District Court, City and County of Denver, Colorado **1437 Bannock St.** **Denver, CO 80204**	DATE FILED: October 12, 2021 5:18 PM FILING ID: 9C3C48559DF68 CASE NUMBER: 2021CV33225
IN THE MATTER OF THE REDACTION OF THE INVESTIGATIONS LAW GROUP INVESTIGATION REPORT DATED SEPTEMBER 13, 2021 DENVER PUBLIC SCHOOLS, Petitioner v. THE DENVER POST, THE DENVER NORTH STAR, AND AUON'TAI ANDERSON, Respondents	

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APPLICATION REGARDING DISCLOSURE OF RECORDS PURSUANT TO SECTION 24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT

The Custodian of Records ("Custodian") for School District No. 1, City and County of Denver, State of Colorado (the "District"), by and through its undersigned attorney, requests this Court determine whether the District should release, in its unredacted form, Section G.2 of the Investigation Law Group ("ILG") Investigation Report, submitted to the Denver Public Schools School Board, and concerning the investigation into allegations against Director Tay Anderson

(the "Report") or whether the Custodian should be prohibited from doing so under the Colorado Open Records Act, C.R.S. § 24-72-204(6)(a) ("CORA"). In support of its application, the District states as follows:

CONFERRAL: Pursuant to C.R.C.P. 121, Section 1-15(8), undersigned counsel has in good faith conferred with counsel for Director Anderson and with representatives from the Denver Post and The Denver North Star. Undersigned counsel is authorized to state the relief requested herein has been agreed to by the Denver Post and Director Anderson. The Denver North Star restated its belief the Report should be released unredacted but expressed no opinion as to the filing of this application.

I. INTRODUCTION

In April 2021, the District engaged ILG to investigate and prepare a summary of its findings to assist the District in determining whether Director Anderson has adhered to the Board's code of conduct. Because the ILG Report contains highly personal and/or intimate information potentially implicating Director Anderson's constitutional right to privacy, the Custodian is unable to determine if the redacted material is a public record subject to disclosure under CORA. Furthermore, CORA is silent as to this type of investigative report and there is limited judicial precedent in Colorado on this issue. What precedent is available, is divergent and distinguishable from the present controversy, which further strains the Custodian's ability to chart a course of action.

In this civil action under CORA, C.R.S. §§ 24-72-201 *et seq*., the District requests this Court enter a declaratory judgment and Order directed to the Custodian, indicating whether redacted portion of Section G.2 of the ILG Report is a "public record" as that term is used under

the statute and, if so, whether the redacted portions should be made available for public inspection in its unredacted form notwithstanding Director Anderson's right to privacy.

II. JURISDICTION

This Court has jurisdiction over the issues raised herein because the public records at the center of this action can be found in this judicial district. C.R.S. § 24-72-204(6)(a). This Court may also invoke its discretionary authority to address the issues raised herein pursuant to C.R.S. § 13-51-105 and C.R.C.P 57.

III. FACTUAL BACKGROUND

In March 2021, Black Lives Matter 5280 ("BLM5280") issued a statement alleging Denver Public School Board of Education Director Tay Anderson had sexually assaulted a female community member. Director Anderson denies this allegation.

Following BLM5280's statements, six members of the Never-Again Colorado ("NAC") organization, who worked with Director Anderson when he was President of NAC in 2018, issued a statement alleging Director Anderson made young women on the NAC board feel uncomfortable through unwanted sexual advances, inappropriate comments, and touching. Director Anderson later apologized for making anyone on the NAC board feel uncomfortable and has largely admitted to the conduct as alleged by members of the NAC board.

The Denver Public Schools Board of Education ("the Board") determined an investigation of these allegations was necessary for two reasons. First, the Board conveyed its desire to afford a fair investigative process to Director Anderson, who was being subjected to public accusations on social media and in the press. Second, the Board believed it was obligated

under the Clair Davis School Safety Act to respond to potentially unlawful sexual contact allegations to ensure District students are protected.

ILG was retained on April 5, 2021 to investigate, *inter alia*, the issues raised by the NAC board members. ILG also investigated other topics, which topics are not the subject of this application. As pertinent to this application, ILG was engaged to investigate: "Whether Director Anderson made unwelcome sexual comments and advances and/or engaged in unwelcome sexual contact with members and associates of the NAC Board of Directors in the spring and summer of 2018." [*See* Public ILG Report at p. 9, 37-49 attached as **Exhibit A**.][1]

Due to the sensitive nature of the allegations contained in the ILG Report, and based on a request from Director Anderson through his counsel, portions of the Report were redacted prior to publication. Specifically, large portions of Section G.2 were redacted at Director Anderson's request. [*See* **Ex. A** at pp. 37-49.]

Director Anderson's request to redact the Report was based on (1) the fact he was not a public official at the time these alleged incidents occurred, (2) the fact the report concluded the incidents largely occurred but were not relevant to Denver Public Schools, and (3) his privacy interest in maintaining the confidentiality of the specific details that were redacted.

The Board originally intended to release Section G.2 because the Board had committed to transparency wherever legally permitted. However, in an abundance of caution, the Board agreed to redact section G.2 and submit the matter to this Court for review.

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[1] The District is also providing the Court with the Unredacted ILG Report, attached as **Exhibit B**, for *in camera* review pursuant to ***Martinelli v. Dist. Ct. In & For City & Cnty. of Denver***, 612 P.2d 1083, 1092 (1980) (directing district court to conduct *in camera* examination of files and reports and to make specific findings on the petitioner's claims based on the constitutional right to confidentiality).

The ILG Report was released to the public on September 15, 2021. Since its release, news agencies have submitted CORA requests for release of the Report with Section G.2 unredacted.[2]

On October 4, 2021, The Denver North Star delivered a written request for access to the Unredacted ILG Report through the District's official CORA Request email address. A true and correct copy of this request is attached hereto as **Exhibit C**.

On October 5, 2021, The Denver Post submitted a written request for access to the Unredacted ILG Report via email to the District's Director of External Communications. This request was forwarded to the Custodian. A true and correct copy of this request is attached hereto as **Exhibit D**.

The District also anticipates additional requests will be forthcoming due to the high volume of news reporting and social media attention concerning the Report and the intense public scrutiny these allegations have engendered.

For his part, Director Anderson maintains the Report should remain available only in its redacted form and renews his previous objections to the release of an unredacted version.

[2] Although other portions of the Report have been similarly redacted, the District is confident those portions of the Report should remain redacted due to other concerns related to student privacy and the restrictions in the Colorado Open Records Act prohibiting release of sexual harassment/Title IX records. C.R.S. § 24-72-204(3)(a)(X)(A)-(B). The interested parties also seemingly agree the remaining redacted portions of the Report are protected from inspection under federal and state law and are not the subject of this application. *See e.g.* The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 CFR Part 99 (confidentiality of student records under FERPA); Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §1681 *et seq*.; 34 C.F.R. § 106.71(a) (identity of person who has reported sexual harassment must remain confidential under Title IX); *see also* C.R.S. § 24-72-204(2)(XXI)(d)(III)(no public inspection required where contrary to state or federal law or regulation).

Specifically, Director Anderson states Section G.2 relates to a period of time when he was neither a DPS employee or an elected member of its Board of Directors. The section also relates to a period of time that Director Anderson was not yet an adult and references numerous other minors who would be substantially impacted by public disclosure. Director Anderson objected to this particular portion of the external investigations at the time, and only provided information in reliance on assurances it would not become public record.

The interested parties have expressed no objection to presenting the issue to this Court for a determination as to whether Section G.2 should remain redacted and to forego the necessity of further cost, litigation, and delay.

IV. APPLICABLE LAW

A. Uniform Declaratory Judgments Act

Under the Uniform Declaratory Judgments Law, "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." C.R.S. § 13–51–106; C.R.C.P. 57(b).

In addition to interpreting statutes and written instruments, a trial court may exercise its discretionary power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed," C.R.S. § 13–51–105, in any proceeding where declaratory relief is sought and the judgment would terminate the controversy or remove an uncertainty. C.R.S. § 13–51–109; *see* ***American Family Mut. Ins. Co. v. Bowser***, 779 P.2d 1376, 1379 (Colo. App. 1989).

The purpose of the declaratory judgments law is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations," and it is

therefore to be liberally construed and administered. C.R.S. § 13–51–102; *see* ***Citizens Progressive All. v. Sw. Water Conservation Dist.***, 97 P.3d 308, 310 (Colo. App. 2004) (approving of use of Declaratory Judgments Act in CORA context).

Furthermore, in the context of declaratory judgment actions, the required showing of demonstrable injury is relaxed, and "one need not risk the imposition of fines or imprisonment in order to secure the adjudication of uncertain legal rights." ***Id.*** at 311. A party seeking declaratory relief must demonstrate the challenged statute or regulation will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future. ***Id.*** (citing ***Mt. Emmons Mining Co. v. Town of Crested Butte***, 690 P.2d 231 (Colo.1984); ***Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc.***, 830 P.2d 1045, 1053 (Colo.1992) (party seeking declaratory judgment on validity of regulatory scheme need not violate regulation, and thus become subject to punishment, in order to secure adjudication of uncertain legal rights; rather, injury-in-fact element of standing is established when allegations of complaint and other evidence show that "the regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities")); *but see* ***Villa Sierra Condominium Ass'n v. Field Corp.***, 878 P.2d 161 (Colo. App. 1994) (there must be a presently existing controversy before declaratory relief may enter; the fact that some controversy may arise in the future is not sufficient to allow a party to invoke court's declaratory jurisdiction).

Here, the District has received two CORA requests from separate news agencies seeking release of the Report with Section G.2 unredacted. Director Anderson has also expressed his desire that the Custodian keep the redacted materials confidential. Under these circumstances, the Custodian is unsure of the path forward and is thus entitled to have this Court determine

whether it is required, under CORA, to comply with the news agencies' request or with Director Anderson's request. The Custodian should not have to risk the monetary and other sanctions it would face upon failure to comply with CORA or violating Director Anderson's constitutional rights. *See* C.R.S. § 24–72–204(5) (attorney fees and costs against custodian who improperly denies right to inspect public record); C.R.S. § 24–72–206 (criminal penalties for willful and knowing violation of CORA); ***Citizens Progressive All.***, 97 P.3d at 310–11. The Custodian therefore seeks declaratory relief.

Without guidance from the Court, the Custodian runs the real risk of generating additional litigation which would needlessly create additional burdens for the District and multiply proceedings in the Denver District Courts.

The interested parties agree that seeking a declaratory judgment in this forum would be mutually beneficial and would avoid needless cost, litigation, and delay. Allowing the District to proceed in this manner will also streamline the pleadings and forego a contested show cause hearing. This is especially important because the District is unclear as to its obligations under CORA as discussed more fully below and does not take a position as to the propriety of releasing the report with Section G.2 unredacted.

B. The Colorado Open Records Act

Under CORA, any person may request access to inspect and obtain a copy of any public record. *See* C.R.S. § 24-72-203(1)(a). CORA guarantees access to records of public business so "the workings of government are not unduly shielded from the public eye." ***Int'l Bhd. of Elec. Workers Local Union 68 v. Denver Metro. Major League Baseball Stadium Dist***., 880 P.2d 160, 165 (Colo. App. 1994).

A public record is defined as any writing "made, maintained, or kept by . . . any . . . political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule." *See* C.R.S. § 24-72-202(6)(a)(I).

The custodian of a public record may not deny access to a public record unless there is a specific exemption that permits the withholding of that record. *See* C.R.S. § 24-72-203(1)(a). If no such exemption applies, the custodian may nevertheless establish to the Court that, because of unique and extraordinary circumstances the General Assembly could not have foreseen, disclosure of a public record in these circumstances would cause "substantial injury to the public interest." C.R.S. § 24-72-204(6)(a). A violation of an individual's constitutional right to privacy would constitute such substantial injury. ***Todd v. Hause,*** 371 P.3d 705, 712 (Colo. App. 2015) ("Whether CORA requires disclosure of personal information collected by the government depends on whether disclosure would do substantial injury to the public interest by invading the constitutional right to privacy of the individuals involved.").

By its terms, CORA balances the public interest in access to information about how the government operates against the privacy interests of public officials and employees. Ch. 271, sec. 1, 1996 Colo. Sess. Laws 1479; *see* ***Denver Publ'g Co.***, 121 P.3d at 194 (citing legislative declaration of intent for 1996 amendments to CORA). Consequently, although the statute generally favors access and inspection, CORA does not require public disclosure of all documents in the custody of state employees or agencies. This is true where, as here, the release of public records could violate an individual's right to privacy. *See* ***Denver Post Corp. v. Ritter***, 230 P.3d 1238, 1240 (Colo. App. 2009), *aff'd*, 255 P.3d 1083 (Colo. 2011).

The definition of "public records," the enumerated exceptions, and consideration of individual privacy rights all limit which documents are required to be disclosed under CORA. *See* ***Denver Publ'g Co.***, 121 P.3d at 194 (recognizing "the privacy protection already integrated into CORA's express statutory provisions").

Here, as discussed more fully below, the District is unclear whether the unredacted portions of the Report sought by the news agencies is a "public record" under CORA. If the Report is a public record, it is unclear whether Director Anderson's privacy interest would operate to limit access under these specific circumstances. As a result, the Custodian "is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited" and requests a declaratory determination by this Court. *See* C.R.S. § 24-72-204(6)(a).

C. Director Anderson's Right to Privacy

Director Anderson requested portions of Section G.2 be produced only in redacted form based on his legitimate right to privacy. In support of his request, Director Anderson asserts he was not a public official at the time the actions discussed in Section G.2 occurred and disclosure of Section G.2 would run afoul of his legitimate expectation of nondisclosure given this conduct occurred when Director Anderson was not a Board Member, was not running for a seat on the Board, and occurred while acting as a private citizen as a member of a private organization. The District agreed to Director Anderson's request with the caveat that production of the redacted portions may be forthcoming pursuant to a valid request under CORA or court order to allow inspection. Director Anderson renews his objections. Director Anderson has further indicated he will not intervene in this action to resist publication of the portions of the Report at issue.

Although there are predicate factual issues involved in determining whether an individual's right to privacy protects the disclosure of particular information collected by the government, under CORA, the ultimate determination of whether that information is protected from disclosure is a question of law. ***Todd***, 371 P.3d at 712 (citing ***Nilson v. Layton City***, 45 F.3d 369, 371 (10th Cir. 1995)). This issue is thus ripe for adjudication even in the absence of a hearing on the matter.

In determining whether disclosure of the requested documents under CORA would do substantial injury to the public interest by invading an employee's constitutional right to privacy, the court must consider: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether there is a compelling public interest in access to the information; and (3) where the public interest compels disclosure of otherwise protected information, how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy**.** ***Id.***; ***Freedom Newspapers, Inc. v. Tollefson***, 961 P.2d 1150 (Colo. App. 1998).

As to the first prong, there are two factors to consider when determining whether a person has a legitimate expectation of nondisclosure. One factor is the person's expectation of nondisclosure, and the other is the nature of the information sought to be disclosed. ***Martinelli,*** 612 P.2d at 1091. As one Court summarized:

> [T]he claimant must show that the material or information which he or she seeks to protect against disclosure is 'highly personal and sensitive' and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities. [T]hose materials deserving the highest constitutional interest concern the intimate relationship of the claimant with other persons. ***See Robert C. Ozer, P.C. v. Borquez***, 940 P.2d 371, 377 (Colo. 1997) ("facts related to an individual's sexual relations . . . are considered private in nature and the disclosure of such facts constitutes an invasion of the individual's right of privacy"; *see also* ***Lawrence v. Texas***, 539 U.S. 558 (2003) (sexual behavior is the most private human conduct). Material of this nature will be less likely to be

> subject to disclosure, especially when considered under the second and third prongs of the test.

In re Bd. of Cnty. Comm'rs of Cnty. of Arapahoe 95 P.3d 593, 601 *as modified on denial of reh'g* (Oct. 23, 2003), *aff'd in part, rev'd in part sub nom.* ***Denver Publ'g Co.,*** 121 P.3d 190 (internal citations and quotations omitted).

Conversely, the statements in the unredacted report are attributable to private citizens who could repeat their statements and Director Anderson would not be able to prevent such disclosure. Given the intimate and highly personal nature of the information contained in the Report and the fact these witnesses could speak out at any time, it is unclear whether the first prong weighs in favor or against disclosure.

While an individual's expectations of privacy are legitimate, so too is the public's interest in accessing the information. ***Todd***, 371 P.3d at 712. There has been intense public interest in the ILG Report. There have been dozens of news articles, public comments at the Board of Education meetings, press conferences, and robust social media discussion.

As for Director Anderson, he has not shied away from the intense public debate over his actions and has released numerous statements to the press, given several press conferences on the topic, engaged in his own social media campaign, addressed the Board with regard to these topics on more than one occasion, and appeared a number of times on podcasts to discuss the issue.

In addition, the public has an interest in the conduct of its elected officials, ensuring good use of the public fisc with regard to the report, and in the freedom of the press to gather information and report on important news of the day. The public may also want full information to assess whether Director Anderson represents the values that the public wants to see in their

chosen leader of a public school district. Alternatively, they may be interested in a deeper understanding of whether there is any risk to their own children, if they interact with Director Anderson, that they will experience the conduct alleged in the report.

The District is cognizant of the requirements under the Claire Davis Safety Act to take reasonable care to prevent foreseeable acts of sexual violence toward its students. Given the intense public interest in the Report, this factor likely weighs in favor of public inspection.

As to the third prong, how disclosure may occur in a manner least intrusive with respect to the individual's right of privacy, the Custodian is unclear as to whether the public interest outweighs Director Anderson's right to privacy or whether releasing only the redacted version would satisfy CORA's mandate that all public records be open for inspection, subject only to prescribed exceptions. C.R.S. § 24-72-201.

Consequently, the "custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited" and requests this Court enter a declaratory judgment and Order. *See* C.R.S. § 24-72-204(6)(a).

In re Bd. of Cnty. Comm'rs of Cnty. of Arapahoe and its progeny further highlights the difficulties the Custodian faces with regard to the release of the ILG Report. 95 P.3d 593 (finding a right to privacy in certain sexually explicit communications and discussing CORA's exemption for records of sexual harassment). In that case, the clerk and recorder's office levied sexual harassment-hostile work environment allegations against the elected clerk and county recorder. ***Id.*** In response, the county hired a private investigator to review the allegations, and prepared a detailed report. ***Id.*** The report consisted of a main report and a subreport entitled "Sexual

Harassment/Hostile Work Environment Report." ***Id.*** Additionally, the report included the contents of 570 sexually explicit and romantic emails the elected official and a subordinate sent to each other. ***Id.***

The board released a redacted version of the report. ***Id.*** The board then received written requests for inspection of public records from various media outlets. ***Id.*** The requests for inspection asked for release of either the emails that were redacted from the publicly released report or the entire unredacted report. ***Id.***

The board filed a petition for a judicial determination as to whether disclosure of the report was prohibited under CORA. ***Id.*** After a hearing, the trial court ordered the release and public disclosure of the entire report. ***Id.***

On appeal, the Colorado Court of Appeals determined the emails at issue were "public records" under CORA but prohibited disclosure based on the individual's right to privacy and based upon CORA's exemption for Records of Sexual Harassment. ***Id.*** at 598-99.

The Supreme Court granted certiorari and determined many of the emails at issue were not "public records" as that term is used under CORA because many of the emails did not have a "demonstrable connection to the performance of public functions or involve the receipt or expenditure of public funds." ***Denver Pub. Co.***, 121 P.3d at 203. The Court approved of redacting the explicit content of emails containing both private and public communications. ***Id.*** at 205. The Court denied certiorari as the the question of "[w]hether the sexual harassment exception to disclosure of public records applies to e-mails that are attached to a report on sexual harassment" and so the vagaries of the interplay between this judicial precedent and the statutory text remain. *See* ***id.*** at fn. 12.

Although the similarities between the above cited cases and the instant action are apparent, so too are the differences. First, the above cases involved questionable emails between an elected official and his subordinate – while the former was acting in his capacity as an elected public official. Here, the question surrounds a report commissioned by the District which details conduct by Director Anderson when he was a private citizen working for a private organization. Second, the cases above concern email communications from an elected official to an employee, the Report at issue here largely details statements made by Director Anderson and later recounted by individuals to investigators. There is no documentary evidence of the communication except as memorialized in the ILG Report.

Given the current posture of the case, the Custodian is left unable to determine the most appropriate course of action.

CONCLUSION

Based on the foregoing, the Custodian requests this Court, pursuant to C.R.C.P. 57, C.R.S. § 13-51-101 *et seq*., and C.R.S. 24-72-204(6)(a), declare the rights and responsibilities of the interested parties and enter a declaratory judgment to determine whether the District must release the redacted portions of Section G.2 of the Report or whether the District must maintain the confidentiality of those redacted portions in order to protect the public interest and/or Mr. Anderson's right to privacy.

PRAYER FOR RELIEF

WHEREFORE, the District prays that:

A. The Court accept the unredacted ILG Report under seal for *in camera* review pursuant to ***Martinelli***, 612 P.2d 1083.

B. The Court enter a declaratory judgment that the redactions in Section G.2 of the Report are either (1) subject to disclosure and not exempt under CORA or other law or (2) the requested record is not subject to disclosure and exempt under

CORA or other law pursuant to C.R.S. § 24-72-204(6)(a), C.R.C.P. 57, and C.R.S. § 13-51-101 *et seq*.;

C. The Court issue an Order directing the Custodian to either release the redacted portion of Section G.2 of the Report or to maintain the confidentiality of the redacted portion consistent with its determination of the public or non-public nature of such record;

D. If the Court deems necessary, to conduct a hearing "at the earliest practical time" to determine what if any portions of the Report are public records as that term is used under CORA as required under C.R.S. § 24-72-204(6)(a);

E. Enter such further and additional relief as the Court deems just and proper.

DATED this 12th day of October 2021,

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Pursuant to C.R.C.P. 121, Section 1-26, a printed copy of this document with original signatures will be maintained by Denver Public Schools and made available for inspection upon request.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2021 a true and complete copy of the foregoing APPLICATION REGARDING DISCLOSURE OF RECORDS PURSUANT TO SECTION 24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT was served via electronic filing, or email, as indicated below:

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s/*Kathy Porter*
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