District Court, Denver County, State of Colorado 1437 Bannock Street Denver CO 80202 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.*	DATE FILED: December 21, 2021 11:55 PM FILING ID: B596709A19994 CASE NUMBER: 2021CV33225 ▲ COURT USE ONLY ▲
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RESPONDENT ANDERSON'S RESPONSE TO PETITIONER'S APPLICATION REGARDING DISCLOSURE OF RECORDS PURSUANT TO §24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT	

Respondent Auontai Anderson ("Respondent Anderson") by and through undersigned counsel, hereby submits his Response to Petitioner's Application Regarding Disclosure of Records Pursuant to Section §24-2-204(6)(a) of the Colorado Open Records Act ("CORA"). Respondent Anderson request that the Court issue an order declaring that the CORA Requests of Respondents The Denver Post and The Denver North Star ("News Media Respondents"), who seek disclosure of the Investigations Law Group Investigation Report ("ILG Report") with Sections G.2 and G.3 unredacted, should, under application of CORA, be denied. In support thereof Respondent Anderson states the following:

II. PROCEDURAL STANDING

This action comes before this Court on application of Petitioner DPS who seeks a declaratory judgment addressing whether Section G.2 of the ILG Report summarizing the findings of an investigation into alleged sexual misconduct by Respondent Anderson should be released unredacted under the provisions of the Colorado Open Records Act, C.R.S. §24-72-204(6)(a) ("CORA"). While Petitioner, did not raise in its application the issue of whether Section G.3, which it previous rejected, should also be released unredacted, the News Media Respondents have clarified in their Response that they are continuing to seek Section G.3's disclosure under CORA.

Respondent Anderson offers his Response in reference to the CORA Request involving both Sections G.2 and Section G.3 without waiving any objections over the manner in which this action came before this Court and whether the Custodian properly denied the CORA Request for Section G.3 and/or constructively denied the CORA requests for Section G.2. Regardless of how Petitioner and News Media Respondents initiated these proceedings, any just, fair and final adjudication of this matter must include not only the narrowly defined issues as presented by Petitioner and News Media Respondents but the full gambit of law applicable under CORA which includes some positions not specifically raised or referenced in the prior pleadings.

II. INTRODUCTION

News Media Respondents seek the unredacted disclosure of Sections G.2 and G.3 of the ILG Report under CORA. Petitioner DPS redacted the ILG Report subject to an agreement with Respondent Anderson. Section G.2 pertains to Respondent Anderson's tenure on the Board of a local youth advocacy organization while Section G.3 pertains to Anderson's tenure as a DPS employee. Both sections together pertain to what can, at its worst, be described as sexual harassment allegations and investigations.

Respondent Anderson maintains that the News Media Respondents' CORA Requests should be denied because the ILG Report is not a public record and to the extent the ILG Report is a public record it falls under several of CORA's exemptions for personnel files and records of sexual harassment complaints and investigations. Finally, even if CORA's express statutory exemptions do not apply disclosure of Sections G.2 and G.3 would cause substantial injury to the public interest – a showing that the Petitioner is responsible for making. Notwithstanding, Respondent Anderson's analysis of the exception for personnel files includes a treatment of his agreement to redact the ILG Report as well as his privacy interests – issues of key importance in determining the impact further disclosure may have upon the public interest.

III. RELEVANT FACTS

Director Anderson graduated from Manual High School in 2017 after serving as the school's Student Body President. By 2018 he joined Never Again Colorado – a youth led advocacy group with a focus on decreasing violence against students. Subsequently, Anderson began working as a restorative practice coordinator at Denver North High School. By 2019 Anderson had successfully campaigned for the DPS School Board where he assumed office on December 4, 2019, becoming one of Colorado's youngest elected officials at only 20 years old.

By February 2021 Director Anderson, having steadily risen through the ranks of progressive advocacy and political circles, went public with the exciting news of his son's birth. While many celebrated this milestone with him, there were others who expressed surprise, cynicism, even outrage. As it turns out, this development ran counter to certain assumptions that had been made within progressive circles about Anderson's personal choices, including how he identified and what causes he would be appropriate to advocate for.

By March 2021, the very next month, Black Lives Matter 5280 ("BLM5280") published a statement to social media purporting to speak on behalf of an anonymous victim who had come forward to them alleging Director Anderson had sexually assaulted her.[1] It should be noted that at the time BLM5280 published the statement they had already expressed criticism of Anderson that his advocacy and platform diminished opportunities for Black women and LGBTQs to take center stage. Indeed BLM5280 is open about their visceral aversion to "male centeredness" and the "heteropatriarchy" as well as their commitment to "center Black women, Black lgbtqia fam and Black femmes."[2] Despite these commitments, BLM5280 called only for Anderson to publicly apologize and attend therapy notwithstanding the severity of his alleged crime.

By April 2021, the very next month, a statement was released on behalf of six former board members of the youth-led organization Never Again Colorado ("NAC") who self-identify as being women. These persons allege that when Anderson, as early as 19 years old, began acting as President of their organization in 2018, he "maintain[ed] a work environment that made them feel "uncomfortable and unsafe." Specifically, the statement went on to accuse Anderson of engaging in a slew very distasteful behaviors such as, "act[ing] unprofessionally[;] sharing inappropriate/ misogynistic content in…group chats[;] talking in code about female board members…with romantic/ sexual subtext[;] daring female board members to perform sexualized actions[;] having conversations comparing the attractiveness of female board members[;] making lewd comments…to female board members[;] [and]…pursu[ing] female board members romantically/sexually[.]" A true and correct copy of the complete statement attributed to these six anonymous women-identifying former NAC Board members is attached hereto as Exhibit 2.

[1] A true and correct copy of BLM5280's statement is attached hereto as Exhibit 1.
[2] https://www.blacklivesmatter5280.com/about

In early April 2021, DPS retained the Investigations Law Group ("ILG") to conduct an investigation into Respondent Anderson's conduct. At the time DPS commissioned ILG to perform the investigation the allegations made by Mary Katherine Brooks-Fleming involving unlawful sexual contact with DPS students had not been published. After ILG was engaged the scope of their investigation expanded consistent with the new allegations. Upon completion of the investigation the results were published in the ILG Report. After negotiations, Respondent Anderson and Petitioner agreed that Sections G.2 and G.3 of the ILG Report would remain redacted. While both parties conceded that CORA Requests would be filed, they agreed that the law supported the redaction of both Sections.

In May 2021, Mary Katherine Brooks-Fleming introduced allegations that a DPS Board member (who she later identified as Respondent Anderson) had sexually assaulted and/or sexually abused 61 current DPS students and 1 former student all of whom were anonymous. Ms. Brooks-Fleming claimed that all of the students had come to her and reported the incidents and she used this claim to bolster her advocacy of a pending bill before the legislature. A copy of Ms. Brooks-Fleming's testimony is attached hereto as Exhibit 3.

The results of the ILG Report determined that not a single allegation of unlawful sexual misconduct against Respondent Anderson was substantiated. Further, DPD conducted its own investigation and shared its findings with the District Attorney. After a review of the information the District Attorney did not seek any criminal charges whatsoever. Notwithstanding, News Media Respondents continue to seek more details including information entirely unrelated to Anderson's service on the DPS Board or his employment with DPS. Disturbingly, much of the information they seek is related to the sexual history of various teenagers including Anderson himself when he was a teen.

IV. ARGUMENT

The News Media Respondents' CORA requests for the unredacted disclosure of Sections G.2 and G.3 of the ILG Report should be denied because (a) the ILG Report is not a "public record" as contemplated under CORA; (b) assuming, *arguendo*, the ILG Report is a cognizable public record it falls under several of CORA's statutory exemptions to public access; and (c) disclosure of the redacted sections of the ILG Report would cause substantial injury to the public interest.

A. THE NEWS MEDIA RESPONDENTS' CORA REQUEST FOR THE UNREDACTED DISCLOSURE OF SECTIONS G.2 AND G.3 OF THE ILG REPORT MUST BE DENIED BECAUSE THE ILG REPORT IS NOT A "PUBLIC RECORD" AS CONTEMPLATED UNDER CORA AND THEREFORE IT IS NOT SUBJECT TO CORA'S PUBLIC ACCESS REQUIREMENTS.

CORA defines "public records" as all writings 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. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1085 (Colo. 2011). The ILG Report, however, is not subject to the requirements under CORA because it was not [1] "made, maintained, or kept…for use in the exercise of functions required or authorized by law or administrative rule or [2] involving the receipt or expenditure of public funds." *Id*.

(1) Section G.2 of the ILG Report is not a "public record" under CORA because it does not "relate to the performance of public functions or involve the receipt or expenditure of public funds.

It is well established in Colorado that, "[t]o determine whether the records kept by the agency are public or non-public records, the agency must look to the content of the records to resolve whether they relate to the performance of public functions or involve the receipt or expenditure of public funds. *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 121 P.3d 190, 191 (Colo. 2005).

While Respondent Anderson's maintains that the entirety of the ILG Report is not a public record as contemplated under CORA, it is particularly evident that Section G.2 cannot possibly be considered a "public record" because it clearly pertains to Respondent's tenure with Never Again Colorado ("NAC") during a time (i.e. 2018) in which Anderson was not on the Board, was not running for the Board and was not a DPS employee. As such, any conduct that Anderson engaged in at this time is entirely unrelated to his performance of public functions as contemplated under CORA.[3]

News Media Respondents also allege that "there is no dispute that the ILG Report was commissioned with public funds for use in the exercise of Petitioner's functions as required or authorized by law. *Cf. Denver Pub. Co., 121 P.3d at 196*."[4] News Media Respondents erroneously argue that because the Custodian had to pay ILG to create the report that the ILG Report itself "involv[es] the receipt or expenditure of public funds." This interpretation is not only erroneous, but, if true, would also be unconstitutionally vague, overly broad and would produce absurd results.[5] Under Respondents' rationale, every writing, regardless of how trivial, irrelevant or obscure becomes a potential public record because every writing necessarily requires cost to make, maintain or keep. Hence, cost related to a writings creation, storage, processing, transfer, printing, debugging all support Respondents claim that everything is a public record. Ironically, the very case cited by News Media Respondents in support of their strained contention nullifies it.

The Court *in Denver Pub. Co.* is clear that:

> Because the General Assembly did not intend the scope of the Colorado Open Records Act disclosure requirements to include records solely because the records were created with the use of public funds, courts must focus on the ***content of the record*** to determine if the record involves the receipt or expenditure of public funds. (Emphasis added). *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 121 P.3d 190, 191 (Colo. 2005).

[3] See ILG Report p. 20 for ILG's Factual Finding of "Not Substantiated that there is any connection to DPS" in relation to the NAC allegations.
[4] Response of Respondents The Denver Post and The Denver North Star at p. 6.
[5] The court cannot follow a statutory construction that would lead to an absurd result. Gessler v. Grossman, 2015 COA 62, ¶ 1, 488 P.3d 53, 57.

Given the ILG Report did not, in terms of its content, involve the receipt or expenditure of public funds, News Media Respondents are precluded from relying on the cost incurred to create the ILG Report to argue that the report itself was "made, maintained or kept…for use in the exercise of functions…***involving*** the receipt or expenditure of public funds."[6] As such Section G.2 of the ILG Report is conclusively not a "public record" as contemplated under CORA because it does not "relate to the performance of public functions" or "involve the receipt or expenditure of public funds."

(2) The ILG Report was not "made, maintained or kept…for use in the exercise of functions required or authorized by law or administrative rule."

Petitioner contends that it decided to investigate the allegations against Anderson because of Petitioner's (a) "desire to afford a fair investigative process to Director Anderson, who was being subjected to public accusations on social media and in the press" and (b) because of Petitioner's belief that it was "obligated under the Clair [sic] Davis School Safety Act to respond to potentially unlawful sexual contact allegations to ensure District Students are protected."[7] Neither Petitioner nor News Media Respondents provide any legal precedent or history of prior District decisions that suggest commissioning the ILG Report fore the foregoing reasons constituted a lawful exercise of its authority under CORA. It is noteworthy to consider whether other Board members who were accused of sexual misconduct were subjected to similar inquiries resulting in similar reports being compiled and distributed to the public. Because the reasons provided by the Board to justify its decision to commission the ILG Report fail to adequately answer the question of "why" the report was made, the District's decision to commission it is exposed as arbitrary and capricious rather than deriving from any legitimate requirement or authorization of law or administrative rule.

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[6] The General Assembly also specifically provided that acceptance of compensation or use of funds or equipment in ***creating***, receiving, or maintaining…e-mail does not convert a record that is not a public record into a public record as defined by CORA. Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Arapahoe Cty., 121 P.3d 190, 191 (Colo. 2005).

[7] See Petitioner's Application Regarding Disclosure of Records at pp. 3-4.

"First, a public record is a writing made, maintained, or kept by the state, any agency, institution, or political subdivision of the state. Second, a public record is a record that is made, maintained, or kept for a particular reason: for use in the exercise of functions required or authorized by law or administrative rule. Acknowledging this framework, Colorado cases interpreting CORA have focused on (1) who made, maintained, or kept the requested record, and (2) ***why*** he, she, or it did so." *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1085 (Colo. 2011). Emphasis added.

(a) The Board's desire to afford a fair investigative process to Director Anderson is an insufficient justification under CORA to make the ILG Report a "public record"

While Respondent Anderson appreciates the good faith that the Board has demonstrated with respect to many matters in the past, respectfully, it's decision to commission a $200,000.00 investigative report based totally on anonymous allegations published to social media by two local organizations known to have bad blood with Anderson was not born from a "desire to afford [him] a fair investigative process." Even if the decision did stem from such a noble cause, "noble causes" are not laws or administrative rules and hence this rationale falls woefully short of CORA's requirement that the report be "made, maintained or kept…for use in the exercise of functions required or authorized by law or administrative rule."

(b) The Board's belief that that the Claire Davis School Safety Act required them to take action is also an insufficient basis under CORA to make the ILG Report a "public record."

The manner in which CORA describes "public records" places no weight on writings that stem from the "belief" of Custodians. Any analysis must be objective and must hinge on whether the functions that the Board attempted to exercise when it commissioned the ILG Report stemmed from a requirement or authorization of the Claire Davis School Safety Act ("Claire Act").[8]

[8] The Claire Act is "an act concerning the limited waiver of governmental immunity for claims involving public schools for injuries resulting from incidents of school violence." 2015 Colo. ALS 266, 2015 Colo. Ch. 266, 2015 Colo. SB 213, 2015 Colo. ALS 266, 2015 Colo. Ch. 266, 2015 Colo. SB 213.

The Claire Act confers upon school districts "a duty to exercise reasonable care to protect… students, faculty, and staff from harm from acts committed by another person **when the harm is reasonably foreseeable**, [and] while such students, faculty, and staff are within the school facilities or are participating in school-sponsored activities."[9] C.R.S. § 24-10-106.3. Given the facts available at the time, commissioning the ILG report was an arbitrary and capricious exercise of power which did not stem from the exercise of "reasonable care" under the Claire Act. Outside of irrational or contrived fears rooted in racist tropes Anderson did not pose "harm…[that was] reasonably foreseeable" to "students, faculty, and staff…while such students, faculty and staff [were] within the school facilities or…participating in school-sponsored activities" on the account of the BLM or NAC statements. *Id*.

(i) The BLM5280 statement did not warrant commissioning of the ILG Report under Claire

As further set forth in Exhibit 1, BLM5280 released a statement allegedly on behalf of an anonymous woman claiming Respondent Anderson had sexually assaulted her. BLM5280 called for Anderson to apologize for the sexual assault and attend therapy sessions. Given the anonymity, the uncorroborated nature of the second-hand allegation, and the fact that as alleged it had nothing to do with the performance of Anderson's public functions, it was not reasonably foreseeable that Anderson posed a threat of sexually assaulting children, faculty or staff at school facilities or school sponsored activities – particularly, given there was a Covid-19 lockdown in effect at the time. Even assuming BLM5280's second-hand anonymous allegation somehow made it reasonably foreseeable that Anderson posed a threat to DPS students, faculty and staff commissioning the ILG Report would still not be an exercise of reasonable care because it is not the responsibility of the District to hire private law firms to investigate whether sexual assaults occurred outside the Districts premises and purview.

[9] C.R.S. § 24-10-106.3

It is axiomatic that law enforcement has purview over investigations of sexual assault crimes and that they have no need for private law firms to attempt to do their jobs for them at considerably higher compensation rates. Not only was Petitioner's conduct in engaging ILG to investigate crimes clearly unnecessary it was wildly improper as it would have placed ILG in the odd position of potentially obstructing justice. The same witnesses, evidence and possibly the same crime scenes may have needed to be evaluated by ILG and law enforcement agencies concurrently. Even to the extent they cooperated and avoided such conflict, to place the private law firm in a position of potential conflict during a lawful investigation by the police department still suggests that the Petitioner's decision did not reflect a serious or sincere effort to apply the standards under CORA and/or the Claire Act to its handling of the allegations against Anderson. Indeed "Administrative conduct that reflects a conscientious effort to reasonably apply legislative standards to particular administrative proceedings is neither arbitrary nor capricious. Colorado-Ute Elec. Ass'n, Inc. v. Public Utils." Comm'n, 760 P.2d 627 (Colo. 1988); Kaiser v. Wright, 629 P.2d 581 (Colo. 1981); Bennett v. Price, 167 Colo. 168, 446 P.2d 419 (1968). Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884, 896 (Colo. 1992).

Further, if Petitioner was operating in good faith and charting a course of action of action that was objectively reasonable, it would not have paid a bare minimum of $160,000 to a private law firm to investigate crimes that could have been investigated at no cost to the District. This factor alone suggests that the Board's decision to commission the ILG Report was arbitrary and capricious at best. Accordingly, the ILG report that resulted from this arbitrary and capricious exercise of power was not related to the exercise of reasonable care as contemplated under the Claire Act. Petitioner cannot use the Act to satisfy CORA's requirement that the ILG Report be "made, maintained or kept…for use in the exercise of functions required or authorized by law or administrative rule."

(ii) The NAC statement did not warrant commissioning the ILG Report under Claire

As further set forth in Exhibit 2, a statement was released by six[10] anonymous persons who self-identified as women, claimed to be former Board members of Never Again Colorado[11] and made certain allegations against Anderson. According to the Petitioner, the statement released "alleg[ed] Director Anderson made young women on the NAC board feel uncomfortable through unwanted sexual advances, inappropriate comments, and *touching*."[12] Petitioner goes on to state that Anderson…largely admitted to the conduct *as alleged by members of the NAC board*." *Id*. While the conduct alleged in the statement certainly captured the immature and inappropriate conduct that Anderson and other NAC board members engaged in as teenagers it did not contain any references to unlawful sexual contact or "touching" as Petitioner claims.[13] In fact, that "touching" was ever included as one of the reasons the ILG Report was commissioned would suggest that perhaps some *effort* was invested in justifying DPS' decision to commission the ILG Report (specifically Section G.2) *post facto*. This effort, in turn, might suggest that Petitioner was aware that its decision to commission the ILG Report (particularly Section G.2) was, at best, arbitrary and capricious.

It should be noted that while the ILG Report states "[t]he Board determined that the public allegations were essential to investigate" it offers no reasoning to explain why it was essential to investigate a sitting Board member's conduct as a teenager in lawfully, albeit at times obnoxiously, expressing sexual interest in his peers. Moreover, the District's knowledge of Andersons'

[10] Allegedly
[11] A youth led organization that Anderson acted as President of for a part of 2018.
[12] See Petitioner's Application for Disclosure at p. 3.
[13] The complete list of behaviors referenced in the statement were: "act[ing] unprofessionally[;] sharing inappropriate/misogynistic content in…group chats[;] talking in code about female board members…with romantic/sexual subtext[;] daring female board members to perform sexualized actions[;] having conversations comparing the attractiveness of female board members[;] making lewd comments…to female board members[;] [and]…pursu[ing] female board members romantically/sexually[.]" See Exhibit 2.

inappropriate behavior as a teenager in 2018 does not suggest that he posed "harm…[that was] reasonably foreseeable" to "students, faculty, and staff…while such students, faculty and staff [were] within the school facilities or…participating in school-sponsored activities" in 2021.[14] Accordingly, the Petitioner cannot rightfully connect the decision to commission the ILG Report to its obligations under the Claire Act and as an escapable result the ILG Report is *not* a public record.[15]

Lastly, the report deals heavily in an extremely nuanced and easily misunderstood concept referred to as "coercive sexual contact." Generally, coercive sexual contact invalidates consent and sexual contact without consent is sexual assault. Hence, According to its proponents, when sex occurs as a result of statements such as "I can't believe you'd hold out on me like this," "I've always had sex this much in a relationship" or "If you really loved me you'd do it" such sexual contact is rape.[16] Sexual coercion can be very subjective and any investigation aimed at discovering whether coercive sexual contact occurred would produce results of extremely limited value that would likely only serve the purpose of defaming someone using terms calculated to confuse and mislead rather than investigate and clarify. That the District and ILG sought to investigate "coercive sexual contact" from years prior is itself yet another demonstration of the arbitrary and capricious decision making demonstrated by the District with respect to Respondent Anderson.

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[14] It should be noted that additional claims that may have been made after the report had been commissioned cannot serve to retroactively justify the commissioning of the report itself. Along that same vein it should also be noted that "reasonable foreseeability" depends on what was known at the time the report was commissioned, not according to accusations that were encountered or contrived after the report had already been commissioned.

[15] It should also be noted that ILG in their own report claims that the reason they were engaged was to investigate "[w]hether 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 ILG Report at p 9.). It is likely, however, that ILG offered this rationale long after the Petitioner engaged them, perhaps even upon completion of the ILG Report itself.

[16] See Exhibit 4 for UMKC Data sheet on Sexual Coercion.

(c) Petitioner offers no other law or administrative rule that justifies their arbitrary and capricious decision to commission the ILG Report

The Petitioner's conduct in commissioning the ILG Report was not only unrequired and unauthorized based on their desires, their beliefs, and the Claire Act, but Petitioner offers no other rationale in terms of a law or statute to justify their conduct. In truth, there is no other law or rule which under the circumstances would have justified the Petitioner's decision because their decision was one that was arbitrary and capricious and hence did not stem from their "duty to exercise reasonable care." It may also be worth noting that nothing in the "Applicable Policies, Oath of Office [or] Best Practices Standards of Conduct for Directors of Boards of Education" that ILG points to in its report (p. 10) is legally or logically capable of providing the requisite authorization or requirement under CORA.

Even if the Board were required or authorized to exercise reasonable care under a valid law or administrative rule it would not follow that such action would justify ILG's engagement to embark upon what amounted to an open ended, *carte blanche*, fishing expedition in which ILG examined matters that impinged upon law enforcement's investigatory purview; matters that weren't raised in the initial allegations; and matters that exceeded the scope of Anderson's service on the Board. Given Petitioner's decision to do so was arbitrary and capricious[17] the ILG Report that was produced as a result was not "made, maintained or kept for use…in the exercise of functions required or authorized by law or administrative rule." *Id*.

[17] In order to conclude that an administrative agency has acted arbitrarily or capriciously, the court must determine that no substantial evidence exists in the record to support the agency's decision. There must be a clear error of judgment, and the court may not substitute its judgment for that of the agency. An agency decision is not arbitrary or capricious if it reflects a conscientious effort to reasonably apply legislative standards to particular administrative proceedings. Gessler v. Grossman, 2015 COA 62, ¶ 1, 488 P.3d 53, 57.

B. ASSUMING ARGUENDO THE ILG REPORT IS A PUBLIC RECORD UNDER CORA, THE NEWS MEDIA RESPONDENTS' CORA REQUESTS MUST STILL BE DENIED BECAUSE THE ILG REPORT FALLS UNDER SEVERAL STATUTORY EXCEPTIONS UNDER WHICH DISCLOSURE IS PRECLUDED.

(1) The ILG Report, particularly Section G.3, falls under CORA's exemption for personnel files and hence must not be disclosed.

Under the express language of CORA there is an exception to disclosure that applies to personnel files. Under Section (3)(a)(II)(A) [of CORA] "[t]he custodian shall deny the right of inspection of the following records…[:] ***Personnel files***; but such files shall be available to the person in interest and to the duly elected and appointed public officials who supervise such person's work." C.R.S. § 24-72-204. Th[e] court, in *Denver Post Corp. v. University of Colorado,* 739 P.2d 874 (Colo. App. 1987), held that the General Assembly intended a blanket protection for all personnel files, except applications and performance ratings. *Denver Pub. Co. v. Univ. of Colo.*, 812 P.2d 682, 684 (Colo. App. 1990). Neither the Petitioner nor News Media Respondents claim that the ILG Report is an application or a performance rating and hence CORA's personnel file exemption clearly applies. In fairness, while its evident and incontrovertible that Section G.3 of the ILG Report, which covered Anderson's brief tenure as a DPS employee, falls under the personnel file exception, the issue of whether the same exception applies to Section G.2 is worth consideration.

Firstly, Sections G.2 and G.3 are a part of the same ILG Report that in its entirety falls under the personnel file exception. The fact that the ILG Report is organized into different sections does not necessarily imply that they must be treated differently. The reason we find ourselves at the current impasse is because (a) Respondent Anderson entered into an agreement with the Custodian to release the ILG Report provided Sections G.2 and G.3 were redacted; and (b) in doing so, Respondent Anderson and Petitioner DPS fairly balanced the public interest in disclosure of the ILG Report with Anderson's own personal privacy interest thereby arriving at the compromise of the redactions.

If News Media Respondent's argue that the public is entitled to Section G.2 of the ILG Report because it does not relate to Anderson's service with DPS and therefore cannot properly be placed in the personnel file then they are fatally conceding that Section G.2 never truly "related to the performance of public functions" as Anderson argues in section A(1) and hence, by their own reasoning, Section G.2 is not a public record and their CORA Request seeking its disclosure should be denied. Conversely, if News Media Respondents believe that Section G.2 somehow does "relate to the performance of public functions" then the Court, in fairness, must find that the personnel file exception applies thereby resulting in News Media Respondents CORA request still being denied. Stated simply, News Media Respondents cannot have it both ways. Either the Custodian lacked authorization to commission the investigation into the NAC statements and hence the report is not a public record or the Custodian possessed the requisite authority and the report is a public record but belongs in the personnel file.

(a) Respondent Anderson entered into an agreement with the Custodian to release the ILG Report provided Sections G.2 and G.3 were redacted.

The Court should also consider that ordering the disclosure of the redacted portions of the ILG Report would violate the terms of a valid agreement between Anderson and the Board in which the parties agreed to release the report with the current redactions in place notwithstanding that the parties new CORA requests would be forthcoming.[18] While Petitioner often characterizes its agreement with Anderson to redact Sections G.2 and G.3 as a "request" Anderson made, there is no question that the request was granted – ergo the instant proceedings. The consideration Anderson gave was to cooperate with the investigation despite the fact that he felt it was what he referred to as a "lynching."

[18] See Petitioner's Application regarding disclosure of records indicating "the Board agreed to redact section G.2" at p. 4; that "interested parties also seemingly agree the remaining redacted portions [i.e. section G.3] of the Report are protected from inspection under federal and state law" at p. 5. While Petitioner may have mischaracterized News Media Respondent's position on section G.3, its agreement with Anderson to redact both sections of the report is indisputable.

It is informative to note that the *Denver Pub. Co.* Court held that the public interest exception to the Open Records Act did not prohibit disclosure of a confidential settlement agreement.[19] While the Court's finding does not readily support the conclusion Respondent Anderson is advocating for in the instant matter, the case does make it clear that generally settlement agreements are enforceable albeit the terms of the agreement in *Denver Pub. Co.* was not because "the public's right to know how public funds were expended was deemed paramount.[20] In the instant matter the ILG Report, as thoroughly shown elsewhere herein, does not pertain to the receipt or expenditure of public funds and, in any event, the public is already aware of how the funds that went into commissioning the report and paying for related cost such as public relations was expended. The Court should consider the impact that setting aside such an agreement regarding redaction might have on the parties involved and the public at large. Regardless of whether a binding agreement existed or whether other whether theories such as promissory estoppel should be applied, the contents of the ILG Report – particularly section G.3 fall squarely in Anderson's personnel file and should not be disclosed.

While it is indisputable that the topics covered in the ILG Report implicate Anderson's right to privacy, News Media Respondents contend that Anderson had no legitimate expectation of privacy, that disclosure served a compelling public interest and that in either case disclosure in the least intrusive manner supports the complete disclosure of Sections G.2 and G.3 save the names of minors and alleged minor victims. Respondent Anderson disagrees.

(2) Under a fair evaluation of the three-part test from *Denver Post,* Sections G.2 and G.3 of the ILG Report should remain redacted.

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[19] In finding that the public interest exception to the Open Records Act did not prohibit [**2] disclosure of a settlement agreement. *Denver Pub. Co. v. Univ. of Colo.*, 812 P.2d 682, 683 (Colo. App. 1990).

[20] While disclosure of the terms of a settlement could chill the university's future ability to resolve internal matters of dispute, the public's right to know how public funds were expended was paramount considering the public policy of the Open Records Act. *Id*.

"In certain circumstances, the constitutional right of privacy prevents the government from disclosing personal information. *Nixon v. Adm'r of Gen'l Servs.*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). 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. *Freedom Newspapers*, 961 P.2d at 1156; *Denver Post*, 739 P.2d at 878. To make that determination, Colorado courts apply the three-factor test set forth in *Denver Post*, 739 P.2d at 879." *Freedom Newspapers*, 961 P.2d at 1156; *see also Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981). *Todd v. Hause*, 2015 COA 105, ¶ 39, 371 P.3d 705, 712.*"Denver Post* prescribes consideration of the following three factors: [a] whether the individual has a legitimate expectation of nondisclosure; [b] whether disclosure nonetheless is required to serve a compelling public interest; and [c] if so, how disclosure may occur in the least intrusive manner with respect to the individual's privacy right. *Denver Post*, 739 P.2d at 878-79…[A]lthough there are predicate factual issues involved in determining whether a right to privacy protects the disclosure of particular information collected by the government, the ultimate determination of whether that information is protected from disclosure is a question of law. *See Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995)." *Todd v. Hause*, 2015 COA 105, ¶ 40, 371 P.3d 705, 712.

(a) Respondent has a legitimate expectation of non-disclosure of Sections G.2 and G.3 of the ILG Report.

By its very nature an investigation into the sexual history of Respondent Anderson carries a considerably high presumption of privacy interests. Such information is highly personal and sensitive, and any reasonable person of ordinary sensibilities would find its disclosure highly objectionable and deserving of the highest constitutional protections. "As for a person's expectation of non-disclosure, a 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. Those materials deserving the highest constitutional interest concern the ***intimate relationship of the claimant with other persons***." *In re Bd. of Cty. Comm'rs*, 95 P.3d 593, 596 (Colo. App. 2003). *Emphasis added*. Given the redacted portions of the ILG Report relate to Anderson's intimate relationships with others, Anderson has a considerably high expectation of non-disclosure and his privacy concerns are subject to the highest constitutional protections.[21]

News Media Respondents argue that the clear legal standard regarding whether there is a legitimate expectation of non-disclosure as set forth under *Todd, Nilson and In re Bd. Of Cty. Comm'rs*, should be set aside in the instant matter because "there can be no legitimate expectation of nondisclosure of information concerning unlawful activity"[22] and "[e]ven though the District Attorney elected not to charge Mr. Anderson, there is no question that the [DPD] and DPS…investigation pertain[ed] to alleged unlawful conduct."[23] News Media Respondents err, however, in several key respects.

Firstly, Respondents present no evidence that Sections G.2 and G.3 of the ILG Report even pertain to unlawful conduct rather than inappropriate conduct common in sexual harassment investigations. The remaining portions of the ILG Report that do clearly pertain to unlawful conduct were already released and hence Respondents have no basis to use the conduct alleged in those sections to compel the disclosure of Sections G.2 and G.3. Moreover, to the extent Respondents are arguing yet again that because one part of the ILG Report pertains to unlawful conduct (that was not sustained) all of it does, that position can also be used to Anderson's benefit however.

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[21] It is also relevant here to consider that the agreement between Anderson and the District contributed to his expectation of non-disclosure.
[22] See News Media Respondents' Responsive Pleading at 7.
[23] News Media Respondents' Responsive Pleading at p. 8.

As set forth elsewhere, given at a minimum Section G.2 does not pertain to the performance of public functions and is not a public record then the entirety of the ILG Report, per Respondents' reasoning, should be treated the same as Section G.2 and therefore found not to be a public record. Under this rationale then the News Media Respondents would have no basis to seek the disclosure of Section G.2 or G.3. Conversely, if, Respondents are prepared to treat the ILG Report more discretely and acknowledge that different sections pertain to different underlying events and conduct, then they cannot seek to compel the disclosure of Sections G.2 and G.3 by attributing to these sections conduct alleged and investigated elsewhere in the report.

Additionally, News Media Respondents conflate their notion of *alleged* unlawful sexual contact with *Todd's* reference to actual unlawful activity. Indeed Todd makes it clear that there is no legitimate expectation of nondisclosure in government arrest records or judicial proceedings, and information actually contained in police reports. Yet, while it would stand to reason that the privacy interest involved in actual unlawful activity would be less than that available for "alleged" unlawful activity the *Todd* court does fail to precisely answer this question which may be one that this Court feels inclined to address.[24] Yet, in any event, what is clear is that attempting to apply a standard from *Todd* that disfavors disclosure is uncompelling given the privacy interest at stake are substantially higher for Anderson. In *Todd*, the disclosure pertained to lists of vehicle operators who took breathalyzer tests whereas in the instant matter Sections G.2 and G.3 pertain to, intimate conduct and allegations which implicate the highest constitutional interests in privacy.

[24] Other considerations under this factor include whether the privacy rights, if any, of persons who took the test and had a breath alcohol level below the lawful levels for drivers are materially different from the rights, if any, of persons who took the test and had a breath alcohol level that exceeded those levels. See *McTimmonds v. Alcohol & Drug Testing Servs. LLC*, Civ. No. 2:14-2124, 2014 WL 6835636, at *2-*3 (E.D. Cal. Dec. 3, 2014). *Todd v. Hause*, 2015 COA 105, ¶ 46, 371 P.3d 705, 713.

Respondents themselves allege that "the District Attorney elected ***not*** to charge Mr. Anderson" yet, oddly, they believe this fact affirmatively supports their position that Section G.2 and G.3 concern unlawful conduct. Respondents overlook that if the DA elected ***not*** to charge, this at least suggest[25] that there was no unlawful conduct. Moreover, News Media Respondents have failed to even allege, much less demonstrate, that the events underlying Sections G.2 and/or G.3 were actually investigated by DPD. If DPD failed to investigate the allegations about Anderson's inappropriate remarks, or playing truth or dare as a teenager and instead focused their investigation on whether he had committed actual crimes such as sexual assault, then there would be no reason for the Respondents to assume that the DPD investigation and the DA's election not to proceed were remotely relevant to Sections G.2 or G.3.

Next, News Media Respondents argue that "an individual cannot have a legitimate expectation of nondisclosure of information already available to the public."[26] Respondents argue that because a great deal of information about Anderson's alleged misconduct was made public that they should be entitled to the disclosure of Sections G.2 and G.3. Yet again, Respondents are suggesting that there is no meaningful distinction between Sections G.2 - G.3 and the remainder of the ILG Report. As stated numerous times herein, that argument fails because if the report must be treated as one report, then none of it can be considered a public record on account of the compelling argument that Section G.2 does not pertain to the performance of public duties. Moreover, if the information contained in Sections G.2 and G.3 were indeed that readily available, there would be no need for Respondents to submit a CORA Request seeking the same. Indeed, the very media stories submitted by Respondents do not pertain to the events or activities underlying Sections G.2 and G.3.

[25] Admittedly, it does not prove.
[26] News Media Respondents Application Regarding Disclosure at p. 8.

News Media Respondents also argue that because Anderson denied the allegations and has filed a defamation suit, that Sections G.2 and G.3 should be disclosed. In short, there is no rationale and certainly no law on point that supports either contention. Respondents' argument that officials accused of serious wrongdoing cannot issue broad statements addressing allegations without providing a back door for actors such as News Media Respondents to obtain the private details of the investigation is baseless and if true would render privacy interests entirely meaningless.[27] It is clearly possible to address an allegation without discussing the details.

The claim regarding Anderson's lawsuit is even more radical. Perhaps if Anderson's lawsuit actually related to the events underlying Sections G.2 and G.3, as Respondents suggest, then this position would require an in-depth analysis. In reality, the defamation lawsuit is related to false allegations of sexual assault and have absolutely nothing to do with Sections G.2 or G.3 of the ILG Report and is therefore in no way related to Respondents' ongoing quests to obtain more information about the sexual history of Anderson and others as teenagers.

(b) Disclosure of Sections G.2 and G.3 of the ILG Report is not required to serve a compelling public interest.

There is no compelling public interest served by News Media Respondents efforts to learn more details about the events underlying Sections G.2 and G.3 of the ILG Report. News Media Respondents argue "the public has a strong (and legitimate) interest in understanding whether there are any safety concerns with students interacting with Mr. Anderson…and there's also a strong public interest in evaluating the investigation that the DPS Board conducted to ensure the process was fair."[28] Respondents take the position that even after the commissioning of a $200,000.00 investigative report

[27] The court must avoid any construction that would render a constitutional provision either superfluous or a nullity. Gessler v. Grossman, 2015 COA 62, ¶ 1, 488 P.3d 53, 57.

[28] News Media Respondents Application Regarding Disclosure at p. 10.

that resulted in Anderson maintaining his position on the Board and that failed to produce criminal charges they still believe the public needs to understand whether Anderson may seek to abuse children – something that he has absolutely no history of outside of the mind of one deranged accuser.

Candidly, it is unclear whether this line of reasoning stems from personal animus against Anderson, racial stereotypes or a genuine desire to increase their subscription base. In either case, if the report accomplished anything, it supported a finding that the sexual assault allegations against Anderson were entirely baseless – particularly those leveled by Mary Katherine Brooks-Fleming, a character who failed to produce a single one of the 62 youth who she claimed Anderson sexually abused. Indeed, the same character who made the ridiculous claim that these abused children were showing up at her home for rectal repair surgeries. Rather than pursue increased subscriptions by taking on Fleming and inquiring into why she would assert such demonstrably false claims, News Media Respondents desperately seek information on Anderson's exploits as a teenager hoping to connect nonexistent dots between who Anderson sexually pursued when he was a teenager and whether he would be likely to pursue teenagers currently. This sort of undertaking is entirely inconsistent with the aims of CORA.[29]

Further, News Media Respondent's claim that public access to Section G.2 and Section G.3 is required to ensure a fair investigation occurred is also unpersuasive. The very purpose of commissioning a neutral third party to undertake the investigation was to ensure that the process was fair. Had DPS undertaken the investigation itself, it would be more plausible for the media to express an interest in whether the investigation was carried out fairly. Given, ILG performed the investigation

[29] Denver Publ'g Co . v. Bd. of Cty. Comm'rs of Arapahoe Cty., 121 P.d 190, 191 (Colo. 2005) (Colo. Rev. Stat. § 24-72-202(6)(a)(II)(B) was not intended to create a backdoor to acquire personal or private communications sent to or from an elected official by demonstrating a tenuous or indistinct impact or effect on an elected official's performance (or non-performance) of his official duties.)

and produced a near 100-page report, the vast majority of which the Respondents have full access to, it is unclear why they believe they need to ensure the public gains access to Sections G.2 and G.3. Moreover, given law enforcement eventually became involved and the district attorney failed to press charges, there is even less of a reason to assume the investigation was not fair.

Finally, Respondents cannot point to Respondent Anderson's censure to support its fears of the investigation not being fair. Given the Board was so quick to commission a $200,000 investigation and report based on anonymous allegations, they are certainly proactive enough to meaningfully act on any results of the investigation that would suggest that Anderson posed even the slightest of threats to children. Hence, there is little merit to Respondents claims that they seek to ensure the public can conduct a fair investigation into matters that ILG already conducted a fair investigation particularly given some of these matters were also fairly investigated by DPS and the DA.

(c) *Disclosure of the ILG Report has already occurred in the least intrusive manner with respect to Respondent Anderson's privacy rights.*

To the extent that the Court finds disclosure of Sections G.2 or G.3 would serve a compelling interest, the Court should ensure that sufficient redactions remain so as to prevent anyone from being able to identify who the various parties are. To be sure, this would require more than a mere redaction of the names of minors and would call for the redaction of all names, places, events, times and the exact conduct outlined. This rationale is, in principle, supported by *Todd* which placed the emphasis on redaction less on whether the actual names were redacted and more on whether the information that was redacted would be sufficient to allow someone to make an identification. Because the nature of the information contained in Sections G.2 and G.3 is highly unique and specific it would be very possible to base identifications on general descriptions of the events, complaints and circumstances.

Accordingly, a much broader redaction would be required.[30] It should also be noted that the release of the ILG Report in its current form already represents a compromise on part of the parties that allowed News Media Respondents to obtain a significant amount of information regarding events that, as has been argued throughout, was not actually a public record anyway. It is unfortunate that Anderson's forthrightness is currently being used as an avenue to keep a story alive that has already and indeed so thoroughly been debunked.

(3) Under CORA the Petitioner must deny the right of inspection of Sections G.3 and G.3 of the ILG Report because they qualify as records of sexual harassment complaints and investigations – particularly Section G.3.

News Media Respondents CORA requests for Sections G.2 and G.3 must be denied because they pertain to sexual harassment complaints and investigations, particularly Section G.3. "Colo. Rev. Stat. § 24-72-204(3)(a)(X)(A) (2002) exempts from disclosure **any records of sexual harassment complaints** and **investigations**. However, an exception to this prohibition allows the disclosure of the result of an **investigation** of general employment policies and practices of an agency, to the extent disclosure can be made without disclosing the identity of the individuals involved." *In re Bd. of Cty. Comm'rs*, 95 P.3d 593, 596 (Colo. App. 2003).

The language from the statute specifically states that "[t]he custodian **shall deny** the right of inspection of the following records…[:] **Any records of sexual harassment complaints and investigations**, whether or not such records are maintained as part of a personnel file[.] C.R.S. § 24-72-204. Hence regardless of whether the Court finds that Section G.2 or Section G.3 were a part of Anderson's personnel file, Petitioner is nonetheless required to reject any CORA requests that pertain

[30] *Todd v. Hause*, 2015 COA 105, ¶ 45, 371 P.3d 705, 713. (Finding that for test takers to have a legitimate expectation of nondisclosure under the first factor the disclosure of the information sought must permit someone to determine identity).

to the records of sexual harassment complaints and investigations set forth in Sections G.2 and G.3. Additionally, the ILG Report was not an investigation into the general employment policies and practices of the District and hence that exception does not apply. Accordingly, any disclosure of Sections G.2 and G.3 are statutorily prohibited.

It should be noted that the applicability of this exception is stronger for Section G.3 because at that time Anderson was a DPS employee. However, because the nature of the investigation covered in Section G.2 pertains to sexual harassment and because it was improperly included in the scope of the ILG Report, the proper application of law and equity would both militate in favor of including Section G.2 as a record of sexual harassment complaints and investigations. To the extent that Respondent argues that Section G.2 cannot be considered a sexual harassment investigation because it pertains to a period of time when Anderson was not an employee, then, yet again, in doing so they also concede that the investigation performed pursuant to Section G.2 was outside of the relevant scope and did not pertain to the performance of public functions. Accordingly, Section G.2 would not be a public record and therefore not disclosable in any event.

C. ASSUMING, ARGUENDO, THE ILG REPORT IS A PUBLIC RECORD AND THAT NO EXPRESS STATUTORY EXCEPTIONS APPLY GRANTING THE NEWS MEDIA RESPONDENTS' CORA REQUEST FOR THE UNREDACTED DISCLOSURE OF SECTIONS G.2 AND G.3 OF THE ILG REPORT WOULD CAUSE SUBSTANTIAL INJURY TO THE PUBLIC INTERESTS.

While Respondent Anderson's position is that the disclosure of Section G.2 and G.3 of the ILG Report would also cause substantial injury to the public interest, the Custodian has the burden of making this showing. Colo. Rev. Stat. § 24-72-204(6) (1988 Repl. Vol. 10B) provides: If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, he may apply to the district court of the district in which such record is located for an order permitting him to restrict such disclosure. After hearing, the court

may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. **In such action the burden of proof shall be upon the custodian**. Denver Pub. Co. v. Univ. of Colo., 812 P.2d 682, 683 (Colo. App. 1990). Notwithstanding, the privacy interests and contractual agreement interests are still evaluated under the personnel file exception and therefore, to the extent the Court is so inclined, should be also considered as applicable to the injury of public interest factor.

WHEREFORE Respondent Anderson respectfully request this honorable Court issue an order consistent with the following:

(a) Finding that the ILG Report is not a public record as contemplated under CORA;

(b) Finding that the ILG Report falls under one or more exceptions to CORA's public access requirements;

(c) Denying News Media Respondents' CORA Request seeking the disclosure of Section G.2 of the ILG Report;

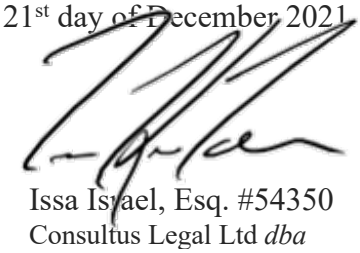
(d) Denying News Media Respondents' CORA Request seeking the disclosure of Section G.3 of the ILG Report;

(e) Finding that Custodian's commission of the ILG Report was arbitrary and capricious;

(f) Ordering Custodian to deny any future CORA Requests that seek the disclosure of any portion of the ILG Report in its currently redacted form; and

(g) Any further relief that the Court deems just and appropriate.

Respectfully submitted this 21st day of December 2021



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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2021 the foregoing RESPONDENT ANDERSON'S RESPONSE TO PETITIONER'S APPLICATION REGARDING DISCLOSURE OF RECORDS PURSUANT TO §24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT was filed through the State's electronic filing system and served on all Counsels of Record including the following:

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