

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AARON C. STEVENSON, et al.,
Plaintiffs,
v.
THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants.

No. C-11-4950 MMC

ORDER DENYING PLAINTIFFS' MOTION FOR TERMINATING SANCTIONS, OR, ALTERNATIVELY, LESSER SANCTIONS, FOR SPOILIATION OF EVIDENCE

Before the Court is the "Motion for Terminating Sanctions, or, in the Alternative, Lesser Sanctions, Against Defendants for Their Intentional Spoliation of Relevant Evidence," filed August 7, 2015, on behalf of plaintiffs Aaron C. Stevenson, Kevin D. Taylor, Kevin W. Smith, Audry Lee and Kirk W. Richardson. Defendants, City and County of San Francisco, San Francisco Fire Department, San Francisco Fire Commission, and Civil Service Commission of San Francisco, have filed opposition, to which plaintiffs have replied. The matter came on regularly for hearing September 18, 2015. Murlene J. Randle and Robert William Reed of the Law Offices of Murlene J. Randle appeared on behalf of plaintiffs. Jonathan C. Rolnick of the San Francisco City Attorney's Office appeared on behalf of defendants. Having read and considered the parties' respective written submissions, and having considered the parties' oral arguments, the Court rules as follows.

//

BACKGROUND

1
2 In the instant action, plaintiffs, each of whom is African-American and employed or
3 formerly employed by the City and County of San Francisco (“the City”) in the Fire
4 Department, challenge the Fire Department’s decision not to promote them to the position
5 of H-50 Assistant Chief. In particular, they challenge as racially discriminatory a
6 promotional examination offered by the City in 2010, the results of which were used by the
7 Chief of the Fire Department to decide who would receive promotions to the position of H-
8 50 Assistant Chief. By the instant motion, plaintiffs argue they are entitled to sanctions
9 because the City destroyed certain documents, specifically, “scoring keys,” also called
10 “worksheets,” used by the individuals who rated the examination.

11 Twenty-three persons took the H-50 examination in 2010, which examination
12 consisted of two exercises. (See Randle Decl., filed August 7, 2015, Ex. A at 20.)

13 First, on August 8, 2010, the candidates took the “fire scene simulation exercise”
14 (“FSSE”), which exercise was intended “to measure how well a candidate can coordinate,
15 direct, and give orders to crews under his or her command at a fire emergency.” (See id.
16 Ex. A at 13, 18, 20.) The candidates were given “four different scenarios,” for example, a
17 “high rise scenario” (see id. Ex. A at 18); as to each scenario, the candidates were provided
18 with certain “written and visual information,” such as “photos of the fire building,” and each
19 scenario was presented to the candidate “via a recorded audio narration.” (See id.) Each
20 candidate “responded orally to the questions,” his/her responses were “recorded via digital
21 recorder” (see id.), and a “verbatim transcription of the candidate’s verbal responses to the
22 test questions” was prepared (see id. Ex. A at 24).

23 Second, on October 30, 2010, the candidates took the “supervision and counseling
24 exercise” (“S/PCE”), which exercise was intended “to measure specific job-related
25 knowledge areas and abilities including monitoring, evaluating, and counseling personnel;
26 ensuring compliance with Department policy; training; information gathering, report writing,
27 and record keeping; and the interpersonal skills of working with others.” (See id. Ex. A at
28 13, 19-20.) In the first step of the exercise, a “roleplay,” each candidate played the role of

1 “an Assistant Chief, counseling a Battalion Chief,”¹ which roleplay was “recorded using a
2 video camcorder”; in the second step of the exercise, each candidate “document[ed] the
3 meeting” in writing.” (See id. Ex. A at 19.)

4 For both exercises, a committee met to “develop the answer (scoring) key” (see id.
5 Ex. A at 20), which meeting occurred “simultaneously with the administration of the
6 respective test exercise to ensure that answers could not be leaked prior to the exam
7 process” (see id. Ex. A at 21). With respect to the FSSE, each committee member
8 “independently listed the behaviors (anchors) that would appropriately respond to the four
9 test questions,” and, then, after discussion among all members, the committee determined
10 “the final product (including point values of the anchors . . .).” (See id.) With respect to the
11 S/PCE, the committee members “developed a full set of appropriate responses” to both
12 “the counseling portion” and “the documentation portion” of the exercise, and then
13 “discussed and determined the point value of each item.” (See id. Ex. A at 22.)

14 The scoring keys developed by the committees were used during the rating process,
15 which process occurred after each exercise had been completed.² The FSSE raters
16 “assessed a verbatim transcription of the candidate’s verbal responses to the test
17 questions,” and, consequently, had no opportunity to view any of the candidates. (See id.
18 Ex. A at 24.) The S/PCE raters “evaluated the counseling session by viewing and listening
19 to the video recording, and evaluated the written documentation of the meeting.” (See id.)
20 The responses were rated by a team of two, each of whom first made an “independent
21 assessment” (see id. Ex. A at 23-24), after which the two raters “would confer and reach [a]
22 consensus on the assigned ratings” (see id. Ex. A at 24). In that regard, with respect to the
23 FSSE, the raters were instructed (1) to “[i]ndependently review the candidate response
24 while referring to the scoring key to check off the statements that best describe[d] the

25
26 ¹The “Battalion Chiefs” were “actors trained to perform the role of a battalion chief.”
(See id. Ex. A at 20.)

27 ²The individuals who rated the responses to the FSSE were ten “Fire officers in the
28 rank of Battalion Chief or higher from jurisdictions outside San Francisco” (see id. Ex. A at
23), while four individuals who were “officers” rated the responses to the S/PCE (see id.).

1 candidate's response" and "[t]otal the score for each dimension and enter this number in
2 the 'Total' box" on the scoring key, and then (2) to use together a form titled Record of
3 Scores, specifically, to place thereon, in addition to the candidate's "credential number" and
4 the raters' "numbers" and signatures, the "point total for each dimension reflecting the
5 independent rating from each rater" and "[t]he consensus score for each dimension." (See
6 id. Ex. 4, Tab 4 at 25.)³ Lastly, each candidate's score was calculated by the City's
7 Department of Human Resources ("DHR") based on the numbers set forth on the Record
8 of Scores. (See Johnson Decl., filed August 28, 2015, ¶¶ 1, 10-11, 14.)

9 On December 20, 2010, the DHR "posted the H-50 eligible list" and plaintiffs
10 thereafter "filed protests with the Civil Service Commission." (See id. ¶¶ 15, 17.) On
11 January 4, 2011, the eligible list was "adopted" and, on January 7, 2011, plaintiffs' protests
12 were denied by the Director of the DHR. (See id. ¶¶ 19-20.)

13 Dave Johnson ("Johnson"), a Manager in the DHR who had "coordinated the
14 development and administration of the H-50 Assistant Chief Examination" (see id. ¶¶ 1, 5),
15 "destroyed" the "scoring worksheets" used by the raters (see id. ¶¶ 14, 21). He did so
16 "sometime during the first week of January 2011 after the adoption of the eligible list and
17 the denial of plaintiffs' protest[s]" (see id. ¶ 21), which destruction he understood was
18 "[c]onsistent with the practice [of the City] at the time" (see id.). According to Johnson,
19 "once a list is adopted" and the "protest and appeal is over," the "scoring worksheets" can
20 be destroyed, as City employees "no longer have to verify the calculation of candidate
21 scores." (See Randle Decl. Ex. E at 120:25 - 121:6.)

22 DISCUSSION

23 Plaintiffs argue they are entitled to sanctions, in the form of an order striking
24 defendants' answer or an adverse instruction to the jury, in light of the destruction of the
25 worksheets used by the raters.

26
27 ³Although the specific instructions provided to the individuals who rated the S/PCE
28 have not been provided to the Court, neither party has suggested the S/PCE instructions
pertaining to use of the scoring keys and the Record of Scores differed from the FSSE
instructions in any material respect.

1 District courts have discretion to impose terminating sanctions where “a party has
2 engaged deliberately in deceptive practices that undermine the integrity of judicial
3 proceedings.” See Leon v. IDX Systems Corp., 464 F.3d 951, 958 (9th Cir. 2006)
4 (affirming dismissal of complaint, where plaintiff was “on notice that [certain computer] files”
5 were “relevant” to his claims and “intentionally destroyed many [such] files” during
6 pendency of action, causing defendant to be “prejudiced” in its ability to defend against
7 claims). District courts also have discretion to impose lesser sanctions, such as
8 “permit[ting] a jury to draw an adverse inference from the destruction or spoliation [of
9 evidence] against the party or witness responsible for that behavior.” See Glover v. BIC
10 Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

11 As the parties herein acknowledge, although the Ninth Circuit has not set forth “a
12 precise standard” for determining when sanctions for the destruction of evidence are
13 appropriate, district courts “have widely adopted the Second Circuit’s three-part test,” which
14 test requires the party seeking sanctions to establish the following: “(1) that the party
15 having control over the evidence had an obligation to preserve it at the time it was
16 destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that
17 the evidence was relevant to the party’s claim or defense such that a reasonable trier of
18 fact could find that it would support that claim or defense.” See Apple Inc. v Samsung
19 Electronics Co., Inc., 888 F. Supp. 2d 976, 989-90 (N.D. Cal. 2012).

20 With respect to the first of the above-referenced elements, plaintiffs argue that, at
21 the time Johnson destroyed the scoring worksheets used by the raters, defendants were
22 under an obligation to preserve them. According to plaintiffs, the obligation arose based on
23 (1) complaints about the H-50 examination submitted by letter to the Civil Service
24 Commission and the DHR, (2) a motion for a temporary restraining order filed by a third
25 party in another action, (3) the DHR’s record retention policy and (4) a state statute and a
26 federal regulation requiring employers to retain certain employment records.

27 As discussed below, the Court finds plaintiffs have not offered sufficient evidence to
28 support a finding that, at the time the scoring worksheets were destroyed, defendants had

1 an obligation to preserve them.⁴

2 **A. Complaint Letters Submitted to Civil Service Commission/DHR**

3 After the FSSE concluded, but before the results were posted, each plaintiff
4 submitted a complaint in the form of a letter, and in some instances, two or three letters, to
5 the Civil Service Commission and/or the DHR, identifying asserted problems with the
6 administration of the test. (See Randle Decl. Ex. K.) For example, one complaint
7 challenged a scenario in which the narrator twice announced the arrival of “Rescue Squad
8 5” (see id. Ex. K at 2), one contended that certain scenarios required the candidates to
9 perform functions that ordinarily are the responsibility of a Lieutenant or a Captain, but not
10 of an Assistant Chief (see id. Ex. K at 17), and one claimed the “manuals that the
11 candidates were directed to study” had “numerous contradictions” (see id. Ex. K at 55).
12 After the results of the examination had been posted, each plaintiff submitted a complaint in
13 the form of a letter to the Civil Service Commission, in which each plaintiff stated that the
14 “scoring calculation system derived by the exam unit has generated flaws in the scoring of
15 the exam” and that African-Americans in the “applicant pool have placed well behind over
16 50% of their peers highlighting the [in]validity of the examination.” (See id. Ex. K at 9-10,
17 23-24, 35-36, 48-49, 61-62.)⁵

18 //

19 _____
20 ⁴In light of such finding, the Court does not consider the other elements of the three-
part test.

21 ⁵Defendants object, on grounds of lack of authentication, to the Court’s consideration
22 of the copies of the complaint letters and responses thereto. With respect to plaintiff
23 Taylor’s complaint letter dated August 16, 2010, plaintiffs have provided sufficient
24 authentication (see Randle Decl., filed September 4, 2015, Ex. C at 106:10-17), albeit after
25 the moving papers had been filed, and, as to said document, the objection is
26 OVERRULED. Plaintiffs seek to authenticate the remaining complaint letters and
27 responses by stating that plaintiffs received them from defendants “in response to the
28 [p]laintiffs’ Discovery Request.” (See Randle Decl., filed August 7, 2015, ¶ 13.) Although
there is some ambiguity in the law as to whether it is sufficient to simply identify the party
from whom a document was received or whether it is necessary to additionally identify the
discovery request prompting such production, see, e.g., Orr v. Bank of America, NT & SA,
285 F.3d 764, 777 & n.20 (9th Cir. 2002), in this instance, given the nature of the
documents in question and the party from whom they were received, the Court finds a
sufficient foundation has been laid, and, accordingly, the objection as to said documents
likewise is OVERRULED.

1 Plaintiffs argue the above-referenced complaint letters put defendants on notice that
2 plaintiffs would file a lawsuit to challenge the H-50 examination. Defendants respond that,
3 given the large volume of “protests” the City receives concerning Civil Service
4 examinations, the City does not consider its receipt of such protests to place it on notice of
5 litigation. (See Rolnick Decl., filed August 28, 2015, Ex. H (deposition of Jennifer Johnston,
6 DHR’s Chief of Policy) at 20:8-11, 141:12-21) (testifying she does not consider “protests”
7 challenging examinations as “put[ting] [the City] on notice” of “litigation,” as the City
8 receives “hundreds” of such complaints.)

9 The “obligation to preserve evidence arises when the party has notice that the
10 evidence is relevant to litigation — most commonly when suit has already been filed,
11 providing the party responsible for the destruction with express notice, but also on occasion
12 in other circumstances, as for example when a party should have known that the evidence
13 may be relevant to future litigation.” Kronisch v. United States, 150 F.3d 112, 126 (2nd Cir.
14 1998). “Before litigation begins, courts agree that the receipt of a demand letter, a request
15 for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger
16 the duty to preserve evidence.” In re Ethicon, Inc. Pelvic Repair Systems Product Liability
17 Litig., 299 F.R.D. 502, 512 (S.D. W.V. 2014) (citing cases). “[I]t is less clear,” however,
18 “what other occurrences should alert a party to preserve evidence for future litigation.” Id.;
19 see, e.g., Apple, 888 F. Supp. 2d at 991 (holding duty to preserve evidence “triggered”
20 when “potential claim is identified”); Hynix Semiconductors, Inc. v. Rambus Inc., 591 F.
21 Supp. 2d 1038, 1061 (N.D. Cal. 2006) (finding future litigation reasonably foreseeable when
22 it is “more than a possibility”).

23 Neither party has cited to any authority addressing the question of whether
24 complaint letters of the type on which plaintiffs rely are sufficient to give notice that future
25 litigation is likely to ensue. The Court thus considers whether the subject communications
26 are similar in purpose or effect to the types of communications courts have concluded
27 provide notice of litigation. See, e.g., In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d
28 1060, 1069 (N.D. Cal. 2006) (holding duty to preserve evidence arose when plaintiff’s CEO

1 advised defendant that if it did not take certain action, defendant “would be sued”).

2 Unlike demand letters, threats of litigation, or other communications in which a party
3 states an intent to pursue legal action, the subject complaint letters do not implicitly or
4 expressly threaten litigation. Rather, as plaintiffs acknowledged at the hearing on the
5 instant motion, the purpose of such letters is to request that the City not use the results of
6 an examination that has been given and, instead, to offer a new examination.
7 Communications that identify a dispute but seek a resolution thereof by means other than
8 by litigation have been held insufficient to reasonably place the receiver on notice of future
9 litigation. See, e.g., Cache La Poudre Feed, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614,
10 622 (D. Colo. 2014) (finding defendant not on notice when it received letter from counsel for
11 trademark holder, where letter, although identifying “client’s trademark rights,” did not
12 “threaten [] impending litigation” and stated client was “willing to explore a negotiated
13 resolution”; citing cases finding communications seeking to resolve identified dispute by
14 means other than litigation not sufficient to place receiver reasonably on notice of litigation).

15 Moreover, denials of complaints submitted to the Civil Service Commission are
16 “final” and not further reviewable. See San Francisco Civil Service Commission Rules,
17 Rule 311.4 (providing, with respect to challenges to examination, “decision of the Civil
18 Service Commission is final and not subject to reconsideration”). Consequently, plaintiffs’
19 complaint letters are unlike administrative claims that must be submitted as a condition of
20 bringing a lawsuit, which administrative claims courts have found give rise to a duty to
21 preserve evidence upon notice thereof. See, e.g., Tabon v. University of Pennsylvania
22 Health System, 2012 WL 2953216, at *2 (E.D. Pa. July 20, 2012) (holding, with respect to
23 employment discrimination claim, “duty to preserve arises when the defendant receives
24 notice of an EEOC charge”); Powell v. Town of Sharpsburg, 591 F. Supp. 2d 814, 819
25 (E.D. N.C. 2008) (finding defendant’s duty to preserve evidence relevant to employment
26 discrimination charge arose when it received notice of plaintiff’s “EEOC charge of

27 //

28

1 discrimination”; citing cases).⁶

2 Lastly, the Court has considered plaintiffs’ argument that emails exchanged between
3 various City employees, acknowledging receipt of the complaint letters, support a finding
4 that defendants did, in fact, treat those letters as evidencing a likelihood of litigation.
5 Although the emails plainly evidence defendants’ knowledge that plaintiffs had complained
6 about the H-50 examination (see, e.g., Randle Decl. Ex P (email from Johnson to his
7 superior) CCSF-AS 019572 (referencing “draft responses” to complaint letters)), nothing in
8 those exchanges in any manner suggests that any of those employees either anticipated or
9 should have anticipated any future litigation.

10 Accordingly, the Court finds the complaint letters were insufficient to place
11 defendants on notice that future litigation was likely to ensue.

12 **B. Motion for Temporary Restraining Order Filed in Johnson Case**

13 In 2009, a third party to the instant action, Mark Johnson, filed in district court an
14 action challenging the results of a different civil service examination given by the City,
15 specifically, a 2008 examination for the H-40 Battalion Chief position. See Johnson v. City
16 and County of San Francisco, Civil Case No. 09-5503 JSW. On July 23, 2010, the plaintiff
17 therein filed an application for a temporary restraining order (“TRO”), seeking to postpone
18 the date on which the City had announced it would give the H-50 Assistant Chief
19 Examination, which application was denied by order filed August 5, 2010. Plaintiffs herein
20 argue the application for a TRO put defendants on notice that the results of the H-50
21 Assistant Chief Examination would be challenged in court.

22 As set forth in the district court’s order denying the application for a TRO, see
23 Johnson v. City and County of San Francisco, 2010 WL 3078635, at *1 (N.D. Cal. August
24 5, 2010), and acknowledged at the hearing on the instant motion, the plaintiff in Johnson

25
26 ⁶Each plaintiff herein did submit an administrative charge to the Equal Employment
27 Opportunity Commission and/or the Department of Fair Employment and Housing, but the
28 City received notice of the earliest of those charges on January 14, 2011 (see Bushong
Decl., filed August 28, 2015, ¶ 4), a date after the subject scoring worksheets had been
destroyed.

1 sought to postpone the H-50 Assistant Chief Examination not because he had any
2 complaint about the content of the H-50 Assistant Chief Examination but, rather, because,
3 as a result of his not having been promoted to the H-40 Battalion Chief position, he was not
4 qualified to take the examination for the H-50 Assistant Chief position. Indeed, at the time
5 his application for a TRO was filed and denied, the H-50 examination had not been given
6 and the content thereof was unknown by the candidates and potential candidates.

7 Accordingly, given the above-described circumstances, the Court finds the
8 application for a TRO filed in Johnson was insufficient to put defendants on notice that
9 candidates who later took the H-50 examination would file a lawsuit challenging the
10 examination.

11 **C. City's Retention Policy**

12 Plaintiffs argue that the City was obligated to preserve the scoring worksheets used
13 by the raters, irrespective of any notice of litigation, in light of the DHR's record retention
14 policy. The policy, titled "Department of Human Resources Record Retention and
15 Destruction Policy," was "adopted pursuant to Chapter 8 of the San Francisco
16 Administrative Code, which requires each department to develop policies to properly
17 maintain records and to create a systematic records retention and destruction schedule."
18 (See Randle Decl. Ex. C, Ex 2 thereto.)

19 The San Francisco Administrative Code defines "record" to mean "such paper, book,
20 photograph, film, sound recording, map, drawing or other document, or any copy thereof,
21 as has been made or received by the department in connection with the transaction of
22 public business and may have been retained by the department as evidence of the
23 department's activities, for the information contained therein, or to protect the legal or
24 financial rights of the City and County or of persons directly affected by the activities of the
25 City and County," see San Francisco Administrative Code § 8.1; such definition is
26 contained in the DHR's written policy (see Randle Decl. Ex. C, Ex. 2 thereto at 1.)

27 The issue before the Court is whether the scoring worksheets used by the raters
28 constitute "records" within the meaning of the Administrative Code and, by extension, the

1 DHR's policy.⁷

2 "Courts interpret municipal ordinances in the same manner and pursuant to the
3 same rules applicable to the interpretation of statutes." City of Monterey v. Carrnshimba,
4 215 Cal. App. 4th 1068, 1087 (2013). "Although statutory interpretation is ultimately a
5 judicial function, the contemporaneous construction of a statute by an administrative
6 agency charged with its administration and interpretation, while not necessarily controlling,
7 is entitled to great weight and should be respected by the courts unless it is clearly
8 erroneous or unauthorized." Id. (internal quotation and citation omitted).

9 In the instant case, Johnson testified at his deposition, as well as stated in a
10 declaration submitted in opposition to the instant motion, that he destroyed the used
11 scoring worksheets in conformity with DHR policy, specifically, the policy that, after an
12 eligibility list is adopted and any protests have been denied, the used scoring worksheets
13 are to be destroyed. (See Randle Decl. Ex. C at 120:20 - 121:6; Johnson Decl. ¶ 21.) As
14 explained by Johnson, the Record of Scores is the "official record of a candidate's
15 performance on [an] exam," and is retained by the DHR, whereas the "scoring worksheets"
16 are considered "non-records" as "they are superseded by the Records of Scores and are
17 not necessary to the functioning or continuity of DHR operations." (See Johnson Decl.
18 ¶ 14.)

19 Plaintiffs argue that Johnson's supervisor, John Kraus ("Kraus"),⁸ has testified,
20 during two different depositions, that the scoring worksheets used by the raters are
21 documents that should be retained as "records" under DHR's policy, and, consequently,
22 that the Court should defer to Kraus's, rather than Johnson's, understanding of the policy.

23
24 ⁷The policy's sole reference to materials used in connection with Civil Service
25 examinations is found in a section titled "Categories of Records," in which the policy gives,
26 as an example of "records" that may be preserved in an off-site location, "examination
27 materials that are older than one year but less than five years and no longer necessary for
28 regular or immediate access." (See id. Ex. C, Ex. 2 thereto at 2.) The term "examination
materials," however, is not defined.

⁸Kraus testified that his "functional title" is "director of recruitment and assessment
services" and his "official classification" is "assistant deputy director." (See Randle Decl.
Ex. C at 7:21-25.)

1 As set forth below, however, the Court finds Kraus's deposition testimony does not support
2 a finding that Kraus's interpretation differs from that of Johnson.

3 During his first deposition, Kraus testified that the form the raters use to memorialize
4 their "consensus" is the "official rating" that would be retained, i.e., the Record of Scores,
5 whereas "anything prior to that," specifically, "their note rating form, the one they took
6 initially," would not be retained. (See Randle Decl. Ex. D at 36:6 - 39:18.)⁹ The testimony
7 on which plaintiffs rely was given during Kraus's second deposition, at which he was shown
8 a blank version of the scoring key and asked whether it was a document that needed to be
9 retained under the DHR's retention policy, to which he responded "there should be a copy
10 of the scoring guidelines . . . somewhere." (See id. Ex. C at 61:2-8, 62:3-23.)¹⁰ Given the
11 particular exhibit shown the witness, i.e., a blank form, the testimony is, at best,
12 ambiguous. Moreover, any ambiguity was thereafter clarified when the witness was asked
13 "should the form that was completed by the rater be somewhere," to which the witness
14 responded, "what I expect to see is their consensus rating" (see id. Ex. C at 62:24 - 63:22),
15 and further clarified when read in the context of testimony he gave earlier in the same
16 deposition, in which he explained that the "official record" is the "document" that "reflect[s]
17 the individual ratings of the two raters and the consensus score of the two raters," i.e., the
18 Record of Scores (see id. Ex. C at 58:21 - 59:24.)

19 In sum, Kraus's testimony as to the DHR's interpretation of "records" is wholly
20 consistent with Johnson's understanding that the scoring worksheets used by the raters are
21 not "records," and plaintiffs have not shown any other employee has either interpreted or
22 applied the DRH's policy differently. Under such circumstances, the Court finds it
23 appropriate to defer to the DHR's interpretation of "records."

24 //

25
26 ⁹From the context in which it appears, the term "note rating form" is a reference to
27 the scoring key here at issue. (See id. Ex. D at 35:0-25 (describing "scoring key" as "a
rating form").)

28 ¹⁰Indeed, defendants did retain that scoring key form, a copy of which was produced
during discovery and, as set forth above, shown to the witness.

1 Accordingly, the Court finds the “Department of Human Resources Record Retention
2 and Destruction Policy” did not obligate defendants to retain the scoring worksheets used
3 by the raters.

4 **D. State and Federal Statutory Duties**

5 Pursuant to California state law, “[i]t shall be an unlawful practice for employers . . .
6 to fail to maintain and preserve any and all applications, personnel, membership, or
7 employment referral records and files for a minimum period of two years.” See Cal. Gov’t
8 Code § 12946. Additionally, a federal regulation requires that “[a]ny personnel or
9 employment record made or kept by a political subdivision . . . shall be preserved . . . for a
10 period of 2 years.” See 29 C.F.R. § 1602.31. Plaintiffs argue that the above-quoted statute
11 and regulation obligated the City to retain the scoring worksheets used by the raters of the
12 H-50 examination. Plaintiff’s argument is not persuasive.

13 With respect to the state statute, plaintiffs rely on Irion v. County of Contra Costa,
14 2005 U.S. Dist. LEXIS 4293 (N.D. Cal. March 16, 2005), which appears to be the sole
15 decision in which a court has considered the question of what types of documents fall
16 within the scope of § 12946. In that case, the district court found an employer had violated
17 § 12946 by destroying “score sheets” on which the raters who had interviewed candidates
18 for a position had given each candidate a score, where those scores were then used by the
19 employer to determine which candidate would be hired. See id. at *37-38. Here, however,
20 unlike the situation in Irion, the City did retain the document on which the raters recorded
21 the scores that were used to determine where each applicant would be placed on the
22 eligibility list, namely, the Record of Scores.

23 With respect to the federal regulation, the Seventh Circuit, the only court to have
24 considered an issue in any manner analogous to that presented in the instant case,
25 concluded that “ranking sheets, manager’s notes and evaluations notes” made by raters,
26 who met to determine a ranking to be given to each employee for purposes of effectuating
27 a reduction-in-force, did not constitute “employment records” under § 1602.31. See
28 Rummery v. Illinois Bell Telephone, 250 F.3d 553, 558-59 (7th Cir. 2001). Rather, the

1 Seventh Circuit found that the document that had been retained by the employer,
2 specifically, "one summary sheet averaging out the ratings for each individual," was the
3 "actual employment record" the employer was required to retain under § 1602.31. See id.
4 As the Seventh Circuit put it, "[it] is sufficient that the employer retains only the actual
5 employment record, not the rough drafts or processes which may lead up to it." See id. at
6 559. Here, as discussed above, the City did retain the Record of Scores, the document on
7 which the individual scores of each rater, as well as the consensus score of both raters, are
8 formally recorded, and which document was used to determine the candidate's placement
9 on the eligibility list.

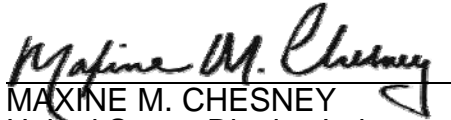
10 Accordingly, the Court finds neither § 12946 nor § 1602.31 obligated defendants to
11 retain the scoring worksheets used by the raters.

12 **CONCLUSION**

13 For the reasons stated above, plaintiffs' motion for sanctions is hereby DENIED.

14 **IT IS SO ORDERED.**

15
16 Dated: October 21, 2015


MAXINE M. CHESNEY
United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28