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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

JOHN DOE, an Individual, Plaintiff/Petitioner, v. MILL VALLEY SCHOOL DISTRICT, Defendant/Respondent.	Case No. CV0003896 **REAL PARTY IN INTEREST HOLLY McDEDE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PRELIMINARY INJUNCTION**
HOLLY McDEDE, Real Party in Interest.	Date: November 6, 2024 Time: 1:30 p.m. Dept.: H The Hon. Sheila S. Lichtblau

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I. INTRODUCTION

John Doe resigned from the Mill Valley School District (the "District") during the District's investigation of his actions that it deems "well-founded and constitut[ed] 'boundary crossing or grooming behavior.'" Def.'s/Resp't's Opp'n to Pl.'s/Pet'r's Ex Parte Appl. for a Protective Order 7:13–14. Holly McDede, a freelance reporter, made a request for public records that covers documents about the District's investigation in Doe's conduct. The records at issue are subject to disclosure under the California Constitution and California Public Records Act (the "CPRA"), especially to the extent they go to the people's compelling interest in evaluating how public agencies respond to allegations of misconduct by persons in positions of trust and confidence. After the District said it would disclose certain records, Doe filed this action seeking to prevent disclosure. The Court issued a temporary restraining order and is now deciding whether to grant Doe's request for a preliminary injunction.

The Court should deny that request because nothing argued by Doe defeats the people's constitutional right to disclosure of public records. He cannot prevail merely by asserting that records at issue might qualify for an exemption under the CPRA, because any asserted exemptions are permissive, not mandatory. Even assuming exemptions might apply, the District retains discretion to assert them, which they have not done for the records at issue, and a court cannot direct a public agency to exercise its discretion in a particular manner. To prevail, Doe must show that disclosure is prohibited by law, which he cannot do. He invokes his interest in privacy, which cannot defeat the people's right to disclosure in this case, which involves well-founded allegations of substantial misconduct. Accordingly, the Court is respectfully requested to review the records at issue *in camera*, deny the preliminary injunction, and allow the District to disclose the records it intended to release before Doe filed suit.

II. FACTS

John Doe was previously employed in the District; he resigned during an investigation into his conduct. On June 7, 2024, Holly McDede, working as a freelance reporter, sought public records from MVSD "related to any and all claims of misconduct against teachers or other school employees from 2014 to the date this request is fulfilled." Def.'s Opp'n 3–4; McDede Decl. ¶ 2 &

Ex. 1. On June 28, 2024, McDede updated the request to seek "public records related to claims of sexual harassment, sexual assault, or boundary crossing or grooming behavior made regarding teachers or other school employees" as well as "claims of sexual harassment, sexual assault, or grooming made to the California Commission on Teacher Credentialing." Def.'s Opp'n 4; McDede Decl. ¶ 4 & Ex. 2.

On July 8, 2024, the District informed McDede that it interpreted her request as one for "records that satisfy the requirement that the information sought is both of a substantial nature and is well-founded." Def.'s Opp'n 4; McDede Decl. ¶ 6 & Ex. 3. The District informed McDede that it had responsive records, which it would review and disclose, to the extent they were subject to disclosure, after sending notices to employees or former employees involved. Def.'s Opp'n 4; McDede Decl. ¶ 6 & Ex. 3. On August 23, 2024, the District notified Doe regarding the option to oppose disclosure. Def.'s Opp'n 4; *see Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250 (2012).

The records at issue have been lodged under seal, and therefore McDede must rely on Doe's characterization of the records and underlying incidents, which may be self-serving. Although he denies touching a student's thigh and engaging in "manspreading," Doe does not materially dispute the underlying facts of the following allegations against him:

- Staring at a female employee "by looking into her eyes and blinking silently for about 10 seconds" and, on the same day, blocking a doorway to the same female employee and another staff member by "standing in the middle of the kitchen doorway with one arm leaning on the door frame" and forcing them "to exit underneath his arm." Doe also "did not consistently wear his face mask indoors and while in close proximity to staff during the Covid-19 pandemic." These events led to "a Conference Summary memorandum which later became a written warning."
- "[T]ouching the braided hair of a female African-American student," resulting in "the directive that failure to address the conduct could result in a written warning."

- Walking down a hallway "with his arm around a male student's shoulder," again resulting in "the directive that failure to address the conduct could result in a written warning."
- Referring to "having sex in the booty hole" during a Zoom meeting, which led to a "Written Warning."
- Berating "students and a staff member by using a harsh and elevated tone of voice." Doe "resigned prior to learning of this complaint."

Pl.'s/Pet'r's Notice of Mot. & Mot. for Prelim. Inj. 3–5. Doe was placed on administrative leave pending investigation of his actions and resigned during the investigation. *Id.* 5:18–19.

III. ARGUMENT

To obtain a preliminary injunction, Doe must "present evidence of the irreparable injury or interim harm that [he] will suffer if an injunction is not issued pending an adjudication of the merits," and the Court must consider "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." *White v. Davis*, 30 Cal. 4th 528, 554 (2003) (citing *City of Torrance v. Transitional Living Ctrs. for L.A., Inc.*, 30 Cal. 3d 516, 526 (1982)). Because he cannot prevail on the merits, Doe cannot justify a preliminary injunction interfering with the constitutional right to disclosure of public records. In a reverse-CPRA case or any case, the Court "may not grant a preliminary injunction, regardless of the balance of interim harm," unless there is a possibility the plaintiff "will ultimately prevail on the merits." *Doe v. Regents of Univ. of Calif.*, 102 Cal. App. 5th 766, 775 (2024) (quoting *Butt v. State*, 4 Cal. 4th 668, 678 (1992)). This Court should deny a preliminary injunction and vacate the temporary restraining order. *Landmark Holding Grp. v. Superior Ct.*, 193 Cal. App. 3d 525, 529 (1987) ("A TRO is purely transitory in nature and terminates automatically when a preliminary injunction is issued or denied.").

A. Access to Public Records Is Guaranteed by the California Constitution.

"Openness in government is essential to the functioning of a democracy." *Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21 v. Superior Ct.*, 42 Cal. 4th 319, 328 (2007) [hereinafter *Local 21*]. To that end, access to public records is a constitutional right in California. "The people have the

right of access to information concerning the conduct of the people's business, and, therefore . . . the writings of public officials and agencies shall be open to public scrutiny. . . . In order to ensure public access to . . . the writings of public officials and agencies, . . . each local agency is hereby required to comply with the California Public Records Act." Cal. Const., art. I, § 3(b)(1), (7).

The CPRA reflects "legislative impatience with secrecy in government," for "secrecy is antithetical to a democratic system of 'government of the people, by the people [and] for the people.'" *San Gabriel Trib. v. Superior Ct.*, 143 Cal. App. 3d 762, 771–72 (1983) (alteration in original) (quoting Opinion No. 67-144, 53 Ops. Cal. Atty. Gen. 136, 143 (1970)). As the CPRA declares, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 7921.000.

The District is subject to the CPRA and must provide public records upon request unless it asserts and proves the records are exempt from disclosure. Gov't Code §§ 7920.510(d), 7920.525(a), 7922.000, 7922.530(a). It is undisputed that the documents requested by McDede are public records, and the District is not seeking to prevent their disclosure in their entirety.

B. Doe Must Prove Disclosure of the Records at Issue Is Prohibited by Law.

In bringing this action to preclude disclosure, Doe cannot merely contend the records at issue might qualify for an exemption under the CPRA. The CPRA's exemptions "are permissive, not mandatory" and thus "allow nondisclosure but do not prohibit disclosure." *Amgen Inc. v. Cal. Corr. Health Care Servs.*, 47 Cal. App. 5th 716, 732 (2020) (citation omitted); *see also* Gov't Code § 7921.500. The discretion to assert exemptions belongs to the District, not Doe, and the District cannot be compelled to exercise discretion "in a particular manner." *Marken*, 202 Cal. App. 4th at 1266.

Because the District "has the discretion to invoke an exemption" and an injunction "cannot be used to control an exercise of discretion," Doe "must show disclosure is otherwise prohibited by law, that is, that the government agency *lacks* discretion to disclose" the records at issue. *Amgen*, 47 Cal. App. 5th at 732 (citations and internal quotation marks omitted). This case does not involve records that agencies may "have no discretion to disclose," such as "pupil records." *Marken*, 202 Cal. App. 4th at 1266 n.12. Student privacy laws do not prevent disclosure of records

about staff misconduct. *BRV, Inc. v. Superior Ct.*, 143 Cal. App. 4th 742, 754–55 (2006). Doe asserts his own interest in privacy, which cannot defeat the people's right to disclosure of the records at issue in this case.

C. The People's Constitutional Right to Disclosure Outweighs any Privacy Interests Doe Might Possess.

Under controlling precedent, any privacy interests claimed by Doe cannot preclude disclosure of the records at issue. Although a public employee may argue that disclosure would violate the right to privacy, that right is not absolute. *Marken*, 202 Cal. App. 4th at 1271. The "strong public policy supporting transparency in government" that is "grounded in both the California Constitution and the CPRA" can "outweigh constitutional privacy interests" and require disclosure of public records. *Id*. (citations omitted). That is the case here.

The CPRA contains an exemption for "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov't Code § 7927.700. This exemption parallels the CPRA's catchall exemption, Gov't Code § 7922.000, and balances any privacy interests against the public's interest in disclosure. *Versaci v. Superior Ct.*, 127 Cal. App. 4th 805, 818 (2005); *Braun v. City of Taft*, 154 Cal. App. 3d 332, 345 (1984). To the extent the records at issue do not fall within the personnel files exemption, their disclosure cannot violate the constitutional right to privacy. *Marken*, 202 Cal. App. 4th at 1271 n.18. Under settled law, the records at issue do not qualify for this exemption, and therefore their disclosure cannot invade Doe's right to privacy.

D. Any Records Documenting Doe's Employment Must Be Disclosed.

To the extent any of the records at issue are unconnected to misconduct allegations and merely show the fact and duration of Doe's employment, his salary, and his professional background, as well as his name, their disclosure cannot invade any privacy rights. *Local 21*, 42 Cal. 4th at 333 (requiring disclosure of public employees' names and salaries due to "the strong public interest in knowing how the government spends its money"); *Eskaton Monterey Hosp. v. Myers*, 134 Cal. App. 3d 788, 794 (1982) (noting "information as to the education, training, experience, awards, previous positions and publications of [the employee]. . . . is routinely

presented in both professional and social settings, is relatively innocuous and implicates no applicable privacy or public policy exemption").

E. The Public Is Entitled to Disclosure of Records that Document Findings of Misconduct or Contain Reasonable Grounds to Believe Doe Committed Substantial Misconduct.

With respect to records relating to complaints about Doe, misconduct of public employees is "undoubtedly an issue of public interest." *Collondrez v. City of Rio Vista*, 61 Cal. App. 5th 1039, 1050 (2021). The public has a compelling interest in disclosure of records that "shed light on the public agency's performance of its duty" to respond to such complaints, *Versaci*, 127 Cal. App. 4th at 820 (citation omitted), and show "whether the law is being properly applied or carried out in an evenhanded manner." *CBS, Inc. v. Block*, 42 Cal. 3d 646, 656 (1986). The right to transparency is "intended to safeguard the accountability of government to the public." *Reg. Div. of Freedom Newspapers v. County of Orange* 158 Cal. App. 3d 893, 901 (1984) (citation omitted).

California law is clear that "where the charges are found true, *or* discipline is imposed" on a public employee, such as a teacher, the relevant records must be disclosed. *Am. Fed'n of State, Cnty. & Mun. Emps. v. Regents of Univ. of Cal.*, 80 Cal. App. 3d 913, 918 (1978) (emphasis added). "In such cases a member of the public is entitled to information about the complaint, the discipline, and the information upon which it was based." *Id.* (quotation marks omitted). Accordingly, whenever "the complaint has been upheld by the agency involved *or* discipline imposed, even if only a private reproval, it must be disclosed," regardless of the nature of the misconduct. *Marken*, 202 Cal. App. 4th at 1275 (citation omitted) (emphasis added).

Even if no formal discipline was imposed on Doe, discipline is not required to meet this standard. It is sufficient if charges are found true. Without access to the records at issue, McDede cannot verify if the District found any of the allegations to be true. Except for the thigh-touching and manspreading incident, Doe does not dispute that the underlying events occurred. The Court is respectfully requested to review the records *in camera* to determine if the charges are true.[1]

[1] The District "disputes [Doe's] claim that he was never disciplined for alleged misconduct. The facts show that Petitioner elected to resign . . . in response to the allegations against him." Def.'s Opp'n 7.

In addition, Doe admits he received "two written warnings." Pl.'s/Pet'r's Notice of Mot. & Mot. for Prelim. Inj. 10:3. Doe contends that only a "reprimand," not a "warning," is sufficient to amount to "discipline" for purposes of disclosure, but the cases he cites are not controlling because they are neither CPRA nor privacy decisions. *Id.* at 10:6–10. Accordingly, those cases do not preclude a holding that a warning is a sufficient "reproval" to require disclosure of public records. *Marken*, 202 Cal. App. 4th at 1275.

In any event, while findings of misconduct are sufficient to require disclosure, they are not necessary. Although "there is a strong policy for disclosure of true charges," the relevant "cases do not stand for the premise that either a finding of the truth of the complaint contained in the personnel records or the imposition of employee discipline is a prerequisite to disclosure." *Bakersfield City Sch. Dist. v. Superior Ct.*, 118 Cal. App. 4th 1041, 1045 (2004). As the Court of Appeal held, "where complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public's right to know." *Id.* (citation omitted).

Therefore, if the records "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded" and substantial, their disclosure cannot be enjoined. *Id.* at 1047; *see also Marken*, 202 Cal. App. 4th at 1272 (holding that "a proper reconciliation between the right to information embodied in the CPRA and the constitutional right to privacy" upholds "the right of public access" when alleged misconduct is of "substantial nature" and "there is reasonable cause to believe the complaint to be well founded"). Reasonable cause does not require certainty or strong proof. The terms "reasonable cause" and "probable cause" are generally "synonymous." *Carroll v. State*, 217 Cal. App. 3d 134, 141 (1990). Therefore, this Court need only find there was probable cause to believe the incidents occurred.

That standard is met here. As noted above, Doe does not dispute the facts of most of the incidents at issue. Accordingly, those incidents are well founded in fact. The Court is respectfully requested to review the records *in camera* to verify reasonable cause to believe the incidents occurred. *Bakersfield City Sch. Dist.*, 118 Cal. App. 4th at 1047 (holding courts "are required to

examine the documents presented to determine whether they reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded"). For most of the incidents at issue, Doe does not dispute the underlying facts. Instead, he disputes only how to characterize them, but that goes to the question whether they are substantial allegations, not whether there is reasonable cause to believe the events in question occurred.

Doe is mistaken that only "allegations of sexual-type conduct, threats of violence, and violence" qualify as "substantial." *Associated Chino Tchrs. v. Chino Valley Unified Sch. Dist.*, 30 Cal. App. 5th 530, 543 (2018). Such conduct is sufficient to make allegations substantial, but it is not necessary. *Cf. Iloh v. Regents of Univ. of California*, 87 Cal. App. 5th 513, 526 (2023) (ordering disclosure of records related to alleged plagiarism).

To make an allegation "substantial," it is necessary only that it is not "baseless or trivial." *Bakersfield City Sch. Dist.*, 118 Cal. App. 4th at 1045. While Doe's behavior may not have been as egregious as the conduct at issue in *Marken* or *Bakersfield City School District*, it is far from "trivial." This is not a minor case about an employee borrowing a few office supplies for personal use or clocking in five minutes late. On the undisputed facts, Doe's behavior involved an escalating series of intimidating or inappropriate actions. Taken as a whole, these kinds of actions can be early warning signs of more egregious conduct in the future. *See*, *e.g.*, Holly McDede, *A San José Teacher Is Charged with Sexual Abuse. His School District Knew of Alleged Misconduct a Decade Ago*, KQED (June 12, 2023), https://www.kqed.org/news/11952597/a-san-jose-teacher-is-charged-with-sexual-abuse-his-school-district-knew-of-alleged-misconduct-a-decade-ago. The public has a compelling interest in assessing the extent to which school districts respond to substantial early warning signs before they escalate to more egregious abuse.

Although Doe contends the District did not invoke its policies against sexual misconduct or harassment during its interactions with him, this Court should make its own judgment that the allegations were substantial for purposes of requiring disclosure of the records at issue. Similarly, this Court is not bound by the decision of the Committee of Credentials to take no adverse action against Doe. For purposes of this case, the issue is whether the allegations against Doe are substantial, or more than merely trivial, which does not require the revocation of his credential.

This case is not like *Associated Chino Teachers*, in which the behavior at issue arose from the unique context of competitive high school sports and the court found that a coach's conduct was "objectively reasonable" because it was "nothing more than what most dedicated coaches do to motivate players, maintain discipline and team morale, and push athletes toward their full potential." 30 Cal. App. 5th at 543. Taken as a whole, Doe's undisputed conduct was far from objectively reasonable in a very different context from competitive athletics. In these circumstances, Doe cannot prove that his alleged privacy interests clearly outweigh the public's compelling interest in disclosure.

How school districts respond to behavior such as Doe's is undoubtedly a matter of public concern. The release of the records requested by McDede can help examine what actions the District took to address or prevent harm or misconduct in its schools. Disclosure of the records at issue is justified by the public's compelling interest in assessing whether and to what extent the District properly responded to Doe's undisputed conduct. Preventing violence and sexual harm or misconduct before it happens is essential to children's safety. Thus, the requested records are extremely valuable to the public, and the constitutional right to public disclosure outweighs Doe's alleged privacy interests.

IV. CONCLUSION

For the foregoing reasons, the Court is respectfully requested to deny Doe's request for a preliminary injunction, vacate the temporary restraining order and allow the District to disclose public records requested by McDede.

Dated: October 23, 2024

FIRST AMENDMENT COALITION

By _____

DAVID LOY
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PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Marin, State of California. My business address is 534 4th Street, Suite B, San Rafael, CA 94901-3334.

On October 23, 2024, I served true copies of the following document(s) described as **REAL PARTY IN INTEREST HOLLY McDEDE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address rregnier@firstamendmentcoalition.org to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 23, 2024, at East Palo Alto, California.

Robin P. Regnier