SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - August 23, 2018

EVENT DATE: 08/24/2018 EVENT TIME: 02:00:00 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. Petitioner Voice of San Diego's request for judicial notice is granted.

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.

Having previously continued the hearing on this matter to allow the parties to submit supplemental briefing and 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 addressed by SDUSD in its supplemental brief, 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 16 §§ 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 in this case 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 Bulletin: 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*.

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."

The court first addresses VOSD's argument that SDUSD's Policy violates the 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.

In opposition 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.

The court is not persuaded by the guidance/training materials SDUSD submits. As discussed on the previous hearing, 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 SDUSD also relies on. This 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 set of guidelines on June 13, 2018, attached to SDUSD's supplemental opposition papers as Exhibit 2 ["Email Retention Guidelines"]. These guidelines again rely on the definition of "record" from 5 CCR § 16020 and state: "The following is intended to assist staff in determining whether an email constitutes a District 'record' that we are required by law to maintain." Attached to its recently filed supplemental brief SDUSD again attaches the "Email Retention Guidelines" [Exhibit 1] as well as a copy of the "SDUSD Email Retention and Archiving webpage" [Exhibit 2]. The web page includes much of the same information as that contained in the previously issued "Email Policy Update" "Legal Requirements for Retention of Public Records, including Emails" and "Email Retention Guidelines" and includes links to various other web pages for information such as the applicable regulations and policies, as well as links to technical assistance with respect to computer storage/archiving. As on the original hearing, SDUSD's continued issuance of guidelines causes the court to question the adequacy of these guidelines and the ability of SDUSD to insure that "records" will not be improperly destroyed upon implementation of the automatic deletion procedure set forth in the Policy.

Addressing another issue raised by the court at the previous hearing, SDUSD argues that it is appropriate for SDUSD employees to evaluate their own email to decide what they must archive. Given that the applicable definition of "records" contains a component personal to the official – items "which are prepared or retained as necessary or convenient to the discharge of official duty" – SDUSD demonstrates that it is appropriate form SDUSD employees to make this determination. However, the issue raised by the court at the prior hearing was as to the absence of evidence 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." As on the prior hearing, the court is not persuaded that the above guidelines and materials sufficiently address this issue.

At the previous hearing the court also required evidence as to 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. To address these issues, in its supplemental brief SDUSD submits evidence in the form of a declaration from Gregory K. Ottinger, SDUSD's Chief Business Officer.

7. SDUSD has implemented the following procedures to ensure employees are properly archiving their email. SDUSD will require senior management to sign a document affirming they have read and understand the Email Archiving and Retention Policy, and acknowledging they are responsible for ensuring their staff follow the Policy.

8. In addition, SDUSD will utilize language on the login page for SDUSD electronic devices and web-based email to specifically identify its Email Archiving and Retention Policy. This language will require employees to affirm that by logging in they have read the Policy and agree to archive their emails in accordance with the Policy. Specifically, the revised login page language will be as follows:

In support of academic instruction, research, public service, and administrative functions, San Diego Unified School District (SDUSD) encourages the use of, and provides access to, information technologies and network resources. Users of SDUSD computing resources, information technologies, and networks are responsible for using those resources in accordance with the law and with SDUSD policy. Use of SDUSD computing, information technologies, and networking resources is a privilege that depends upon appropriate use of those resources. Individuals who violate the law or SDUSD policy regarding the use of computing resources, information technologies, and networks are subject to loss of access to those resources as well as to SDUSD disciplinary and/or legal action. Users are expected to review Administrative Procedure 7039 for the details of the appropriate use policy. All users are reminded that all emails older than one year will be automatically deleted from SDUSD servers unless archived. Each user must regularly review emails to preserve and archive all Records, as required by law. The definition of Records is found in the guidance published on the email retention and archiving page of SDUSD's website (https://www.sandi.net/itd/resources/e-mail/emailretention-and-archiving). Administrative Procedure 7101 and Administrative Regulations 3580 and 5125 provide District approved steps and protocols in the collection, storage, maintenance, archiving and confidentiality of all student, employee and other District public records. By proceeding, you are acknowledging that you understand and accept this SDUSD policy and the information published in the Administrative Procedures and Regulations identified above. You are also agreeing that you will regularly preserve and archive all Records, as required by law.

9. SDUSD has also provided guidance to all of its employees regarding archiving emails. A true and correct copy of the guidance SDUSD sent to its employees is attached as Exhibit 1 to the Notice of Lodgment in Support of San Diego Unified School District's Supplemental Brief Addressing Issues Raised by the Court at the June 22, 2018 Hearing on Plaintiffs Motion for Preliminary Injunction ("NOL"). SDUSD will continue to send this guidance to all employees on a quarterly basis for the next two years and will include the guidance in all new employee orientation packets.

10. The Email Retention and Archiving webpage on SDUSD's website contains information regarding how employees can archive their email. The webpage also provides a link, from which employees can access and download the guidance regarding what emails they need to archive and retain. A true and correct copy of SDUSD Email Retention and Archiving webpage is attached as Exhibit 2 to the NOL.

Preliminarily, this evidence appears to address only archiving of emails going forward. SDUSD fails to address the issue of archiving historic emails. SDUSD fails to address emails that will not be reviewed prior to deletion. Also absent is any evidence as to the process undertaken by SDUSD for assessing the emails of employees who have left employment with SDUSD. In its supplemental brief, SDUSD argues that "emails of former employees are no longer necessary or convenient to the discharge of official duties and are not records under Section 16020 or 6200." This argument ignores first part of the definition of a record – items "required by law to be prepared or retained." SDUSD fails to provide any assurance that items in a former employee's email that are "required by law to be prepared or retained" will not be deleted after an employee leaves SDUSD.

The court finds SDUSD fails to establish that its guidelines, policies and procedures will insure that "records" will not be destroyed during the automatic deletion procedure.

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."

SDUSD's supplemental opposition and the papers more recently filed by both SDUSD and VOSD raise 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.

VOSD/SDOG 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") part of the California Freedom of Information Act. Although 64 Ops. Cal. Atty. Gen. 317 expressly rejects this definition, the prior opinion, 58 Ops. Cal. Atty. Gen. at 425, cited by VOSD applies the Government Code § 6252 definition to a claim under Government Code § 6200. As on the previous hearing, 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 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,

[The California Public Records] 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.

Specific to SDOG's petition and CPRA request, this court's prior tentative ruling raised issues not then addressed by SDUSD including 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 and whether SDOG's CPRA request precludes the planned destruction of SDUSD emails. In its supplemental brief SDUSD argues that SDOG's CPRA request is invalid as a matter of law. Specifically, SDUSD argues that SDOG's CPRA request lacks specificity and is unreasonably burdensome.

The court first address the unreasonably burdensome issue. While the authority SDUSD relies on, *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, recognizes that "a request which compels the production of a huge volume of material may be objectionable as unduly burdensome" [*California First Amendment Coalition,* 67 Cal.App.4th at 166] this case also recognizes that "[r]ecords requests . . . inevitably impose some burden on government agencies" and that "[a]n agency is obliged to comply so long as the record can be located with reasonable effort." *California First Amendment Coalition,* 67 Cal.App.4th at 166 citing *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1186.

Although SDUSD does not cite to Government Code § 6255, the case SDOG cites, *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, explains,

[p]ursuant to subdivision (a) of section 6255, disclosure of otherwise responsive public records may be blocked as overly burdensome if " 'on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.' " (*ACLU, supra,* 32 Cal.3d at p. 452, 186 Cal.Rptr. 235, 651 P.2d 822; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 477, 23 Cal.Rptr.2d 412.) When weighing the benefits and costs of disclosure, any expense or inconvenience to the public agency may properly be considered. (*ACLU, supra,* 32 Cal.3d at pp. 452–453, 186 Cal.Rptr. 235, 651 P.2d 822.)

Bertoli, 233 Cal.App.4th at 372.

SDUSD fails to provide any discussion or evidence on the issue of whether the public interest served by

not making the records public "clearly outweighs" the public interest served by disclosure of the records. Pursuant to § 6255(a) this burden is on SDUSD. ["The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."] See also, *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 291 citing (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071. ["In determining the propriety of an agency's reliance on the catchall provision to withhold public records, the burden of proof is on the agency "to demonstrate a clear overbalance" in favor of nondisclosure."]

Although SDUSD raises arguments as to the amount of time it will take to review the emails at issue, SDUSD provides no evidence to support these arguments. Based on the evidence SDUSD provides as to SDUSD's proposed plan to address pending CPRA requests in conjunction with the automatic deletion procedure it appears a process for review of the emails sought by SDOG is feasible. The Declaration of Andra Greene states:

9. To address the Court's concern regarding pending CPRA requests, SDUSD will not implement any automatic deletion procedure until all emails that SDUSD is reasonably able to identify as potentially responsive (using search terms or other electronic search methods) to any CPRA request, submitted up to one week before the deletion date, have been identified. SDUSD will exempt such emails from being subject to automatic deletion until each email has been reviewed as part of SDUSD's standard CPRA response process. Only after an email has been reviewed and determined not to be responsive to any pending CPRA request or otherwise exempt from disclosure, will that email be subject to automatic deletion.

The Declaration of Gregory K. Ottinger, SDUSD's Chief Business Officer contains similar information.

SDUSD also raises technology-based arguments. However, evidence that it is "very likely impossible from a technological standpoint for SDUSD's IT Department to process this volume of emails for review" does not foreclose the possibility of production or the possibility of alternate methods of production.

The court is not persuaded by SDUSD's reliance on *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754. *Rosenthal* is distinguishable because the plaintiff requested from the California Department of Human Resources Development a copy of the "Benefit Determination Guide" which consisted of a "seven volume loose-leaf work containing guidelines for the department's use in determining a claimant's eligibility for unemployment benefits." The court ruled "[c]onstruction of Government Code section 6256 in the manner sought by plaintiff could result in state agencies entering the printing business. Although it may be desirable for state agencies to have available for public purchase such documents as herein sought, the California Public Records Act is not the vehicle by which such purchase can be obtained." *Rosenthal,* 34 Cal.App.3d at 760. Such circumstances are not present in this case.

Nor is the court persuaded by SDUSD's reliance on language from *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209 ["[w]e are mindful of the press of business of public agencies, particularly in these difficult fiscal times, and will not hold the Department to an impossible standard, but to a reasonable one"]. The quoted language is in the context of a discussion of the extension of time afforded a public agency under Government Code § 6253 for responding to a CPRA request.

Based on the foregoing SDUSD fails to establish that SDOG's CPRA request as overly burdensome.

As to SDUSD's lack of specificity argument, the authorities SDOG relies on demonstrate that the burden is on SDUSD to contact SDOG to seek clarification. See, *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1418; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 85 at fn. 16. There is no evidence that SDUSD has done so in this case. Moreover, it is apparent from the papers in this case that SDUSD knows what records SDOG seeks – all the public records that are to be automatically deleted under SDUSD's proposed

"automatic deletion procedure." As recognized in *California First Amendment Coalition*, "[f]eigned confusion based on a literal interpretation of the request is not grounds for denial." *California First Amendment Coalition*, 67 Cal.App.4th at 167.

SDUSD fails to establish lack of specificity as grounds for invalidation of SDOG's CPRA request.

In its recently filed reply, VOSD again raises an issue specific to 5 CCR 16022 [Classification of Records]. As set forth above, subsection (a) 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.

VOSD argues that this subsection requires review and classification only by the district superintendent. Although not addressing this issue in the recent briefing, in prior papers (also discussed above) SDUSD argues that the requirements of 5 CCR § 16022(a) only apply to "records" (as defined by 5 CCR § 16020) and, because SDUSD is not destroying any "records" the automatic deletion procedure does not violate the requirements of 5 CCR § 16022. This argument ignores the issues raised above with respect to whether SDUSD's proposed automatic deletion procedure will sufficiently insure that emails meeting the criteria of "records" are not destroyed.

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. Significantly, 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 pending trial in this matter. While SDUSD addresses other costs related to storing emails, it does not address this precise issue. SDUSD also states that it will "preserve all emails required to be retained under Sections [5 CCR] 16020 and [Government Code] 6200" and "will not delate any emails potentially responsive to any pending, valid CPRA requests." It is undisputed that SDUSD has the ability to continue to store the emails at issue in this case. VOSD submits evidence that SDUSD has resources available to it to do so at a minimal cost. 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.

If this tentative ruling is confirmed, the Minute Order will be the final order of the court, and the parties shall not submit any further order on this motion.