SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - June 21, 2018

EVENT DATE: 06/22/2018 EVENT TIME: 02:15:00 PM DEPT.: C-74

JUDICIAL OFFICER: Ronald L. Styn

CASE NO.: 37-2018-00026433-CU-WM-CTL

CASE TITLE: VOICE OF SAN DIEGO VS. SAN DIEGO UNIFIED SCHOOL DISTRICT [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED:

The court addresses the evidentiary issues. Respondent/Defendant San Diego Unified School District's evidentiary objection 7 is sustained. All remaining objections are overruled.

The court then rules as follows. Petitioner Voice of San Diego and Plaintiff/Petitioner San Diegans for Open Government seek an order prohibiting Defendant San Diego Unified School District from destroying email correspondence, and directing SDUSD to retain all email correspondence, pending trial in this matter.

At the June 1, 2018, hearing on VOSD's ex parte application for a temporary restraining order and an order to show cause why a preliminary injunction should not be granted, SDUSD agreed to delay its proposed destruction of certain email correspondence until July 1, 2018. Since that ex parte hearing, the court consolidated the case entitled *San Diegans for Open Government v. San Diego Unified School District*, Case No. 37-2018-00027282-CU-MC-CTL, with this case [ROA 28]. Having reviewed and considered the papers and arguments presented by the parties, the court issues the requested preliminary injunction for the reasons set forth herein.

Standards for Issuance of a Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442 [261 Cal.Rptr. 574, 777 P.2d 610].) . . . .

The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228 [240 Cal.Rptr. 829, 743 P.2d 889].) Of course, "[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits." (*Common Cause, supra,* 49 Cal.3d at p. 442.) A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. (*Id.,* at pp. 442-443.)

Butt v. State of California (1992) 4 Cal.4th 668, 677–678. See also, *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286. Plaintiff must also establish irreparable harm/inadequacy of legal remedies. *White v. Davis* (2003) 30 Cal.4th 528, 554.
"The burden is on the party seeking the preliminary injunction to show all of the elements necessary to

support issuance of a stay." *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 856.

Irreparable Harm/Inadequacy of Legal Remedies

VOSD/SDOG submit evidence, and it appears undisputed that, absent issuance of an injunction, SDUSD will commence destruction of the email correspondence at issue in both the petition filed by VOSD and the complaint/petition filed by SDOG. The court finds the destruction of email correspondence, potential evidence in both cases, sufficient to establish irreparable harm. See, *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1419.

Probability of Prevailing

Addressing a preliminary issue, SDUSD argues that an abuse of discretion standard applies to writs of mandate. *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, explains,

. . . courts should generally " 'let administrative boards and officers work out their problems with as little judicial interference as possible [because] boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.' " (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315, 144 P.2d 4.) But this does not mean that boards and officers may refuse to act, or may act with unfettered discretion. "Mandamus may issue ... to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442, 261 Cal.Rptr. 574, 777 P.2d 610.) "Where only one choice can be a reasonable exercise of discretion, a court may compel an official to make that choice." (*California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002) 96 Cal.App.4th 824, 827, 117 Cal.Rptr.2d 595.)

California School Boards Ass'n, 186 Cal.App.4th at 1327. Thus, "[t]he superior court has jurisdiction over a mandate petition to compel a person, such as a public employee, to comply with a duty imposed by law." *TrafficSchoolOnline, Inc. v. Superior Court* (2001) 89 Cal.App.4th 222, 235.

Via their petitions/complaint, VOSD/SDOG seek to compel SDUSD to comply with the law with respect to retention of public records, specifically 5 CCR § 16020, *et seq*. and Government Code § 6200 and also to comply with the California Public Records Act (Government Code § 6250, et seq.).

VOSD's petition alleges causes of action for Violation of the California Public Records Act, Declaratory Relief and Injunctive Relief. VOSD's petition alleges:

33. SDUSD has abused, or will soon abuse, its discretion by destroying public records in its possession, some of which may include materials responsive to outstanding CPRA requests made by VOICE, and others, in violation of Government Code § 6252, 6253 and 6253.1, Education Code §§ 35250 and 35254 and 5 CCR 16020 et seq.

VOSD's petition seeks, *inter alia*,

41. A temporary restraining order, preliminary injunction and permanent injunction . . . directing SDUSD to halt any efforts to destroy public records upon reaching a year in age . . . .

SDOG's complaint/petition alleges causes of action for Violation of Open-Government Laws, Premature Destruction of Public/Official Records and Declaratory Relief. SDOG's complaint/petition alleges:

18. The "[i]tems to be automatically deleted" on June 1, 2018, under the Email Policy Update include (i) at least one Class 1, 2, and/or 3 records pursuant to Section 16020 et seq. of Title 13 of the California Code of Regulations, but the minimum retention period prescribed by law will have not yet expired; and (ii) at least one "record, map, or book, or of any paper or proceeding of any court, filed or deposited in

any public office, or placed in [a public officer's] hands for any purpose" pursuant to Government Code Section 6200.

. . . .

21. The Email Policy Update violates the controlling legal authorities in multiple ways. By way of example and not limitation (including alternative theories of liability):

A. It authorizes the termination of retention and the destruction of Class 1, 2, and/or 3 records prior to the expiration of the minimum retention period prescribed by law.

B. It authorizes a crime act by the destruction or other wrongful act against at least one "record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in [a public officer's] hands for any purpose."

. . . .

SDOG's complaint/petition prays for, *inter alia*,

3. Preliminary and permanent injunctive relief directing Defendants/Respondents to refrain from taking any action pursuant to any portion of the Email Policy Update that does not comply with all applicable laws.

The central issue is SDUSD's "Email Archiving and Retention Policy" as embodied in Administrative Regulation 3580 and Board Policy 3580 approved by the SDUSD Board on July 25, 2017. Specifically, SDUSD's plan to implement this Policy by the following procedure as set forth in the SDUSD IT Department "IT Bulleting: Email Policy Update":

Effective June 1, 2018 district email accounts will no longer retain items older than one year (365 days). The district's email servers will begin automatically deleting the items once they have reached one year in age on a perpetual basis. This includes all items stored within a mailbox with the exceptions noted below. All district email accounts will be subject to the retention policy including individual employee accounts, school site accounts, departmental accounts, shared accounts and email accounts for any other purpose hosted on the district's servers.

Items exempted from automatic deletion Items to be automatically deleted

- Contacts
- Email messages (both sent and received)

- Tasks * Calendar Items
- Notes * Voicemail messages

- Instant Messages

- Deleted Items

- File Attachments

- RSS Feeds

- All other items not specifically listed as exempt

Employees who wish to retain a specific item longer than one year must archive that item on to their local hard drive. As outlined in Board Policy 3580 employees are expected to archive only those items

that are essential to the employee's ongoing work. In addition, items that are classified as a District record according to Board Policy 3580 must be stored in a safe location outside of an email mailbox.

Pursuant to Government Code § 35250

The governing board of every school district shall:

(a) Certify or attest to actions taken by the governing board whenever such certification or attestation is required for any purpose.

(b) Keep an accurate account of the receipts and expenditures of school moneys.

(c) Make an annual report, on or before the first day of July, to the county superintendent of schools in the manner and form and on the blanks prescribed by the Superintendent of Public Instruction.

(d) Make or maintain such other records or reports as are required by law.

SDUSD relies on Education Code § 35253. Pursuant to this section,

whenever the destruction of records of a district is not otherwise authorized or provided for by law, the governing board of the district may destroy such records of the district in accordance with regulations of the Superintendent of Public Instruction which he is herewith authorized to adopt.

The regulations adopted by the Superintendent of Public Instruction are contained in 5 CCR 16020, *et seq*. VOSD argues that SDUSD's Policy is in violation of the classification requirements of 5 CCR 16022(a). As to "Prior Year Records" this subsection requires,

Before January 1, the district superintendent (or a person designated by the district not employing a superintendent) shall review documents and papers originating during the prior school year and classify them as Class 1 -Permanent, Class 2 -Optional, or Class 3 -Disposable.

5 CCR § 16020 defines "records" as "all records, maps, books, papers, and documents of a school district required by law to be prepared or retained or which are prepared or retained as necessary or convenient to the discharge of official duty."

SDUSD argues that the classification requirements of 5 CCR § 16022(a) and the minimum three-year retention requirement of 5 CCR § 16027 only apply to "records" (as defined by 5 CCR § 16020) and, because SDUSD is not destroying any "records" the Policy does not violate the classification requirements of 5 CCR § 16022. Specifically, SDUSD argues "the District is not destroying 'records' because District employees are informed as to what constitutes a record and are instructed to archive those documents in compliance with the law. The District is only deleting emails that do *not* qualify as 'records' under Section 16020, after ample time for District employees to archive those documents that must be retained." Via its Policy, SDUSD has placed the burden on each of its employees to evaluate the two bases for qualification of a document as a "record" – 1) whether the email was "required by law to be prepared or retained" and 2) whether the email is necessary or convenient to the discharge of official duty." Under SDUSD's Policy any email not categorized as a "record" will be destroyed. Also under SDUSD's Policy any email not reviewed by an employee will be destroyed. Absent from SDUSD's papers is any evidence establishing how SDUSD will confirm that each of its employees has completed the task of reviewing all of his or her existing emails and how SDUSD will confirm that each of its employees engages in this process going forward. Also absent is any evidence as to any procedures undertaken by SDUSD for assessing the emails of employees who have left employment with SDUSD. In addition, while the parties discuss the evaluation of the second basis for qualification of an email as a "record" – whether the email is necessary or convenient to the discharge of official duty – there is no evidence before the court with respect to the process for an employee's evaluation of the first basis for

qualification of an email as a "record" – whether an email is "required by law to be prepared or retained." The court is not persuaded by the guidance/training materials SDUSD submits. The "Email Policy Update" set forth above advises only that email messages will be automatically deleted after one year, that employees "are expected to archive only those items that are essential to the employee's ongoing work" and "items that are classified as a District record according to Board Policy 3580 must be stored in a safe location outside of an email mailbox." There is no reference or guidance as to the two elements of the 5 CCR § 16020 definition of "records." There is no indication as to how employees are advised of, or directed to, the "Email Retention and Archiving" page of the SDUSD web site that SDUSD also relies on. This web page contains information virtually identical to that of the "Email Policy Update" with respect to the definition of "records." SDUSD also relies on a document titled: "Legal Requirements for Retention of Public Records, including Emails." This document uses language similar to the 5 CCR § 16020 definition of "records" but under the heading "What about emails?" advises:

There is no legal requirement to keep email communications unless they meet the definition of a "record." You should keep those emails which you believe are necessary or convenient for you in performing your job. Some examples might be:

- Communications with parents on substantive issues affecting their child
- Substantive communications with other staff members.

On the other hand, emails such as transmittals, informal notes, notices of community or school affairs, and communication regarding personal matters are not records and should not be retained.

SDUSD issued another guideline on June 13, 2018, attached to SDUSD's supplemental opposition papers as Exhibit 2. VOSD/SDOG have not had an opportunity to respond to these latest guidelines. As such the court does not address these guidelines at this time. However, SDUSD's continued issuance of guidelines causes the court to further question the adequacy of the previous guidelines and the propriety of any emails destroyed under the previous guidelines and directives. The court finds such circumstances support issuance of a preliminary injunction.

VOSD/SDOG also contend that SDUSD's Policy violates Government Code § 6200. Pursuant to this section,

Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:

(a) Steal, remove, or secrete.

(b) Destroy, mutilate, or deface.

(c) Alter or falsify.

Similar to its argument with respect to 5 CCR 16022, SDUSD argues that its Policy "does not violate Section 6200 because the District instructs its employees to archive 'substantive communications,' which is consistent with the California Supreme Court's guidance. (Ex. E.) Only emails determined to be non-substantive or not business related will be subject to deletion."

In its supplemental opposition SDUSD raises the issue of the uncertainty as to the definition of "record" for purposes of Government Code § 6200. SDUSD advocates for a definition similar to that of 5 CCR § 16020 – the definition contained in 64 Ops. Cal. Atty. Gen. 317.

"[A] thing which constitutes an objective lasting indication of a writing, event or other information, which

is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.

As SDUSD raises this issue for the first time in its supplemental opposition, VOSD/SDOG have not had an opportunity to reply. In their arguments VOSD/SDOG appear to rely on the definition of "public records" contained in Government Code § 6252 ("any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics"). 64 Ops. Cal. Atty. Gen. 317 expressly rejects this definition. However, a prior opinion, 58 Ops. Cal. Atty. Gen. at 425, cited by VOSD but not discussed on this issue, appears to apply the Government Code § 6252 definition to a claim under Government Code § 6200. The court finds it is not required to resolve this issue, at least at this juncture. SDUSD's reliance on a similar definition of "record" as to VOSD/SDOG's Government Code § 6200 claim suffers from the same maladies as discussed above with respect to VOSD/SDOG's 5 CCR § 16020, *et seq*. claim.

VOSD/SDOG also contend that SDUSD's Policy violates the California Public Records Act.

Under Government Code § 6253, part of the California Public Records Act,

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

. . . .

City of San Jose v. Superior Court (2017) 2 Cal.5th 608 explains that the

CPRA establishes a basic rule requiring disclosure of public records upon request. (§ 6253.) In general, it creates "a presumptive right of access to any record *created or maintained* by a public agency that relates in any way to the business of the public agency." (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323, 165 Cal.Rptr.3d 250, 314 P.3d 488, italics added.) Every such record "must be disclosed unless a statutory exception is shown." (*Ibid*.)

City of San Jose, 2 Cal.5th at 616.

Government Code § 6252 defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

SDUSD argues only that the CPRA "provides the public a right of access to agency documents, but does not require an agency to retain records" and that "[r]ecords under the Public Records Act are not necessarily records under Section 6200." The case SDUSD relies on, *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, explains,

Act was enacted with the objective of increasing freedom of information. It is designed to give the public access to information in possession of public agencies. Act itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for

disclosure.

Los Angeles Police Dept., 65 Cal.App.3d at 668.

SDUSD fails to adequately address the issue of whether the emails it proposes to delete, and for which a CPRA request has been made by SDOG, are subject to production under the CPRA, even if the emails are not "records" for purposes of 5 CCR § 16020, *et seq*. and Government Code § 6200. SDUSD fails to adequately address the issue of whether SDOG's CPRA request precludes the planned destruction of SDUSD emails.

Based on the foregoing the court finds VOSD/SDOG meet their burden of establishing a probability of prevailing on their claims.

Balance of Hardships

The harm to VOSD/SDOG should injunction not issue is the destruction of email correspondence, making such documents unavailable to VOSD, and the general public, and undiscoverable by SDOG. SDUSD fails to submit any evidence as to the harm/cost to SDUSD should SDUSD be required to delay implementation of its Email Archiving and Retention Policy/Email Policy Update pending trial in this matter. Considering these circumstances, and considering the evidence establishing VOSD/SDOG's probability of prevailing, the court finds the balance of hardships weighs in favor of issuance of a preliminary injunction.

Injunction

The court issues a preliminary injunction prohibiting SDUSD from destroying email correspondence, and directing SDUSD to retain all email correspondence, pending trial in this matter.

Bond

The court sets the bond at $1,000.00. CCP § 529.