IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS, et al.,

Plaintiffs,

v.

TOM TORLAKSON, et al.,

Defendants.

Case No. 17-cv-00635-CRB

ORDER DENYING PLAINTIFFS' ADMINISTRATIVE MOTIONS TO FILE DOCUMENTS UNDER SEAL

Plaintiffs, California Parents for the Equalization of Educational Materials ("CAPEEM") and several Hindu parents, filed three identical Administrative Motions to File Documents Under Seal (dkt. 214; dkt. 216; dkt. 228) in connection with their Cross-Motion for Summary Judgment (dkt. 214-1), their Opposition to Defendants' Motion for Summary Judgment (dkt. 216-1), and documents filed in support of their Reply to Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment (dkt. 228-1). The documents at issue ("Kenoyer Documents") consist of communications among professors of the South Asia Faculty Group ("SAFG") that Magistrate Judge Corley designated confidential during pretrial discovery. See generally Misc. Order (dkt. 171). Though Plaintiffs filed the present motions to comply with Judge Corley's order, they do not believe that the Kenoyer Documents should remain under seal at this stage of the case. See Admin. Mot. (dkt. 214) at 1.[1] Plaintiffs are correct, and the Motions to File Documents Under Seal are DENIED.

[1] For ease of reference, the pages in this Order are numbered as designated by the Court's electronic filing system.

I. BACKGROUND

Plaintiffs brought suit against officials at the California Department of Education ("CDE"), members of the State Board of Education ("SBE"), and four California school districts alleging discrimination against Hinduism in the California public school curriculum. See generally Compl. (dkt. 1). On July 13, 2017, the Court granted Defendants' Motion to Dismiss (dkt. 88) as to all claims, except for Plaintiffs' Establishment Clause claim. See generally MTD Order (dkt. 119). Though the Court dismissed Plaintiffs' claims under the first and third prongs of the Lemon test, it held that Plaintiffs had adequately pled a violation of the second prong of the Lemon test. See id.; Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Therefore, the only remaining issue in the case is whether the curriculum has the "principal or primary effect" of inhibiting Hinduism.

On September 19, 2017, Plaintiffs served Jonathan Kenoyer, a Professor of Anthropology at the University of Wisconsin, and a member of SAFG, with a subpoena for documents. See Molle Decl. (dkt. 144) ¶ 3. The subpoena sought, in part, communications of SAFG members relating to the development of the History-Social Science Framework ("Framework"). See Opp'n to Corley Admin. Mot. (dkt. 147-3) at 2–3. On January 23, 2018, the parties and Kenoyer entered into a Stipulated Protective Order covering "information produced by a Non-Party in this action and designated as 'CONFIDENTIAL.'" See Stip. Order (dkt. 130) ¶ 9(a). Kenoyer then produced 141 documents designated as "confidential." See Molle Decl. ¶ 6. Plaintiffs challenged Kenoyer's confidential designation as to 67 of the documents. Id. ¶ 7. Those documents consist of 2015 communications among SAFG members regarding the SBE's proposed Framework, upon which the CDE allegedly requested that SAFG provide a report.[2] See generally Ken. Docs. (dkt. 145-3). When the parties and Kenoyer could not resolve their

[2] Plaintiffs point to an email by Professor Kamala Visweswaran stating, ". . . I spoke with Tom Adams on Friday. We are asked to submit a short, concise report by November 6, 2015 in time for the November 19th CDE meeting; we may also be asked to weigh in after the 60 day period of comment on the curriculum framework, in Jan/Feb 2016." See P. MSJ (dkt. 214-1) at 12–13. This email appears to be hearsay.

disagreement over the documents' designation, Kenoyer moved to retain their confidentiality. See generally Mot. for Confid. (dkt. 141). Kenoyer argued that the documents were protected by "academic freedom" and that public disclosure would "result in the inability of faculty and their collaborators to communicate freely." See Brief for Mot. for Confid. (dkt. 142) at 2.

The Regents of the University of California ("The Regents") also moved to maintain the documents' confidential designation, because they include "private communications of University of California San Diego professor Kamala Visweswaran." See Mot. to Int. (dkt. 151) at 2. The Regents also argued that confidential designation was necessary to protect Professor Visweswaran's academic freedom. See id. at 13.

On August 16, 2018, Magistrate Judge Corley issued an order retaining the confidentiality of all but one of the 67 documents, finding that the risk of a chilling effect on academic research and collaboration among SAFG was sufficient to meet the "good cause" standard typically applied to non-dispositive motions. See Misc. Order at 11–12; see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002). Judge Corley's order cautioned, however, "When and if a document marked as 'confidential' is submitted to the Court in connection with a dispositive motion or at trial, documents can be sealed only if there is a 'compelling' reason for doing so. Kamakana v. City and Cty. of Honolulu, 447 F.3d 1171, 1180 (9th Cir. 2006)." See Misc. Order at 13.

Now before the Court are Plaintiffs' Administrative Motions to File Documents Under Seal (dkt. 214; dkt. 216; dkt. 228), filed in connection with their Cross-Motion for Summary Judgment (dkt. 214-1), their Opposition to Defendants' Motion for Summary Judgment (dkt. 216-1), and documents filed in support of their Reply to Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment (dkt. 228-1). Plaintiffs filed the present motions to comply with Judge Corley's protective order, but they contend that the Kenoyer Documents should no longer remain under seal now that the Court is assessing dispositive motions. See Admin. Mot. at 1. Kenoyer and the Regents oppose Plaintiffs' position, arguing that the Kenoyer Documents are irrelevant to the remaining

issues in the case and thus should not be held to the more stringent "compelling reasons" standard typically applied to dispositive motions. See Kenoyer Response (dkt. 219) at 2–3; Regents' Response (dkt. 218) at 4–5. Alternatively, Kenoyer and the Regents argue that CAPEEM's alleged intent to use the records to "denigrate and discredit researchers" presents a compelling reason to maintain confidentiality. See Kenoyer Response at 3–4; Regents' Response at 5.[3] Plaintiffs are correct.

II. LEGAL STANDARD

Two standards generally govern motions to seal documents. First, a "compelling reasons" standard applies to most judicial records. See Kamakana, 447 F.3d at 1178 (holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the 'compelling reasons' standard"); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135–36 (9th Cir. 2003). This standard derives from the common law right "to inspect and copy public records and documents, including judicial records and documents." Kamakana, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." Id. at 1178–79 (internal quotation marks and citations omitted).

Second, a different standard applies to "private materials unearthed during discovery," as such documents are not part of the judicial record. Id. at 1180. Rule 26(c) of the Federal Rules of Civil Procedure provides that a trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The relevant standard for purposes of Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing

[3] The Regents also request that, should the Court require new evidence in support of keeping the Kenoyer Documents under seal, the Court set a briefing schedule for additional briefing. See Regents' Response at 5. Kenoyer similarly requests additional time to prepare evidence to the same effect. See Kenoyer Response at 4. The Court finds it unnecessary to receive additional briefing on the matter.

the needs for discovery against the need for confidentiality." Gen. Motors Corp., 307 F.3d at 1213. This "good cause" standard is a lower burden than the "compelling reasons" standard. The cognizable public interest in judicial records that underlies the "compelling reasons" standard does not exist for documents produced between private litigants. See Kamakana, 447 F.3d at 1180 (holding that "[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); Foltz, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes.").

III. DISCUSSION

A. The "compelling reasons" standard applies

Kenoyer and the Regents urge the Court to apply the less stringent "good cause" standard to the Kenoyer Documents, arguing that those documents are irrelevant to the dispositive motions in the case. See Kenoyer Response at 3, Regents' Response at 4–5 (citing Center for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1097–98 (9th Cir. 2016)). But in Center for Auto Safety, the Ninth Circuit used relevance to expand, not limit, the application of the compelling reasons test beyond just dispositive motions to non-dispositive motions that are related to the merits of a case. Id. at 1101. In doing so, the Court emphasized the "long held interest in ensuring the public's understanding of the judicial process" and precedent presuming that the "compelling reasons" standard "applies to most judicial records." Id. at 1098 (emphasis in original) (internal quotation marks and citations omitted). Thus, Center for Auto Safety clarified only that public access to filed motions and their attachments is not determined solely by whether a motion is dispositive. Id. at 1011.

Where information is potentially harmful and only tangential to a court's decision, the public interest in accessing the information is low. See Music Group Macao Commercial Offshore Limited v. Foote, No. 14-cv-03078-JSC, 2015 WL 3993147, at *5 (N.D. Cal. June 30, 2015). Consequently, courts have considered the relevance of the documents to the underlying cause of action when determining whether they should remain under seal. See id., at *6 (holding that sealing was appropriate where the contours of

plaintiff's technology systems were not at issue in defendant's motion for summary judgment but public disclosure of the information risked exposing plaintiff to another cyber-attack); Network Appliance, Inc. v. Sun Microsystems, Inc., No. C-07-06053 EDL, 2010 WL 841274, at *2 (N.D. Cal. Mar. 10, 2010) (holding that sealing was appropriate where documents were attached to a dispositive motion but had no bearing on the resolution of the dispute on the merits and risked trade secret disclosure). However, the parties have not cited, and the Court has not found, authority holding that where a court finds that documents are irrelevant or only tangentially relevant to issues to be decided in a dispositive motion, it may decline to apply the "compelling reasons" standard. Instead, the above referenced cases indicate that where the documents are not relevant to the motion and a compelling reason is presented, they may be kept under seal. See Music Group, 2015 WL 3993147, at *6; Network Appliance, 2010 WL 841274, at *2.

Finally, the Court is not prepared to declare the Kenoyer Documents wholly irrelevant to the issues remaining in this case. Plaintiffs' Cross-Motion for Summary Judgment alleges that Defendants' coordination with SAFG to provide reports on the curriculum was falsely construed as "public comment." See P. MSJ at 12–14. Defendants' Motion for Summary Judgment disputes this assertion, arguing that the Framework adoption process was appropriate and that it legitimately incorporated feedback from different advocacy groups. See D. MSJ (dkt. 163) at 20–23. Because both parties discuss the process behind the Framework's adoption in their dispositive motions, and the second prong of the Lemon test involves an objective observer "acquainted with the text, legislative history, and implementation of the statute" (emphasis added), see Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring), the Court will not presume that the Kenoyer Documents are wholly irrelevant to the remaining cause of action. Consequently, the "compelling reasons" standard is the appropriate standard to apply to the present motions.

B. The Kenoyer Documents cannot meet the "compelling reasons" standard

Unless a court record is of a type "traditionally kept secret,"[4] a party seeking to seal a judicial record must overcome the "strong presumption in favor of public access" by meeting the "compelling reasons" standard. Kamakana, 447 F.3d at 1178. The party must articulate "compelling reasons" supported by specific factual findings that outweigh the general history of access public policies favoring disclosure. Id. "Compelling reasons" exist when court files "might have become a vehicle for improper purposes," such as to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978). That public disclosure of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation is not sufficient. Foltz, 331 F.3d at 1136.

Neither the Regents nor Kenoyer present an adequately "compelling reason" to keep the Kenoyer Documents under seal at the summary judgment phase. The Regents argue that CAPEEM's history of posting private researcher communications on its website to "denigrate and discredit researchers" indicates that Plaintiffs seek disclosure of the Kenoyer Documents for the same purpose. See Regents' Response at 5. Kenoyer raises similar concerns, as well as the need to protect scholarly deliberation over a politically-charged subject. See Kenoyer Response at 4. Preventing records from being used for purposes of gratifying private spite or promoting public scandal have been recognized as compelling reasons to keep them under seal. See Nixon, 435 U.S. at 598. However, this case does not involve a private dispute. SAFG provided public commentary to the SBE on the proposed curriculum. See Visweswaran Decl. (dkt. 151-2) ¶¶ 14–15, 18. Nor is there evidence before the Court that Plaintiffs seek disclosure of the Kenoyer Documents to promote public scandal.

Compelling reasons recognized as outweighing the public's substantial interest in access to judicial records at this stage of a case include the protection of trade secrets and

[4] These include grand jury transcripts and warrant materials during the pre-indictment phase of an investigation. See Kamakana, 447 F.3d at 1178.

cyber security. See Federal Trade Commission v. DIRECTV, Inc., No. 15-cv-01129-HSG, 2017 WL 840379, at *2 (N.D. Cal. Mar. 3, 2017) (granting request to seal documents containing party's confidential source code); Music Group, 2015 WL 3993147, at *5 (granting request to seal documents detailing changes to party's security system following cyber-attack). The Kenoyer Documents do not meet this high bar.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motions are DENIED.

IT IS SO ORDERED.

Dated: January 31, 2019

CHARLES R. BREYER
United States District Judge