District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100	
JOHN DOE, a Colorado citizen, and **JANE DOE,** a Colorado Citizen Plaintiffs, v. **KRISTEN BENNETT**, in her official capacity as a Records Custodian of the Poudre School District, and **THE POUDRE SCHOOL DISTRICT,** Defendants.	**▲ COURT USE ONLY ▲** Case Number: 11CV1118 Courtroom: 5A

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

I. INTRODUCTION

This case arises from the request by the Plaintiffs, referred to in this case for the purposes of confidentiality as John and Jane Doe (collectively "Does"), under the Colorado Open Records Act ("CORA") C.R.S. §§ 24-72-201 to -206, for records related to their son, a six-year-old student with special needs at a school within the Poudre Valley School District. The Defendants are the Poudre School District, a public school district, and Kristen Bennett, risk manager and public records custodian for the District (collectively "District").

The Court finds and determines that CORA applies to the records at issue, but rejects the Does' claims that instructions by District employees to destroy emails and other records prior to the CORA request at issue violated CORA or constituted spoliation of evidence. The Court finds and determines that the District has met its burden of showing that it performed a reasonable search for the requested records and, therefore, does not order that the District perform any of the

additional searches requested by the Does. However, the District has withheld some of the documents it discovered under claims that they are privileged or constitute work product, and the Court grants the Does' request for an index of these documents as detailed below. The Court reserves the issue of attorney fees requested by the Does until the case has been fully resolved.

II. PROCEDURAL HISTORY

The Does filed this action on May 26, 2011. At the request of the Does, the Court did not set the matter for an immediate show cause hearing, but set it for a case management conference so as to allow the parties time to attempt to resolve the matter and to prepare for a hearing, if needed. After the case management conference, the Court set the matter for a one-day hearing on July 27, 2011, and set a deadline for the District to file a proposed motion to dismiss. The District filed its "Motion to Dismiss for Lack of Subject Matter Jurisdiction and/or Judgment on the Pleadings" on July 8, 2011, based on its argument that this action was barred by the federal Individuals with Disabilities Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, the Does responded to that motion on July 25, 2011, and the District replied on July 26, 2011. The Court heard oral argument on the motion at the first day of the hearing on July 27, 2011, took the matter under advisement, and denied the motion by order dated August 29, 2011.

The Court held a hearing in this matter for four days on July, 27, August 31, September 1, and October 5, 2011. At the hearing, the Court heard the testimony of Gloria Hohrein, Sarah Belleau, Markay Cosper, Joe Horky, John Doe, Nick Reizen, Tim Hanners, Amy Agnew and Kristin Bennett. The Court received Plaintiffs' Exhibits 1 through 74 and 76 and Defendant's Exhibits A though H and J through Y. The Court also received designated portions of the depositions of Kristin Bennett (subsequently amended to remove identifying information) and

Amy Agnew, both designated by the District pursuant the C.R.C.P. 30(b)(6), pursuant to C.R.C.P. 32(a)(2).

After the close of the Does' case, on September 16, 2011, the District filed a written "Motion for Dismissal Pursuant to C.R.C.P. 41(b)(1)," and the Does responded to this motion on September 29, 2011. The Court, pursuant to the rule, declined to render judgment on the motion until the close of all the evidence.

After the District presented its case and the evidence was closed, counsel presented closing arguments and the Court took the matter under advisement, ordering limited briefing on two legal issues. The District submitted a closing brief on October 11, 2011 and the Does submitted a closing brief on October 14, 2011.

III. GENERAL FINDINGS OF FACT

Based on the evidence presented at the hearing, the Court makes the following findings of fact:

The Does are the parents of a six year old child with special needs ("Doe Child") who is eligible for special education services under the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§ 1401-1482 (2010). Before moving to Larimer County, the Does lived in California where their child attended a school that provided those services under an individualized education program ("IEP") it had developed.

The Does decided to move to Larimer County and began to correspond with the District regarding the enrollment of the Doe child in August, 2010. The District is responsible under state law for providing education to children residing within its boundaries.

Mr. Doe wrote a letter dated October 4, 2010, referring to letters and communications between the Does and the District regarding the IEP that would be developed and used by the

District for the Doe Child, in particular a letter from Sarah Belleau, the director of Integrated Services for the District, dated September 30, 2010. In his October 4, 2010 letter, Mr. Doe takes issue with a number of statements in an earlier letter from Belleau and demands answers to a number of questions regarding the services the District would provide the Doe child "on day 1." In addition, he requested information regarding the services provided other children in the District. He ended his letter as follows:

> Ms. Belleau, I sincerely hope that you will provide truthful and direct answers to my questions. If you are unwilling to do so, please understand that you may be forcing us to enroll our son in your district 'blindly,' not knowing whether you will be cooperative and compliant with all IDEA obligations (as we hope), or whether we will be moving into a district that is highly likely to force us to seek judicial relief to protect our son's statutory rights and ensure that he will not regress from the progress he has made under his existing IEP. I fail to see how such uncertainty would be in anyone's interest.

The District responded to this letter with a letter from Darryl Farrington, an outside attorney retained by the District to represent it in the matter. In the first paragraph of that letter, Farrington stated, "The District is justifiably concerned about the reference to judicial action, particularly since you are an attorney." The District, through a team including witnesses Hohrein, an integrated services coordinator, Cosper, a speech pathologist, Belleau, and Horky, the principal at the elementary school attended by the Doe Child, as well as others, began to work on an "Interim Plan" for the Doe Child so that a plan would be in place when and if he enrolled in the District. In doing so they collectively sent numerous emails in the period between September, 2010 and the enrollment of the Doe Child on January 7, 2010.

Among the emails sent between District employees, there are a number that contain references to the Does that were flippant, disrespectful and unprofessional. These included a reference to them as "crazy people" and sarcastic comments, such as "[t]he fun begins," "strap on your waders," "This is going to be so much fun!!" and "Bring it on!!" The evidence,

including emails and testimony, indicated that the District was sending some documents to outside counsel, including drafts of the IEP, during this time for review and advice, and outside counsel communicated with the Does' attorney, Jack Robinson, and directly with Mr. Doe, upon the request of Robinson. A record of a telephone conversation from Horky's "phone log" indicates that the topic of an "immediate lawsuit" was raised, apparently by Belleau, on November 23, 2010.

The District's efforts culminated in an interim IEP for the Doe Child, to be implemented upon his enrollment, finalized on or about December 8, 2010. Cosper sent an email, with an "Interim Plan for [the Doe Child].doc" attached, stating that the plan was "officially [] closed." The following day, December 9, 2010, Belleau responded to an email from Hohrein regarding implementation of the plan, stating as follows:

> Please delete this e-mail when done . . .
>
> Please ask all involved staff to delete AND destroy any email or paper records related to this family. When they delete the e-mail, they need to then "empty the trash" Please have them do this immediately. All other records with the exception of the latest plan should be destroyed—shred. The reason is to protect against an Open Records Request.
>
> Thank you for doing this and for verbally communicating this with staff. I do not want this put in writing.

Hohrein testified that she told Cosper to pass on the instruction to the rest of the staff involved. She also testified that she printed the emails that related to the Doe family and kept them in a file in her desk drawer. She later produced the file the District disclosed it to the Doe family in response to the record request. Hohrein testified that although she had received general instructions to delete emails in the past, she had never before received an instruction to delete emails related to a particular family. Belleau also testified that she did not recall giving such an instruction in the past.

With respect to her intent in giving the instruction, Belleau testified that she did not want to have "duplicate copies of information" as they might cause confusion. She also testified that her instruction was intended to delete confidential information provided by the Does regarding their child's California IEP, as it was, in her view, a concern that such documents would be held by multiple individuals in the District for a student who was not enrolled in the District. She also suggested that she was concerned that, in the event that the Doe Child did not enroll in the District, the Does might make a CORA request, discover that the District retained confidential records and "be upset" that the records had not been deleted or destroyed. Finally, she testified that she was concerned that emails and other writings could have been misconstrued or misunderstood based on her interactions with Mr. Doe and her belief that he had misconstrued or misunderstood communications or actions.

Horky testified that he received an instruction from Hohrein to delete email records and complied with that request. He testified that from his point of view, the District had completed the work necessary to prepare for the potential enrollment of the Doe Child, namely, the preparation of an Interim Plan, and that it did not need to retain anything else.

On January 4, 2011, Cosper sent out an email to District employees working on the Interim Plan for the Doe Child in preparation for a meeting the next day, attaching an agenda and other documents for them to review. She also stated, "Gloria and Sarah have asked that you print these documents, delete the emails and empty your trash." The employees were instructed to meet at 3 p.m. the next day to discuss the proposed Interim Plan and any other items and then to meet with the Does.

The Doe child enrolled in the District and began attending school on or about January 7, 2011. The District continued to meet with the Does regarding the IEP and various disagreements

or questions the Does had regarding it. District employees also continued to communicate with each other regarding the services provided to the Doe Child, and created various records of those services, some of which were provided to the Does in the ordinary course.

On March 20, 2011, at 10:27 a.m., Mr. Doe submitted an e-mail to Horky, with courtesy copies to Ms. Doe, Belleau, the District's outside counsel Farrington, the Does' lawyer Robinson (with a later copy to another district employee apparently responsible for handling special education records) seeking to inspect and review education records related to their child. Specifically, the Does sought to "inspect[] and review of all of the district's records pertaining to [their child,] . . . [including] raw test scores, staff notes, and all protocols that have been used in connection with tests, observations, and formal and information evaluations of [the Doe child]." The Does also sought to "review all other records pertaining to the development of [their child's] Interim Plan and proposed [IEP], and to the Interim Plan and proposed IEP themselves, including all documents and notes created by any members of [their child's] IEP team or their supervisors."

Seven minutes later Belleau sent an email to Hohrein and Horky regarding this request stating as follows:

> Our parent is preparing to make our lives interesting. In regard to the records review, we must copy all records. The way that we typically handle this is to have ALL records send [sic] to us at JSSC. We look through to assure that they are not personal notes, etc (which should not be on school site). Gloria and I will work with dad to find a time that he can come in and decide what he would like to copy of those records.

Fourteen minutes later, at 10:48 a.m., Belleau also sent an email to Cosper, and others working with the Doe Child, and Hohrein and Horky, stating in part as follows:

> Our new family has made an official records request. This means that everything (really everything) that you have on this student needs to be sent to me at JSSC as soon as possible. … I know that you did this once already for the mediation, but

> we need to make sure that everything comes forth with the exception of personal notes to yourself regarding this student. These should not be kept with the educational record. … Protocals [sic], assessment data, raw data from sessions, classroom assessment, reports, progress notes, etc are all part of the record.

Approximately 24 minutes later, Belleau followed this email up with another to the same recipients: "I just want to remind you that deleting any unnecessary e-mails and then 'emptying the deleted folder' is an important step to take." And then eight minutes later, Belleau wrote, "Please remember to delete your sent mail as well." About three hours later, Belleau again sent a follow-up to the 10:48 a.m. email, in a separate email string but to the same recipients, stating, "Please print any e-mail or other documents that you have saved as part of the student's educational record and include these with what you send to me." Belleau testified that she interpreted the request as a request for the "educational record" of the Doe Child pursuant to the [FERPA] and that she believed that this record did not include what she referred to as "unnecessary emails" or other documents.

The next day, March 21, 2011, Mr. Doe sent a second request "in accordance with" CORA, via e-mail and regular mail, to the Custodian of Records for the Poudre School District, with courtesy copies again to Robinson, Farrington, and Belleau ("March 21 Request"). This letter requested inspection of

> (1) All writings created and/or received by the following District personnel (the "District Team) between September 1, 2010 and [March 21, 2011] in connection with the District's development, proposal, and/or implementation of (i) interim special education and related services for [their child] in connection with his transfer to the District, and/or (ii) an Individualized Education Program (IEP) for [Doe Child]:
>
> a) Sarah Belleau
> b) Gloria Hohrein
> c) Nikki Arensmeier
> d) Lisa Hernandez
> e) Joe Horky
> f) Jill Cottingham
> g) Markay Cosper

h) Lindsay Perrich
i) Nancy Miller
j) Janet Clark
k) Crystal Tani
l) Melanie Bacon
m) Debbie Fredericks
n) Kim Mauer
o) Melanie – (a paraprofessional at Bacon Elementary).

> (2) "All writings created and/or received by the District Team between September 1, 2010 and the present in connection with the District's special education eligibility determinations for [the Doe child], including but not limited to determinations of eligibility for physical therapy, speech and language therapy, occupational therapy, applied behavioral analysis ("ABA"), extended school day services ("ESD"), extended school year ("ESY") services, and any related services."

These two requests ("Requests 1 and 2") are the only ones at issue in this case.

The District's email system serves some 6,000 staff members and 25,000 students. It limits the storage capacity for emails each user has sent, received or deleted. When their storage limit is reached, a user receives a message informing them of the need to delete messages from their "mailbox." If they fail to do so, the system will first prevent them from sending messages and then, if the mailbox grows still larger, from sending and receiving messages.

Emails the user deletes from their "deleted" folder go to a repository referred to as the "dumpster" and, if the system is working properly, resides there for thirty days. Emails in the dumpster are not searchable, so to search emails from the dumpster in the past, the District staff has removed emails from the dumpster and placed them back in a user's deleted folder. The District discovered during the process of responding to the Does' CORA requests that the system for emptying the dumpster had not worked consistently for months and that the system for backing up the District's system had also not been working properly. Users may recover items from the dumpster to the deleted folder through the use of a "button" in the email program.

In response to the March 21 Request, at Bennett's direction, Agnew and her assistant, Brenda Yocum, performed searches of the emails for the fifteen named users ("District Team"), including emails in the dumpster by removing the emails for each user from the dumpster, placing them back in the user's deleted folder, conducting the search using the email system Outlook, and then placing them back in the dumpster by re-deleting them. They used as search terms the Doe Child's first and last name. They spent "a good part of" two days on this search, printed out responsive emails, and then turned the results, organized by user and by search term, over to Bennett. Bennett and her assistant reviewed the documents to determine if they were responsive and, if so, whether they were or might be privileged or subject to another exception under CORA. The documents Bennett was not sure should be withheld or produced were provided to the District's counsel, Tom Crabb, for further review.

On March 23, 2011, Bennett responded to the Does' March 21 letter and indicated that she was responsible for "responding to requests under the Colorado Open Records Act ["CORA"]," and that "all future communications involving CORA . . . requests" should be directed to her attention. The letter stated that the District would comply with the Does' request by "search[ing] its computer system for e-mails to and from" the named employees that contained the first or the last name of the Doe child. The letter also explained that the District would not produce any records containing confidential student education records, or personnel information or evaluations, or any document that "contain[ed] privileged attorney communications and/or work product." The letter stated that "the records [would] be made available at noon on Friday, March 25, 2011," at a place to be determined.

Mr. Doe responded to the District with a three and one-half paged, single-spaced letter dated March 23, 2011. In this letter, he argued that the District was obligated to produce all

"writings" as that term is defined by CORA and "[t]hus, in addition to producing emails, the District must also produce any other responsive documents," including "without limitation, any of the District Team members' responsive text messages, calendar entries, journal entries, notes (whether typed or hand-written, electronic or paper), information recorded in binders, personal e-mail accounts, draft and final reports and memoranda, and any other responsive files regarding [the Doe Child]." Mr. Doe also argued that the two search terms the District suggested using to identify responsive records were inadequate to capture all of the public records related to the education and the development of the IEP for their child. The emails introduced into evidence and the testimony at the hearing showed that District employees did not have a consistent practice with respect to referring to the Doe Child or the Does in their emails, such as last names, initials or an identification number. Because of this, the Does suggested a broader search, incorporating terms such as "California," "Palos Verdes," "MELA," "Miraleste," "PVPUSD," "BSOTR," "Behavioral Services of the Rockies," "Blevins," "Juliet," "Horvath," "TJ," "CUSP," "Freeman," "BJ," "Shirley," "Resich," "transfer student," and "out-of-state." Mr. Doe also demanded "a manual review of records," including a manual review of "all electronic communications between Ms. Hohrein and Ms. Belleau between noon and 9pm on each of February 8 and 15." With respect to the District's claim that it was withholding some documents on the basis of privilege or another basis, he requested that the District identify the requests to which they were responsive. Lastly, the Does made formal requests for additional documents, none of which are the subject of this action.

On March 25, 2011, the District provided approximately 3,300 pages of records responsive to the Does' requests, and indicated that it had performed a search of e-mails to and

from the named employees that contained the first or the last name of the Doe child. Mr. Doe reviewed this material and requested 1, 348 pages be copied for him.

In responding to Mr. Doe's March 23 letter, Agnew and Bennett determined that performing a search of emails with this larger set of search terms would be too time-consuming and asked their on-site consultant about a "solution" that would allow the District to search the dumpster more efficiently. The District decided to purchase software that would perform this function and attempted, with the help of consultants, to perform the search with the new search terms.

This attempt, which took a "few days," failed because, as Agnew discovered in a spot check of the process, the new software did not "pull in" items from the dumpster. The software also did not allow Agnew to print out the results of the search in the way she planned. The search also failed to find emails that had already been discovered in the first search, indicating that the search was not working properly. Agnew spent the last week of March and into April on this process.

On March 28, 2011, Bennett responded to Mr. Doe's March 23 letter. She stated that the District had produced all public records responsive to the March 21 request "that are not protected from disclosure under CORA, in accordance with governing law."

On March 31, 2011, Mr. Doe sent the District additional record requests in six categories not at issue in this case. On April 6, 2011, Mr. Doe sent a 15-page single-spaced letter to Bennett accusing the District of "spoliation" of evidence and demanded that the District "promptly search—without limitation—its back-up storage systems, the District Team members' hard drives and personal storage locations, Mr. Farrington's files , and all other District storage locations (including those that retain items deleted by the District Team members) in order to

retrieve and produce all Writings affect[ed] by that instruction and/or by any other instruction to delete, destroy, and/or conceal Writings pertaining to [the Doe child] his parents, and/or our efforts to obtain FAPE for [the Doe Child] in Colorado." He also accused the District of failing to produce a number of items, including handwritten notes and electronic messages, produced by Hohrein during her meetings with him, as well as emails from Horky, Cosper, Belleau and others. He also stated that the documents disclosed up through this date revealed the inadequacy of the electronic search conducted by the District, as they included a number of emails that did not contain the Doe Child's first or last name. Some of these emails were admitted into evidence at the hearing.

With respect to Requests 1 and 2, Mr. Doe stated that "[g]iven the spoliation however, the District will now inevitably have to perform manual or electronic searches of records stored on back-up media such as server systems or tape file to fulfill its production obligations under [CORA]." Mr. Doe demanded that the District produce a list of all records withheld on the basis of privilege or immunity, including attorney-client privilege or the work product doctrine, specifying "the general nature of ***each such record*** … its author(s), recipient(s), cc and bcc recipient(s), subject reference, date, and the alleged privilege and/or immunity, so that the District's basis for withholding each record may be considered." He also made 10 additional CORA requests.

In response to this letter, the District retained new counsel, W. Stuart Stuller ("Stuller"), to respond to the issues raised by the Does with respect to Requests 1 and 2. Stuller stated that any deleted emails would remain on the District's "central system" and that the District would repeat its search using the Doe Child's first and last names "in areas in which deleted emails are located. Stuller also stated that a search using the Does' suggested search terms for the 15

individuals named in Request 1 would cost approximately $6,000 and that the District would be willing to conduct such a search if the Does submitted search terms and provided "an appropriate deposit." After receiving this letter, the Does decided to retain an attorney, Steven Zansberg, to represent them with respect to the CORA requests because of their concerns that the District was relying on the same custodians who they believed were improperly destroying documents to respond to those requests and because of the District's requirement that the Does pay for additional electronic searches.

One day prior to the date of this letter, on April 12, 2011, Stuller contacted Xact Data Discovery ("Xact Data"), a firm based in Texas specializing in discovery management. The District learned from the then the Director of Forensic Services for Xact Data, Tim Hanners, that it would not be able to search emails from the dumpster in the way that it thought it could, but that it would need a more advanced "forensic type tool" to recover emails from the dumpster. The District learned that there were items in the dumpster that were "invisible," i.e., present but not searchable or viewable with the software it had.

In early April, the District placed a "litigation hold" on emails related to the Does. The District implemented such holds by moving relevant users from their original location on the system to a "storage group" that retained emails indefinitely. In doing this, however, the District did not realize that the portion of the dumpster attached to a user's account did not move with the account.

On April 16, 2011, Bennett sent an email to Hanners attaching Mr. Doe's various CORA requests and stating, "As we discussed yesterday, please construct and conduct a search as if you are representing Mr. [Doe], not the District, and do whatever in your professional judgment you feel you need to do to locate the electronic records in Mr. [Doe's] requests."

Hanners traveled from Texas to the District to discuss options for "harvesting" emails that might be responsive the Does' requests. On the advice of Hanners, the District shut down the email servers for about 50 percent of the 25,000 students and 6,000 staff in the District during the night of April 21, 2011 and provided copies of the "users Exchange Database files" to Hanners, who took the data back to Texas. Xact Data placed a copy of the data on its network for processing and then stored the hard drives containing the date it had received from the District in a secure evidence vault. Using the names provided by Bennett, Hanners extracted each of their mailboxes from the Exhange Database files, creating a "separate container" of what are known as PST files for each user. As Hanners did this, he observed that the files contained consecutive delete times. Because this information would not be included in the PST files, he generated a report documenting the delete field. This report consisted of a large spreadsheet that was later produced to the Does, as discussed further below.

Nicholas Reizen, the Director of E-Discovery of Xact Data, directed the processing of this data. This processing included extracting "metadata" associated with the emails, e.g., sender, recipients, creation date, modification date, and the like; "deduplication" to remove duplicative emails from an employee's individual email account; "date culling" to limit the documents to the specified date range (September 1, 2010 to the date of the "harvesting"); extracting the contents of emails to make them searchable; and then conducting two searches on the body of documents, one applying 37 search terms for the 15 people named in Request 1 and the other applying eight additional search terms to just Horky, Hohrein, Belleau, Hernandez and Bennett. This process took about two to three days and resulted in 21,569 "reviewable documents." These documents were then provided to the District for their review using a computer database program designed for litigation support called Relativity, which allows a

reviewer to search, print and tag documents. The total cost of this work to the District was approximately $47,000.

Bennett reviewed the documents in the database in much the same manner as they had reviewed the printouts of emails from the earlier search. Of these 21,569 documents, the District provided some 1,600 email-related records, including a large number of duplicates, i.e., the same email sent to multiple recipients, as well as paper files including work sample, data and graphs regarding the Doe Child, for the Does to review on a computer on May 5, 2011 at the District's offices. On May 7, 2011, Mr. Doe wrote an email to Bennett regarding the fact that that the new records showed that the District's production of records was still "far from complete."

These included an email from Horky to those working with the Doe Child dated March 23, 2011. This email states, "I spoke with [Belleau] last night—here is what I found out. . . ." This statement is followed by seven bulleted items. The first four items refer or appear to relate to the Does' CORA request. The last three state, "• Delete your message! • Delete your deleted! • Delete your sent!" Horky testified that, contrary to appearances, the last three items were not instructions from Belleau, but instead were simply his personal instructions based on training he had recently received. Belleau also testified that she had not given the instructions to delete in the last three bulleted items.

On May 16, 2011, Zansberg sent a letter to Stuller (correcting a version of the same letter sent on May 13, 2011), informing him that the Does intended to file this action under CORA. At or about this time, the District compared a stack of hard copy emails obtained by Bennett from the staff and discovered that they were not identified by Xact Data, despite the fact that some of them contained the search terms used by Xact Data. Xact Data confirmed that they had been "successfully deleted" prior to the harvesting of the emails from the District's servers.

On May 20, 2011, the District produced 44 pages of the hard copy emails that Hohrein had deleted from her email in response to Belleau's email of December 9, 2010, but had printed out and kept in a folder, including Belleau's December 9, 2010 email. On May 23, 2011, the District produced two more emails that had not yet been produced, and on May 24, 2011, produced another 130 pages of hard copy emails from Hohrein, although most of these were duplicates of previous disclosures.

On May 26, 2011, the Does filed the complaint in this action. The District continued to disclose emails responsive to the Does' request, although it is not clear from the record the extent to which these disclosures related to Requests 1 and 2.

On or about July 6, 2011, the District provided the Excel spreadsheet created by Hanners to the Does. This spreadsheet, consisting of 44,471 rows, contains information on all of the emails harvested by Xact Data for the sixteen identified users, without regard for any limitations on subject matter, sender, or recipients. The spreadsheet contains emails created several years prior to September 2, 2010, apparently as far back as 2005, because Hanners did not limit the date range. Although derived from the same information, the spreadsheet was not used by Xact Data in processing the documents for production in the Relativity database. Rather, as discussed above, it was created by Hanners to preserve information regarding the multiple delete dates of the emails that would not be carried forward into the PST files processed by Reizen.

Mr. Doe examined the spreadsheet and, through sorting and analyzing the data, concluded that it appeared to list a number of emails that the District had not at that time provided to him. Zansberg, on behalf of the Does, requested seven additional emails received by Horky on July 11, 2011. On July 13, 2011, Zansberg sent a second request based on Mr. Doe's analysis of the spreadsheet identifying an additional 406 email messages that he believed might

be responsive to Requests 1 and 2 from the emails in the files of Horky, Hohrein, Belleau, Cosper, and Bennett. The request contained a spreadsheet derived from the Excel spreadsheet provided by Xact Data listing the emails by the "PSD#," a unique reference number created by Xact Data, as well as subject, "From," "To," "CC," "Creation Date," "Sent Date," and "Deleted Date."

At the hearing, Mr. Doe testified as to additional analysis he had performed, adding emails from two other users as well as additional emails from Horky, Hohrein, Belleau, Cosper and Bennett, for a total of 572 records responsive to Requests 1 and 2 that he believed the District may not have produced. He also indicated that he had not performed the same analysis for eight other users and not completed the analysis for Cosper and Bennett, so that the ultimate number if the analysis were carried through to completion could be substantially higher.

On July 18, the District produced seven emails in response to the July 11, 2011 request, stating in part that "it took Xact Data approximately 10 hours to identify and retrieve the emails that you requested in your July 11th letter. Therefore, a response to your 400 email request will be delayed."

In preparation for the July 27 show cause hearing, the Does began conducting depositions of District employees, including a deposition of Hohrein on July 19, 2011. During this deposition and the following day, the District produced additional hard copies of emails brought by Hohrein to her deposition.

On July 20, 2011, the District, through counsel, responded to the Does' July 13 request and stated that it would "provide some identified emails because they may relate to [the Doe Child] to be consistent with earlier disclosures that were made regardless of being a public record or educational record." It also stated that some of the requested 406 emails related to

different students or "contained attorney client privileged information" and would thus not be provided. The District also pointed out that some of the emails were in the Relativity database but that Mr. Doe had not selected them for copying and that others were duplicates of other emails that had already been disclosed, although with different document numbers.

On July 21, 2011, the District produced a redacted log of Horky's handwritten telephone conversations containing some references to the matter, including the following (with formatting roughly preserved):

> 11/23 Sarah Belleau
> Jack Robinson
> [Mr. Doe]
> Immediate Lawsuit – No Date!

The District also provided Bennett's handwritten notes from her March 21, 2011 meetings with Belleau on that date.

The evidence at the hearing showed that members of the District Team deleted large amounts of emails on or shortly after the dates on which instructions or reminders to delete emails were sent, including substantial numbers of emails on March 21, 22 and 23, 2011, after the March 21 Request. However, the evidence also showed that mass deletions on or shortly after March 21, 2011 resulted from the search process employed by Agnew and her assistant. Specifically, after Agnew and her assistant brought emails from the dumpster to the users' deleted folders and searched them, they then deleted the emails again, so as to leave those folders in the same condition they were prior to their search. This action created a new deletion date in the metadata associated with those emails.

IV. SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ANALYSIS

A. The Parties' Positions

The Does argue that they have established that the District has improperly denied their right to inspect public records responsive to their Requests 1 and 2. They claim that the evidence has established that the District has engaged in "a deliberate, coordinated, and systematic effort to obfuscate, hide, and even to intentionally *destroy* public records, for the express purpose of preventing the Does from gaining access to them under CORA." They also argue that, in light of this effort, the District has failed to meet its burden of establishing that its subsequent searches of its records—in particular, its email system—have been reasonable, applying a standard primarily developed in federal litigation involving the federal Freedom of Information Act ("FOIA").

The Does also argue that the District has not complied with CORA requirements by withholding documents under a claim of attorney-client privilege or pursuant to the work product doctrine without providing a privilege log identifying and describing the documents withheld and identifying the basis for the claimed privilege.

The Does further argue that the District has failed to comply with its obligations under CORA and in anticipation of litigation. Specifically, the Does contend that the deletion of emails and other records by District employees prior to the March 21 Request constitute spoliation of evidence and warrant the imposition of sanctions by the Court under its "inherent" power.

Based on these claims, the Does seek an order from the Court requiring the District to take the following steps: (1) conduct further searches of email accounts and other electronic and paper files, including portable electronic devices, digital storage media, and telephones of the

District Team, as well as searches of the files of the District's attorneys Farrington and Tom Crabb, several other staff members attorneys for any records responsive to Requests 1 and 2; (2) include additional search terms when conducting these searches that the record shows have been or may have been used to refer to the Doe Child; (3) include in the searches all available back-up tapes and other storage media in the District's possession, custody or control upon which responsive records may be found; (4) conduct a "manual review" supervised by a lawyer of the paper and electronic records discovered through these searches, including but not limited to the 572 emails identified as potentially responsive by Mr. Doe; and (5) produce all responsive records resulting from this process, along with an index of all communications sent between District employees and the District's attorney's concerning the Doe Child that it has withheld as privileged, as work product, or on the basis of some other CORA exception. The Does also request that the Court award them all of the reasonable costs and attorney fees they incurred in this litigation pursuant to CORA and as a sanction for alleged spoliation.

The District responds first, in its mid-hearing motion to dismiss, that the Does failed to meet their burden to show that some or all of the requested records not yet produced are "public records" subject to CORA. Specifically, the District argues that the records at issue were not "'made, maintained, kept or held' for use in the function of educating the Does' son." The District asserts that the 572 emails specifically listed by the Does were not made, maintained or kept by the District, but "retrieved only through the extraction efforts of a third-party data recovery firm." It also argues that the Does have not shown that these emails "are necessary for school officials to keep in order to fulfill government functions."

In its mid-trial motion, and in general, the District argues that the destruction of emails by its employees prior to the March 21 request did not violate any obligations under CORA and that

the Does have failed to establish that District employees deleted any emails subsequent to that request that have not now been recovered, and if responsive, produced to the Does. The District also argues that it has met its burden of establishing that its searches, which indisputably have consumed many hours of its employees' time and substantial expense, have been reasonable under the FOIA standard adopted by the Does, and that it therefore should not be ordered to conduct further searches or produce any further records.

With respect to the Does request for an index of withheld documents and the claims regarding spoliation, the District argues that they have no basis in CORA. Rather, in the District's view, these requests represent an attempt to improperly import to CORA standards and principles applicable in civil discovery proceedings.

B. General CORA Law

The General Assembly has declared that it is "the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as . . . provided by law." C.R.S. § 24-72-201 (2011). A "public record" is a writing "made, maintained, or kept by the state, any agency, institution, ... or political subdivision of the state ... for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds. C.R.S. § 24–72–202(6)(a)(I); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). "Writings" includes "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics", as well as "digitally stored data, including without limitation electronic mail messages . . . ." C.R.S. § 24-72-202(7).

CORA requires custodians of public records to make them available to the public, subject to certain exceptions, including that the records are "privileged." C.R.S. § 24-72-204(2), (3) &

(3)(a)(IV). Because CORA establishes "a strong presumption in favor of public disclosure," exceptions must be construed narrowly. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154, 1156 (Colo. App. 1998). A records custodian must provide access to the requested documents within three working days (if documents are in active use or otherwise not immediately available), unless "extenuating circumstances" exist that permit the custodian to produce the documents within ten working days. C.R.S. § 24-72-203(3)(a)-(b).

If the custodian denies access to any public record, the party requesting access to that record may request a written statement of the grounds for the denial, and such statement shall cite the law or regulation under which access is denied. *Id*. § 24-72-204(4). Any person denied access to any public record may petition the district court for an order directing the custodian to show cause access to that record should not be permitted. *Id.* § 24-72-204(5). In an action under CORA, "to show that CORA applies, the plaintiff must show that a public entity: (1) improperly; (2) withheld; (3) a public record." *Wick Commc'ns Co. v. Montrose Bd. of County Comm'rs*, 81 P.3d 360, 362 (Colo. 2003)

This case raises the issue of the extent that CORA requires an entity to search its records, including its electronic records, an issue that apparently has not been addressed in a reported Colorado case. The parties agree, and the Court concurs that, in the absence of controlling Colorado authority on this issue, it is appropriate under existing precedent to apply the standards developed in the federal courts in FOIA litigation. *See, e.g., Wick Commc'ns*, 81 P.3d at 362-63 (adopting FOIA law for the purpose of interpreting requirements of CORA). Under that FOIA standard, an agency responding to a request under the Act must make a good faith effort to conduct a search for the requested records using methods reasonably expected to produce the requested information. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001)

(citing *Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 27 (D.C.Cir.1998)). Under this approach, the burden is on the governmental agency to establish the reasonableness of the search. *Id.*; *see Wick Commc'ns,* 81 P.3d at 364 (holding that burden is generally on public entity to prove that document does not fit within definition of public record, because public entity "is in the best place to demonstrate why CORA does not apply").

"'The factual question ... is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" *Grand Cent. P'ship v. Cuomo,* 166 F.3d 473, 489 (2d Cir.1999) (quoting *SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1201 (D.C.Cir.1991)).

The court's inquiring "focuses not on whether additional documents exist that might satisfy the request, but on the reasonableness of the agency's search." *CareToLive v. Food and Drug Admin.*, 631 F.3d 336, 341 (6th Cir. 2011). The "continuing discovery and release of documents" after the original production under a FOIA request "does not prove that the original search was inadequate, but rather shows good faith on the part of the agency that it continues to search for responsive documents." *Landmark Legal Found. v. Envtl. Prot.*Agency, 272 F.Supp.2d 59, 63 (D.D.C. 2003); *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("[A] search is not unreasonable simply because it fails to produce all relevant material. . . . "). "The amount of time and staff devoted to a FOIA request are relevant to the reasonableness inquiry." *Landmark*, 272 F.Supp.2d at 64 (citing *Meerpol*, 790 F.2d at 956).

Under FOIA, a "request pertains only to documents in the possession of the agency at the time of the FOIA request." *Landmark*, 272 F.Supp.2d at 66; *accord Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 155 n. 9 (1980) ("There is no question that a 'withholding' must here be gauged by the time at which the request is made since there is no

FOIA obligation to retain records prior to that request."). "FOIA does not impose a document retention requirement on agencies." *Id.* Therefore, in general, an agency "need not attempt to recover electronic data that has been deleted in order to meet its requirement of performing a reasonable search." *CareToLive,* 631 F.3d at 343. Moreover, "FOIA does not require an agency to update or supplement a prior response to a request for records." *James v. United States Secret Service*, __F.Supp.2d __, 2011 WL 4359853 *4 (D.D.C. 2011) (citing cases).

In some cases, however, involving the destruction of documents following a FOIA request, the statute may require an agency to attempt to recover deleted electronic files or recreate information through the use of expert services. *See, e.g., Landmark,* 272 F.Supp.2d at 67 (holding that EPA fulfilled its obligations after post-request destruction of "intact hard drives and the email backup tapes" by "recovering information from the reformatted hard drives to the extent possible"); *Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (holding that an agency is "not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA"). Indeed, in at least one case, a federal court directed a magistrate judge to supervise discovery by a requester "aimed … at identifying instances of unlawful destruction and removal of documents by the [government agency]" after the request was filed and "explore the extent to which the [agency] ha[d] illegally destroyed and discarded responsive information, and possible methods for recovering whatever responsive information still exist[ed] outside of the [agency's] possession." *Judicial Watch, Inc. v. United States Dep't of Commerce*, 34 F.Supp.2d 28, 41 (D.D.C. 1998).

Under FOIA, federal courts have held that a requesting party, in the face of information that an agency is withholding documents pursuant to a FOIA exception, may move for an index of documents withheld pursuant to an exception including the title of the document or category

of documents withheld, the date of the document, the identity of the author and its recipients, and as detailed a factual description as possible without revealing the exempt material, and the statutory exemption claimed for that item or category. *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C.Cir. 1973). The agency may object to the motion, arguing that it is unnecessary, or provide the index. Once an index has been produced, the requester then has "an opportunity to seek to persuade the Court that they should receive" withheld documents or redacted portions of documents or to argue that the index is inadequate. *Nat'l Council of La Raza v. Dep't of Justice*, 345 F.Supp.2d 412, 414 (S.D.N.Y. 2004). A judge may reject the index as inadequate, *El Badrawi v. Dep't of Homeland Security*, 596 F.Supp.2d 389, 395 (D. Conn. 2009), rely on it to rule regarding the production of the listed documents, or review them *in camera* to further investigate the agency's position, *La Raza*, 345 F.Supp.2d at 414.

With respect to costs and attorney fees, "unless the court finds that the denial of the right of inspection was proper, it shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court. . . ." C.R.S. § 24-72-204(5). On the other hand, if the "court finds that the denial of the right of inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian if the court finds that the action was frivolous, vexatious, or groundless." *Id.*

C. Analysis

1. Threshold issues raised by the District's motion to dismiss

The District raised several arguments in its motion to dismiss, most of which are resolved in the discussion below. However, the Court addresses here one aspect of the threshold issue of whether the Does met their initial burden of proof to show that the District "improperly withheld a public record." *Ritter*, 255 P.3d at 1083. The District's argument rests on the premise that the

emails "harvested" by Xact Data were not "made, maintained, kept or held" by the District, because they are now in the possession of Xact Data, and are therefore not public records. This is contrary to CORA. The statute, in relevant part, defines public records as "all writings made, maintained, or kept by … [a] political subdivision of the state … for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6); *Ritter*, 255 P.3d at 1089. The term "held" only applies to the clause "or that are described in section 29-1-902, C.R.S. and *held* by any local-government-financed entity." *Id.* (italics added). The District's attempt to smuggle it into the balance of the definition defies grammar and is not supported by any precedent.

Moreover, the Court rejects the District's argument that the Does have not met their initial burden of showing that CORA applies. Under *Wick Communications,* the burden is on the District—not the Does—as the custodian of the records to show that the requested documents are not public records. 81 P.3d at 363. And although the District may argue that a few specific emails—out of hundreds of pages produced—are not public records under CORA, there is no doubt that the majority of them were "for use in the performance of public functions," *Ritter*, 255 P.3d at 1090 (discussing *Denver Publishing Co.* 121 P.3d at 203), namely, the education of the Doe child. As the District employees testified, the emails were produced in the course of their official duties and sent through the District's email system. Therefore, the Court concludes that the Does have met the burden of showing that CORA applies and, as discussed above, the burden shifts to the District to establish that it conducted a reasonable search for the requested documents and, if appropriate, to establish that any withheld records fall outside of the definition of "public records."

2. Emails with delete instructions sent prior to March 21, 2011

The center piece of the Doe's argument that the District has violated CORA is the December 9, 2010 email sent by Belleau to Hohrein asking her to "ask all involved staff to delete AND destroy any email or paper records related to this family." Indeed, they open their hearing brief with the statement, "No proper understanding of this case can proceed without first reviewing, carefully," that email. The Does also rely on an email sent by Cosper on January 4, 2011, relaying an instruction from Belleau and Hohrein to the District team to "print these documents, delete the emails and empty your trash." And the Does point to the series of emails sent by Belleau on March 20, 2011, shortly after receiving Mr. Doe's records request on that day. They argue that these emails, and others during the same time period, should "shock" the Court and provide compelling reason for it to grant them the relief they request. The Court disagrees.

With respect to the December 9, 2010 and the emails sent in January, 2011, the Court finds, based on Belleau's testimony and the content of the email, that her primary intent in sending this email was to have District employees destroy records, both paper and electronic, related to the Does so as to prevent them from obtaining access to those records under CORA and possibly using statements in them against the District. Her explanations that she intended to destroy any confidential California records in the District's possession in the event that the Doe child did not enroll in the District, and that any duplicate copies that might cause confusion, are at most a partial explanation for her email and are contradicted by the emails plain terms. In addition, Belleau's demeanor on the witness stand was evasive, vague and, with respect to this testimony, not credible.

The Court further finds, however, that Belleau did not anticipate or have reason to anticipate a CORA request related to specific documents or coming at a specific time. There is no evidence that the Does informed her or told her that they planned to file a CORA request on a particular date. Therefore, this case does not involve a situation in which the District destroyed documents shortly before a CORA request that the District knew the Does would probably submit at a particular time so as to thwart their expressed intent. Rather, this case involves destruction of records and deletion of emails based on a general concern regarding a potential CORA request at some indefinite point in the future.

With respect to Belleau's emails of March 20, 2011, the Court finds that Belleau did not understand this to be a CORA request. The testimony of the witnesses was consistent on this point and was not contradicted by any evidence or testimony from Mr. Doe. Moreover, the fact that he filed a CORA request the next day strongly suggests that he himself did not consider the March 21, 2011 request to be a CORA request. The Court makes no findings or determination regarding the nature or scope of the March 20, 2011 request, as the Does have expressly limited the scope of this consideration to Requests 1 and 2 and the Court has not been briefed or asked to consider the requirements for a records request under FERPA.

Given these factual findings, the Court determines that the instructions to destroy records prior to March 21, 2011 do not represent a violation of CORA. The Does have not cited any provision of CORA or any binding Colorado precedent, and the Court knows of none, standing for the proposition that CORA requires the District to retain emails between its employees, including emails that that those employees "made … for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6)(a)(I). Rather, as discussed above with respect to FOIA, the Court

determines that CORA applies only to those documents in the possession of the District at the time of the CORA request. Therefore, under CORA as currently written, District employees may legally delete emails and destroy other records in their possession prior to a CORA request and may take into account, in making this decision, the fact that CORA will provide public access to such documents if they are not destroyed. In other words, the Court concludes that CORA, to a large extent, allows public employees a broad range of discretion to determine, through their decisions to create and destroy documents, what writings ultimately constitute "public records."

The fact that Belleau instructed District employees to destroy records in anticipation of a potential CORA request at some time in the future or to prevent the Does from misconstruing them or using them against the District does not alter this conclusion. The Does do not cite any authority, and the Court has found none, for the proposition that CORA prohibits the destruction of records for these reasons.

Contrary to the Does' assertions, this conclusion is in accord with District policy regarding emails. "GBEE—Employee Use of District Information Technology" provides as follows:

> After an e-mail is received in an employee's inbox, the employee may retain it in the inbox, save it in another folder or delete it. E-mail deleted from the employee's inbox, saved e-mail folders and sent items folder remains accessible through the employee's account in the "deleted items" folder. In order to help ensure that storage space on the District's system is not wasted, employees shall delete the e-mails in their inbox, saved e-mail folders, sent items folder and deleted items folder when they are no longer needed. After e-mail is deleted from an employee's deleted items folder, it will be retained by the District in archival storage for 30 days and then permanently deleted unless otherwise provided by law or District policy, or dictated by District needs.

District employees testified that this was their understanding of the District's policy and practice, although Agnew's testimony made clear that the permanent deletion of emails did not occur after thirty days because of a flaw in the District's system.

The Does believe strongly, although they fail to articulate any legal or policy basis for their belief, that allowing District employees to delete emails or destroy records in anticipation of potential CORA records requests is contrary to the public interest and that CORA somehow implicitly prohibits the destruction of public records for this reason. On the other hand, the District apparently believes, although they too did not articulate the basis for their position, that public employees be allowed to control what "writings" remains as "public records" and that any prohibition on destruction or deletion would be impractical or counterproductive. The Court can imagine plausible arguments for both positions. However, the Court's role is not to make policy choices such as this one. Rather, it believes that this issue is best addressed by the General Assembly, which is able to weigh the various pragmatic, economic, political and perhaps even moral considerations necessarily involved in its resolution. *See Ritter*, 255 P.3d at 1093 (declining to expand CORA's applicability beyond that intended by General Assembly because "expanding a statute's reach is an inherently legislative function not proper for a court").

The Does argue, citing C.R.S. § 18-8-114(1)(b), that "CORA recognizes [a] document preservation principle expressly, making it a misdemeanor to willfully and knowingly violate *any* provision of the open records statutes." However, this provision only has meaning to the extent that CORA contains another provision prohibiting the destruction of public records.

Perhaps recognizing the lack of a basis for their position under CORA, the Does argue at length that the District had an obligation, under well-established case law, to preserve all evidence "relevant to pending, imminent, or reasonably foreseeable litigation." *Castillo v. Chief*

Alternative, LLC, 140 P.3d 234, 236 (Colo. App. 2006). As the Does point out, failing to comply with this duty may subject a party to sanctions. *Id.* ("Sanctions may be imposed both to punish a party who has spoiled evidence and to remediate the harm to the injured party from the absence of that evidence.") In support of this argument, the Does presented substantial amounts of testimony and evidence at the hearing that the District actually or reasonably should have anticipated litigation related to the Doe Child and therefore that the instructions to destroy records sent prior to March 21, 2011 constitute "spoliation of evidence."

In this case, however, the Does appear to seek sanctions for spoliation of records that may be evidence in another action that the Does may file in the future based on state and federal statutes or causes of action other than CORA, such as the IDEA. In the Court's view, this is improper. The Does have vigorously opposed any attempt by the District to have the Court consider the standards imposed by federal or state law other than CORA and FOIA or to introduce any evidence regarding the actual services required by their child or provided by the District. The consequence of this focus on CORA is that no other causes of action are before the Court and it is therefore impossible for Court to determine whether any of the deleted emails or destroyed records in this case would be or might be evidence, much less whether the District's actions constitute "spoliation."

To the extent that the Does are alleging that the public records constitute "evidence" in this case, the Court disagrees, particularly in light of its determination that the District had no duty to retain records under CORA prior to the March 21, 2011 CORA request. To hold otherwise would be to alter fundamentally CORA's requirements without any statutory basis. In addition, the Court finds that the Does established only that the Belleau anticipated a possible CORA request, not CORA litigation, at the time any of the instructions to destroy records were

issued; rather, to the extent that it anticipated litigation—and to the extent that the Does threatened litigation—it at all times appeared to center on an action under the IDEA. For these reasons, in the Court's view, the issue of whether any destruction of records constitutes spoliation should and must be addressed if and when the Does file an action potentially involving those records. At that time, the court hearing the action will be well-positioned to determine the extent of any spoliation and the appropriate remedy, in light of the causes of action then at issue.

The published cases cited by the Does all involve spoliation of evidence in the action before the Court. The Does do not cite any published cases holding that a court may impose sanctions for spoliation of evidence prior to the filing of an action involving that alleged evidence. The single case cited by the Does supporting their position is an unpublished "Order Denying the City of Fort Morgan's Motion to Dismiss Defendant's Counterclaim," issued by Judge Douglas R. Vannoy in *City of Fort Morgan v. Eastern Colorado Publishing Co.*, Morgan County Case No. 08CV2, on September 2, 2008. In that order, Judge Vannoy ruled that a claim could go forward under CORA "for spoliation of public records in advance of an anticipated request for access to those records." In reaching this conclusion, Judge Vannoy stated that "no persuasive reason has been shown why a remedy for spoliation of evidence cannot be imposed if a municipality destroys public records in advance of an anticipated request for access to those records under CORA. After all, CORA and the spoliation doctrine serve both punitive and remedial functions."

The Court does not find this reasoning persuasive. The assertion that CORA and the spoliation doctrine serve both punitive and remedial functions, even if true, is not a good reason for importing spoliation into CORA or creating CORA requirements not supported by the plain language of the statute. The Court also believes that Judge Vannoy's reasoning improperly

places the burden of persuasion and proof on the defendant rather than on the plaintiff. The burden is on the plaintiffs to show a reason why the Court may impose a requested remedy for spoliation evidence, not on the defendants to show "why a remedy … cannot be imposed." As discussed above, the Court concludes that the Does have not met this burden. Finally, Judge Vannoy ruled in the context of a motion to dismiss and thus did not squarely consider the issue of actually imposing sanctions, as the Court must in this case.

For these reasons, the Court finds and concludes that the instructions to delete emails and records issued prior to March 21, 2011, are not relevant to this case under CORA.

3. Horky's March 23, 2011 email

On March 23, 2011, two days after the submission of Requests 1 and 2, Horky sent out an email to members of the District team discussing aspects of that CORA request. This email specifically referred to a portion of that request—not at issue in this case—related to various personnel records. The Court finds that Horky's testimony that the portions of this email that instructed the recipients to delete "your message," "your deleted," and "your sent" were simply a reflection of training he had received the prior week, and not instructions relayed from Belleau, to be partially, but not wholly credible. Horky's demeanor on the witness stand was at times evasive, but in general he appeared to be sincere. In addition, the content of the instruction itself, directed at "your message," "your deleted," and "your sent," supports his testimony that he was simply repeating a generic direction rather than specific instructions. Indeed, in contrast to Belleau, he did not instruct employees to delete records specifically related to the Does or their child.

Even given this finding, however, it is possible and perhaps even probable that this email was interpreted by some of its recipients as a specific instruction regarding records related to the

Does. Although there is no clear evidence that any employees deleted emails because of this email, it certainly raises legitimate concerns regarding the District's response to Requests 1 and 2. Therefore, the Court finds that this instruction is relevant to this case, as discussed further below, with respect to the adequacy of the District's search for responsive records.

4. Adequacy of District's Search

The Court finds that the District has met its burden of establishing that the searches it has conducted were reasonably calculated to discover the requested documents. The Court finds, based on the undisputed testimony, that the District spent tens of thousands of dollars and several hundred hours of staff time responding to the Does' requests. Although the Court believes that it is possible that additional documents responsive to Requests 1 and 2 may exist, it finds and concludes that the District need not search for these documents to comply with its obligations under CORA.

This case has focused largely on emails, and the Court will first address these records. The Court concludes, based on its review of case law applying FOIA, as a general rule the District is not required to hire outside experts to search for email in response to a CORA request. *See, e.g.*, *CareToLive*, 631 F.3d at 342-43 (rejecting claim that agency must use an information technology expert and attempt to recover electronic documents that have been deleted). However, the Court further finds and concludes that a reasonable search for responsive emails by the District must generally include the deleted folders and the dumpster. Emails in these two locations, although a given employee may consider them to be gone forever, are nevertheless accessible to ordinary employees with only general knowledge of the District's email system, and thus they can serve as *de facto* storage for an employee. A ruling that an agency was not reasonably bound to search these locations would allow employees to evade CORA requests

simply by temporarily moving responsive emails that they do not wish to produce to the deleted folder or even in the dumpster, and then recovering them from those locations once the search is over.

Moreover, in cases, such as this one, involving the deletion or attempted deletion of responsive emails after the submission of a CORA request (or perhaps in cases, unlike this one, involving deletion prior to a specific anticipated CORA request), the Court finds and concludes that a reasonable search necessarily includes a search of the dumpster. To the extent that such a search may only be performed efficiently by outside experts, the District may have to hire a firm such as Xact Data to perform it. The Court cautions, however, that the District in taking this step should carefully consider the type of services it needs and the impact the services might have on the location and production of responsive documents. The testimony at the hearing indicated that the processing provided by Xact Data, while perhaps appropriate to preserve evidence in the context of civil or criminal discovery, actually prevented the District from conducting straightforward searches of the "harvested" emails, thus acting as a barrier rather than an aid to disclosure.

With respect to search terms, the Court finds and concludes that a reasonable search of responsive emails or electronic documents must be based on search terms "reasonably calculated to discover the requested documents." *SafeCard Servs.,* 926 F.2d at 1201. Where the District has not adopted a routine practice for identifying emails related to a particular student or family, then a reasonable search will necessarily involve more terms and dramatically increase the cost of the search. *See Canning v. United States Dep't of Justice*, 919 F.Supp. 451, 460 (D.D.C. 1994) (holding that FOIA required agency to perform additional search using newly discovered second name where files kept under that name).

Applying these principles to the facts of this case, the Court finds and concludes that the first search performed by Agnew and her assistant was reasonable except for the fact that it was limited only to the Doe Child's first and/or last names. Given the District's failure to establish and follow any consistent practice for referring to the Doe Child in emails, this search did not meet the standard of a reasonable search because it was not likely to turn up a large proportion of responsive emails. However, all or almost all of this search occurred prior to Horky's email of March 23, 2011, and therefore would have been reasonable even if it had not included the dumpster.

Given the lack of search terms and Horky's email of March 23, 2011, the Court agrees with the Does that the District was required to perform an expanded search in response to Requests 1 and 2, including an expanded list of search terms and a search of the dumpster. In light of the inability of the District to accomplish this search efficiently using its own resources, the Court finds that it was reasonably necessary for the District to hire Xact Data to perform it. The Court further finds and concludes that the search conducted by Xact Data met the standard and complied with the requirements of CORA. The search contained a large number of search terms, including variant spellings and common misspellings, that were reasonably calculated to discover responsive emails, and included a comprehensive search of the dumpster, which would have included at the time the emails were "harvested" any emails deleted in response to Horky's email of March 23, 2011.

The Does argue that they have shown that this search was not reasonable by listing 576 emails that they claim have not been produced and appear likely to be responsive to Requests 1 and 2 based on dates, senders and recipients, and subject lines. The Court rejects this argument for several reasons. First, the Does have not shown that these emails have not in fact been

produced to them as a result of the Xact Data search. Second, the Does' position rests on the assumption that they are entitled to all records from the dumpster, even if those were properly deleted to the dumpster prior to the request. Many if not most of the emails listed by the Does may fall into this latter category. Third, at least some of the emails listed appear not to be responsive to Requests 1 and 2 because they were sent before the date specified in those requests or after the submission of those requests. Based on the FOIA law discussed above, the Court rejects the Does' claim that they can assert a continuing request for responsive documents. *James,* __F.Supp.2d at __, 2011 WL 4359853 *4 (citing cases); *see also, Mandel Grunfeld & Herrick v. United States Customs Serv*., 709 F.2d 41, 43 (11th Cir. 1983) (determining that plaintiff was not entitled to automatic mailing of materials as they are updated). Fourth, the District need only establish that it conducted a reasonable search, not that it produced every possible responsive document. *Meeropol* ,90 F.2d at 952-53 ("[A] search is not unreasonable simply because it fails to produce all relevant material. . . . ").

For the same reasons, the Court also rejects the Does' contention that a reasonable search necessarily includes a "manual review" supervised by a lawyer of all of the emails, or at least of a subset of some 5,000 records sent after September 1, 2010 between the fifteen named employees, a search of home computers or other electronic repositories, such as smart phones, and a search of the files of the District's lawyers. Moreover, these requests are largely based on the Does' position that District employees acted improperly in deleting emails prior to the CORA request and therefore that a reasonable search must attempt to recover these improperly deleted emails. Because the Court rejects this position, it also rejects the Does' request for relief based upon it. To the extent that there was improper deletion of emails to the dumpster after March 21, 2011, the District's search was reasonably calculated to recover them.

Turning to paper records, the Court finds and concludes that the District's search for such records was reasonable. As with the emails, the Does' assertion that this search was not reasonable is based on their position that any destruction of records by the District prior to March 21, 2011 was improper. As explained above, the Court rejects this position. Moreover, the Does have not identified any paper records that they believe should still be produced by the District or how the District should conduct additional searches. As a result of this litigation, the District has produced two additional sets of paper records—Horky's telephone log and some meeting notes of Bennett—demanded by the Does. However, there is no evidence that there are further paper records that were in possession of the District on March 21, 2011. Rather, the evidence, including the emails of Belleau and others on March 20, 2011, and the testimony of Bennett, support a finding that the District made efforts to search for and collect responsive paper records in response to the March 20, 2011 request, and that these were promptly provided to the Does.

5. The withholding of responsive records as privileged

The Does request for a listing of the documents withheld by the District as privileged or work-product is supported by the plain language of CORA: "If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, and such statement shall cite the law or regulation under which access is denied." C.R.S. § 24-72-204(4). The Court sees no reason, in an appropriate case, why it should not adopt the procedure adopted by the federal courts under FOIA as discussed above to enforce the plain language of this statutory provision.

In this case, the Does have requested an index of documents withheld by the District to allow them to identify and challenge that decision. The District has responded that CORA only entitles the Does "to a statement of the law or regulation under which access is denied, and

nothing more." The Court rejects this position, as it renders the statute meaningless. A "statement" not linked to some means of identifying the particular document being withheld, as proposed by the District, is useless because it cannot be challenged by a requester or reviewed by the Court. As one treatise stated,

> The indexing function serves three important policy roles. It forces the agency to evaluate carefully each page or document withheld. Also it enables the court to fulfill its duty to rule on the applicability of the exemption. Third, it gives the requester as much information as possible so that the requester can make a more useful presentation of argument.

James T. O'Reilly, *1 Fed. Info. Discl.* § 8:16; *see also Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005) (adopting privilege logs and federal procedure for discovery requests involving claims of privilege for medical records and discussing benefits of approach).

The District also argues that the General Assembly's inclusion of a more detailed index provision with respect to records withheld under the common law or deliberative process privilege indicates that it did not intend to impose a similar requirement with respect to other exemptions under CORA. C.R.S. § 24-72-204(3)(a)(XII). The Court finds this unconvincing. The two provisions are actually, as a practical matter, quite similar, with the primary differences being that the latter provision requires an entity to "specifically describ[e] each document withheld" and explain "why disclosure would cause substantial injury to the public interest." *Id*. The first requirement, however, is implicit in the first provision, as discussed above, since a statement of privilege without any identification of the withheld documents would be meaningless. Rather, the statute appears to assume that all parties know the particular document at issue. The second requirement is plainly inapplicable in the context of other exemptions.

Therefore, in this case, the Court grants the Does' request for an index listing the title of each document withheld; the date of the document, the identity of the author and its recipients, and as detailed a factual description as possible without revealing the exempt material; and the statutory exemption claimed for that item or category. In addition, to the extent that District is withholding documents responsive to Request 1 and 2 because it contends that they are not "public records" under CORA, as discussed above, it must also include those documents in the index to carry forward its burden under *Wick Commc'ns*. The District shall file this index within 21 days of the date of this order. The Does shall then have 15 days to respond to the index with a written brief objecting to the index or portions of it as inadequate and challenging the District's decision to withhold one or more of the listed documents, as they believe appropriate. The District shall then have 10 days to reply to this response. The Court will consider these objections and challenges and the reply to them and may order any one or more of the following: that the parties appear at a hearing on the matter; that the District revise the index to address any inadequacies; that the District provide specified documents for *in camera* review; that the District produce specified documents to the Does; or that the District need not produce specified documents. The Court will address the issue of the application of the "crime/fraud" exception as appropriate in this process. In light of the fact that the requirement for an index is not set forth explicitly in CORA or in binding precedent, the Court declines to construe the District's failure to produce such an index to date as a waiver of any claim of privilege. *See Alcon*, 113 P.3d at 742 (granting party opportunity to reassert privilege after trial court found overbroad waiver).

6. Costs and reasonable attorney fees

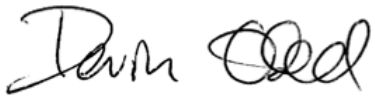
Because this order does not resolve all of the issues before it, the Court at this time reserves ruling on the Does' request for costs and reasonable attorney fees pursuant to C.R.S. § 24-72-204(5).

V. CONCLUSION

Accordingly, the Court DENIES the Does' request that it order the District to perform additional searches and GRANTS the request that the District submit an index of withheld documents as described in detail above within 21 days of the date of this order. The Court will set further proceedings as appropriate in light of any objection to the index and to resolve the issue of attorney fees.

Dated this 1st day of November, 2011.

BY THE COURT:



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Devin R. Odell
District Court Judge