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SAN MARCOS UNIFIED SCHOOL DISTRICT

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – NORTH COUNTY BRANCH

TEACHER 1, TEACHER 2, and TEACHER 3,

Petitioners,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT

Respondent.

CASE NO. 37-2018-00007640-CU-WM-NC

SAN MARCOS UNIFIED SCHOOL DISTRICT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: March 1, 2018
Time: 4:00 p.m.
Crtrm: Dept. N-29
Judge: Ronald F. Frazier

IMAGED FILE

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Respondent San Marcos Unified School District ("District") hereby submits the following memorandum of points and authorities in opposition to Petitioners' motion for issuance of a preliminary injunction in this matter.

I. INTRODUCTION

This action relates to the obligation of public entities to disclose records pursuant to the California Public Records Act ("PRA"). (Cal. Govt. Code § 6250 *et seq.*) "The fundamental precept of the PRA is that governmental records *shall be disclosed* to the public, upon request, unless there is a specific reason not to do so." (*Summary of the California Public Records Act of 2004,* Office of the Attorney General, August 2004, at p. 2; http://ag.ca.gov/ publications/ summary_public_records_act.pdf.) The PRA requires public agencies to "promptly" make disclosable records available to those who request them. (Cal. Govt. Code § 6253(b).)

Public agency records must be disclosed unless a specific exemption prohibits disclosure. (*Id.*) According to the California Attorney General:

> There are two recurring interests that justify most of the exemptions from disclosure. First, several []PRA exemptions are based on a recognition of the individual's right to privacy (*e.g.*, privacy in certain personnel, medical or similar records). Second, a number of disclosure exemptions are based on the government's need to perform its assigned functions in a reasonably efficient manner (e.g., maintaining confidentiality of investigative records, official information, records related to pending litigation, and preliminary notes or memoranda).

(*Id.* at p. 2.)

In this case, Petitioners offer conclusory claims of privacy to prevent disclosure of identified records. However, they do not provide the Court with sufficient legal and/or factual authority to justify application of any exception to disclosure under the PRA. In other words, through their motion for a preliminary injunction, Petitioners fail to demonstrate that they possess a likelihood of success on the merits at trial or that they would sustain sufficient harm without an injunction to justify its issuance. Accordingly, the District respectfully requests the Court deny the motion for a preliminary injunction and allow it to proceed with disclosure of records under the PRA.

II. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Injunctive relief is extraordinary relief that is "never awarded as of right." (*Winter v. Nat. Res. Def. Council, Inc.* (2008) 555 U.S. 7, 129 S. Ct. 365, 367, 172 L. Ed. 2d 249.) Courts consider two interrelated factors when deciding whether to issue a preliminary injunction. "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) "When a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the 'interim harm' and 'likelihood of prevailing on the merits' factors. (*Cohen v. Bd. of Supervisors* (1985) 40 Cal. 3d 277, 286.) Here, and as discussed in section IV below, Petitioners have failed to make the requisite showing as to both prerequisites for relief.

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III. SUMMARY OF THE FACTS

Petitioners do not provide the Court with sufficient essential facts to evaluate the issues in this case. Petitioners' declarations (which accompanied the petition) simply present their belief regarding how the law should be applied in this case. Moreover, despite possessing the subject records and having full anonymity in these proceedings, Petitioners do not generally describe the records at issue.

Moreover, Petitioners' points and authorities request the Court infer that the contents of the records contain description of acts that would subject Petitioners to "public scorn and obloquy" such that that their inherent privacy rights must outweigh the PRA's directive for prompt disclosure. (Motion at 4:28.) Petitioners also generally contend disputes exist related to the contents of the documents at issue here, but they failed to attach comments of their own to those writings after the District issued them in 2014, 2015, and 2017. (Motion at 2:26, 4:28.; Declaration of Henry H. Voros ("Voros Decl.") at ¶¶15, 16.) In order to ensure that the Court may make an informed decision, the District provides a more elaborate recitation of the facts relevant to the question at issue here.

A. District Policies and Options for Discipline.

The District is a public school district which expects that all certificated personnel (*i.e.* employees possessing a California teaching credential) will perform their duties competently and adhere to all District rules, policies, and expectations. (Voros Decl. at ¶4.) When teachers engage in prohibited behaviors, the District may implement disciplinary action. (*Id.*)

The District informs teaching staff of its expectations and right to discipline employees through several published writings including its Employee Handbook, Board Policies and Administrative Regulations, and the collective bargaining agreement between the District and the San Marcos Educators Association ("SMEA"). (Voros Decl. at ¶4-8; Exhibits A-C.) For example, the District's Employee Handbook regarding teacher-student relationships states, in pertinent part:

Staff-Student Relations

Employees are prohibited from establishing personal relationships with students

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> that are unprofessional and thereby inappropriate. Examples of unprofessional relationships include, but are not limited to: employees fraternizing or communicating with students as if employees and students were peers such as writing personal letters or e-mails; calling students on cell phones or allowing students to make personal calls to them unrelated to homework or class work; sending inappropriate pictures to students; discussing or revealing to students personal matters about their private lives or inviting students to do the same (other than professional counseling by a school counselor); and engaging in sexualized dialogue, whether in person, by phone, via the Internet, or in writing. Employees who post information on Facebook, Instagram or similar web sites that include inappropriate personal information such as, but not limited to: provocative photographs, sexually explicit messages, use of alcohol, drugs or anything students are prohibited from doing must understand that if students, parents or other employees obtain access to such information, their case will be investigated by school and district officials and if warranted will be disciplined up to and including termination, depending upon the severity of the offense. Additionally, certified personnel, depending upon the severity of the offense, may have their case forwarded to the appropriate state department for review and possible further sanctions. The Superintendent or designees reserve the right to periodically conduct Internet searches to determine if employees have posted inappropriate materials on-line. If inappropriate use of computers and web sites is discovered, the Superintendent's designees will download the offensive material and promptly bring that misconduct to the attention of the Superintendent.

(Voros Decl. at ¶6, Exhibit A.)

District Board Policy and Administrative Regulation 4119.11 strictly prohibits sexual harassment by all District employees, including teachers. (Voros Decl. at ¶8; Exhibit C.) Board Policy 4119.11 states, among other things:

> Any District employee who engages or participates in *sexual harassment* or who aids, abets, incites, compels, or coercers another to commit sexual harassment *against a* District employee, job applicant, or *student* is in violation of this policy and is subject to disciplinary action, up to and including dismissal.

(Exhibit C; emphasis added.)

Prior to implementing disciplinary action, the District conducts an investigation to determine whether the allegations are well-founded. (Voros Decl. at ¶¶9, 11.) More specifically, following receipt of any complaint alleging employee misconduct, the District investigates the factual allegations, offers the employee an opportunity to respond to all allegations, makes factual findings, considers the employee's past disciplinary history, if any, and, if warranted, implements disciplinary action. (Voros Decl. at ¶9.) The District will not implement disciplinary action

unless, following a thorough investigation that includes the employee's response to the alleged misconduct, it is convinced that the allegations are well-founded. (*Id.* at ¶11)

The District utilizes a progressive discipline process to address teacher conduct that violates District policies and expectations. Under a progressive discipline system, the District implements increasingly severe disciplinary action if the employee engages in repeated offenses of a similar nature. Additionally, for severe offenses, the District may forego less significant forms of discipline in favor of a more significant disciplinary action. (Voros Decl. at ¶10.)

When the District determines that disciplinary action is appropriate, it may issue one of the following forms of disciplinary actions (from least to most severe): (1) a conference memorandum or summary; (2) a written warning/written reprimand; (3) a 45-day Notice of Unprofessional Conduct and/or 90-day Notice of Unsatisfactory Performance; and (4) a Notice of Dismissal and Statement of Charges. (Voros Decl. at ¶10.)

B. The California Public Records Act Request and the District's Response

The PRA was enacted to: (1) safeguard the accountability of government to the public, (2) promote maximum disclosure of the conduct of government operations, and (3) recognize that secrecy is inconsistent with a democratic system of government. (Cal. Gov. Code § 6250 *et seq.*; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651–652; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771–772.) The PRA recognizes that, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Cal. Govt. Code § 6250.)

On or about November 21, 2017, the Voice of San Diego ("VoSD"), an online media organization, submitted a request to the District, pursuant to the PRA, for the following District records:

> Any public records relating to any substantiated claims of sexual misbehavior and related misconduct for any employee, official, contactor, agent or volunteer of the District arising within the last 10 years.

(Voros Decl. at ¶12; Exhibit D.) The District reviewed its records, carefully analyzed its obligations under the PRA, and determined that documents within the personnel files of several employees were both responsive to the request and disclosable. Specifically, those documents

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included disciplinary action against employees for communications and other conduct of an inappropriate sexual nature with or in the presence of students and/or others. (Voros Decl. at ¶13.)

With respect to Petitioners in this action, the District disciplined Teacher 1 on October 27, 2017, through a Written Warning following physical contact with a student. The District disciplined Teacher 2 on September 14, 2015, through a Written Warning related to sexually-charged comments to students. The District disciplined Teacher 3 on October 24, 2014, through a 45-day Notice of Unprofessional Conduct and 90-day Notice of Unsatisfactory Performance (combined into a single document) related to actions, inactions and comments of a sexual nature.[1] (Voros Decl. at ¶15.) All three teachers were permitted to attach comments to their disciplinary documents, but none chose to do so. (Voros Decl. at ¶16.)

Finally, although not necessarily relevant to the Court's analysis under the PRA, the District notes that Petitioners claim a history of "exemplary overall performance." (Motion at p. 2, lines 23-24.) Contrary to Petitioners' claims, all three employees have received evaluations with ratings of "in-progress," "emerging," or "requires improvement," all below the top rating of "meets standards." Further, the evaluations included feedback regarding expected growth in future evaluation periods. (Voros Decl. at ¶17.) This, together with Petitioners' failure to provide evidence in this matter, further undermines their position.

IV. PETITIONERS FAIL TO MEET THE STANDARD FOR A PRELIMINARY INJUNCTION

As described in detail below, Petitioners cannot satisfy the applicable legal standard necessary for the Court to issue a preliminary injunction. In fact, the authorities relied upon by Petitioners illustrate that a preliminary injunction is improper in this case.

A. Petitioners Have Not and Cannot Demonstrate A Likelihood They Will Prevail on the Merits at Trial.

To prevent disclosure of the subject records, Plaintiffs evoke the PRA exemption found at Government Code section 6254(c) which provides that "this chapter does not require the

[1] Teacher 3 also received a prior conference summary, which was incorporated into the 45-day Notice of Unprofessional Conduct and 90-day Notice of Unsatisfactory Performance. (Voros Decl. at ¶15c.)

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disclosure of . . . [p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Motion at 3:11-13.) Although Petitioners acknowledge the competing interest in the "prevention of secrecy in government" under the PRA, Petitioners ask the Court to discount that interest, asserting that "case authorities interpreting and applying the PRA establish . . . criteria" that support nondisclosure. (Motion at 4:1-2.) However, the authorities Petitioners rely upon illustrate that the records at issue here must be disclosed. The District reviews each of the key cases cited by Petitioners to demonstrate that its decision to disclose the records is reasonable and supported by law.[2]

1. *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.

In *Bakersfield City,* the requestor sought "disciplinary records" regarding a particular employee pursuant to the PRA. (*Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1043.) The trial court reviewed the personnel file and noted that it contained *complaint* documents that had not been substantiated or determined to be well-founded. Those complaint documents were excluded. However, the file also contained a single complaint of a serious nature that the trial court felt was otherwise substantiated; thus, the trial court permitted its disclosure. (*Id.* at 1043-1044.) In its analysis, the trial court expressed concern regarding the disclosure of documents containing facts that had merely been "alleged" but where no further action had been taken by the public entity. (*Id.* at 1044.)

Noting that "the PRA embodies a strong policy in favor of disclosure," the Court of Appeal agreed that the standard in evaluating a *complaint* was whether a resulting disciplinary investigation revealed the allegations to be substantial and well-founded. (*Id.* at 1046.) The Court of Appeal further clarified that if evidence demonstrated that a complaint or charge was well-founded, there need not be an affirmative finding of truthfulness by the public entity. (*Id.* at 1046.) The Court of Appeal also noted, "neither the imposition of discipline nor a finding that the

[2] Petitioners also cite to *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, which analyzed whether student test scores along with teachers' names should be disclosed to the media. The facts of that case are distinctly different from the disciplinary records at issue here. As a result, a detailed analysis of that matter is unnecessary.

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charge is true is a prerequisite to disclosure . . .." (*Id.* at 1044, 1046; see also *Marken v. Santa Monica-Malibu Unif. Sch. Dist.* (2014) 202 Cal.App.4th 1250, 1273.)

The Court of Appeal's holding in *Bakersfield City* supports disclosure of Petitioners' disciplinary documents. In each of Petitioners' cases, the documents at issue are not mere complaints but actual disciplinary actions. (Voros Decl. at ¶15.) Notably, the fact that the District implemented disciplinary action demonstrates that the allegations were well-founded because the District only implements disciplinary action when, following an investigation, the allegations are determined to be so. (*See also,* Voros Decl. at ¶9.) Accordingly, *Bakersfield City* supports the District's decision to disclose Petitioners' disciplinary documents.

2. *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.

In *BRV, Inc.,* the requestor sought a report from an outside investigator hired to examine allegations of sexual misconduct by a school district superintendent. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 749.) The report became of interest to a media organization when the superintendent resigned upon assurances by the school board that the report would remain confidential. (*Id.* at 747.)

In that case, the Court of Appeal recognized its duty to balance, on the one hand, the importance of the right to verify accountability in government business with, on the other hand, the privacy of the individual. (*Id.* at 750, 755.) The Court of Appeal explained that "[i]n weighing the competing interests, 'we must determine the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.'" (*Id.* at 755, quoting, *Versaci v. Superior Court* (2005) 27 Cal.App.4th 805, 818.) The court further noted that exceptions to disclosure must be construed narrowly and "[t]he proponent of nondisclosure bears the burden to demonstrate a 'clear overbalance' on the side of confidentiality." (*Id.* at 756.)

Like the court in *Bakersfield City*, and citing to that case, the court emphasized the difference between mere allegations, which should generally remain confidential, and circumstances that resulted in *discipline*. (*Id.* at 757, citing, *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 566, 568.) Nondisclosure of mere complaints protects the individual from

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repercussions based on "unwarranted attacks and accusations," such as exposure to publicity on groundless charges that could cause irreparable harm. (*Id.* at 758.) However, the public's right to know how the school district responded to the superintendent's misconduct "far outweighed" the superintendent's interest in maintaining the matter as confidential. (*Id.* at 759.)[3]

In this case, the District determined that Petitioners engaged in misconduct. (Voros Decl. at ¶15.) As a result, the court's holding in *Bakersfield City* supports the District's decision to disclose the records at issue here.

3. *Marken v. Santa Monica-Malibu Unified School District* (2014) 202 Cal.App.4th 1250.

In *Marken*, a parent submitted a complaint to the school district alleging that a teacher sexually harassed her daughter. (*Marken v. Santa Monica-Malibu Unif. Sch. Dist.* (2014) 202 Cal.App.4th 1250, 1255.) The District retained an attorney to independently investigate the allegations in accordance with the District's sexual harassment board policy. (*Id.*) The attorney interviewed several witnesses and prepared a report that included "partial findings" that certain allegations "more likely than not did occur." (*Id.* at 1255-56.) However, the attorney noted the report was incomplete because no students were interviewed. (*Id.* at 1256.)

Following receipt of the investigation report, the District issued a "written report following accusations of sexual harassment" noting that the teacher violated the District's sexual harassment policy. (*Id.* at 1256.) The report included several directives and warned that future instances would result in additional disciplinary action. (*Id.*)

Over two years later, another parent requested copies of records related to the investigation of the teacher and other documents concerning the teacher's improper treatment of other students pursuant to the PRA. (*Id.* at 1256.) The District notified the teacher that it intended to produce the requested records and the teacher initiated a "reverse-PRA action" to prevent disclosure of those records. (*Id.* at 1256-57.) In that action, the teacher argued, among other things, that the disclosure of the records would violate his privacy rights under the California Constitution, the

[3] The court noted that the identities of students and staff who contributed to the investigation would be redacted from the report to protect their privacy.

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Education Code, and the Government Code. (*Id.*)

At hearing on the teacher's request for a temporary restraining order, the trial court conducted an in camera review of the records the District intended to disclose. (*Id.* at 1258.) The trial court granted a temporary restraining order to preserve the status quo until the hearing on the preliminary injunction. (*Id.*)

Prior to the hearing on the preliminary injunction, the trial court received the teacher's supplemental memorandum in support of the teacher's request for a preliminary injunction, the school district's opposition, and the teacher's reply. (*Id.* at 1259.) At hearing on the teacher's request for a preliminary injunction, the trial court denied the teacher's request for a preliminary injunction and concluded the documents were subject to disclosure pursuant to the PRA, but ordered the names and personal information of the claimant and witnesses redacted. (*Id.* at 1259.) The trial court specifically analyzed the teacher's privacy concerns and found:

> . . . the potential harm to [the teacher's] privacy interests from disclosure of the subject documents does not outweigh the public interest in disclosure. The public has a significant interest in the competence and misconduct of public school teachers teaching their children, especially allegations of misconduct that have a negative impact on their children. The public also has a significant interest in knowing how a school district responds to allegations of misconduct or improper behavior towards students by teachers. (*Id.*)

The trial court also applied the analysis described in *BRV, Inc.* and concluded that the complaint against the teacher was well-founded and substantial in nature. Accordingly, the trial court denied the teacher's request for a preliminary injunction. (*Id.* at 1260.)

The teacher appealed. (*Id.* at 1260.) In analyzing the teacher's appeal, the Court of Appeal reviewed prior authority that noted "if a complaint has been upheld by the agency involved or discipline imposed, even if only a private reproval, it must be disclosed." (*Id.* at 1274-75; *citing American Federation of State etc. Employees v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913, 919.) The Court of Appeal stated:

> . . . although disclosure is mandated if there has been a true finding by the agency, even without such a finding, if the information in the agency's files is reliable and, based on that information, the court can determine the complaint is well founded and substantial, it must be disclosed.

(*Id.* at 1275, citing *Bakersfield City Sch. Dist., supra,* 118 Cal.App.4th at 1044.)

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Ultimately, the Court of Appeal upheld the trial court's determination, noting that the teacher "occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy." (*Id.* at 1275.) The Court of Appeal further noted that the charges had been investigated, a determination on reliability had been made, and discipline had been enforced. Thus, the Court of Appeal concluded "release of the investigation report and disciplinary record . . . is *required* under the []PRA." (*Id.* at 1276; emphasis added.)

Marken is directly on point here. Like *Marken*, Petitioners seek a preliminary injunction barring production of records the District believes it is required to produce in response to VoSD's PRA request. Also like *Marken*, the records at issue here relate to misconduct of a sexual nature. Further, as in *Marken*, the District issued disciplinary action based on the teachers' misconduct. Thus, according to the PRA, the public has a significant interest in the teachers' competence and misconduct and the District's responses to allegations of their misconduct. (*Id.* at 1259.) Thus, the records at issue here must be disclosed.

Finally, Petitioners contend that disciplinary records may not be disclosed unless the conduct was investigated by a disinterested person and resulted in "more than a counseling memo." (Motion at 4:3-6.) Although those facts were present in *Marken*, neither were necessary to the court's holding. Rather, the cases noted by Petitioners acknowledge the inherent complexity in analyzing the disclosure of *allegations* because "working with little or nothing more than written records, are ill-equipped to determine the veracity of the complaint." (*Bakersfield City,* 118 Cal.App.4th at 1047.) However, as in this case, when a school district has investigated, made a determination, and imposed discipline against the employee, the concern regarding reliability is moot and the disclosure "is *required* under the []PRA," even if the disciplinary action is in the form of a private reproval. (*Marken,* 202 Cal.App.4th at 1274-75, 1276; emphasis added.) As a result, Petitioners' contentions that the records may only be disclosed if investigated by a disinterested person and/or resulted in disciplinary action beyond a conference summary lack merit. Petitioners have not demonstrated that they are likely to prevail on the merits at trial.

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B. Petitioners Fail to Demonstrate That They Will Suffer Significant Irreparable Injury If the District Discloses the Records.

Petitioners offer vague and conclusory assertions that disclosure of the records will result in "public scorn and obloquy" in support of their request for a preliminary injunction. (Motion at 4:28.) They also assert, without analysis or evidence, that "there is no bona fide or significant public interest" in disclosure, despite the very purpose of the PRA to promote transparency in government activities. (Motion at 5:1.)

First, conclusory averments by a party, which are not otherwise supported by facts and circumstances upon which they rest, are insufficient to sustain an application for an injunction. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 15, citing *E.H. Renzel Co. v. Warehousemen's Union I.L.A. 38-44* (1940) 16 Cal. 2d 369, 371, 106 P.2d 1; Cal. Code. Civ. Proc § 527(a).) Second, the law recognizes public scorn and obloquy as harmful when it is "false and unprivileged," amounting to libel, neither of which are at issue here. (Cal. Civ. Code § 45.) Petitioners have failed to establish by credible and admissible evidence that they will suffer significant irreparable harm as a result of the District's compliance with the PRA. As a result, Petitioners' request for a preliminary injunction must be denied.

V. CONCLUSION

Based on the foregoing, the District respectfully requests that the Court deny Petitioners' motion and decline to issue a preliminary injunction in this case.

DATED: February 27, 2018

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