party. (*L.A. Times v. Alameda Corridor Transp. Auth.*, *supra*, 88 Cal.App.4th at pp. 1391-1392.)

The court stated the suicide report was not specifically requested and was not responsive to the CPRA requests because it had its own case number and report and because it was not part of the death report file. Nelson's initial CPRA requests were limited to the investigative file regarding her daughter's death. In May 2012 Nelson's attorney requested "[a]udio recordings ... and transcripts of any and all 911 calls to and/or related to" the friend's residence on May 14, 2008, "including but not limited to emails, attachments to emails, correspondence, photographs, memoranda and internal memoranda, transcripts, notes, photos, diagrams, schematics, and video recordings." The City responded by stating the records sought could only be released to the individual who is the subject of the report or an authorized representative.

The court's interpretation that the request for information related to the 911 recording of the suicide attempt did not specifically include a request for the investigative report was reasonable. Even if the request could be contemplated as including the suicide report, the City's response is consistent with its policy limiting the release of crime reports to victims or their authorized representatives. Under the circumstances, we cannot conclude the trial court abused its discretion in determining Nelson had "not demonstrated that the City improperly withheld documents."

DISPOSITION

The judgment and the order determining Nelson is not entitled to attorney fees are affirmed. Respondents are awarded their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.