

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 BANNOCK ST. DENVER, CO 80204	<p style="text-align: center;"><u>COURT USE ONLY</u></p> Case Number: 2021CV33225 Rm. 215
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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REPLY IN SUPPORT OF PETITIONER'S APPLICATION REGARDING DISCLOSURE OF RECORDS PURSUANT TO SECTION 24-72-204(6)(a) OF THE COLORADO OPEN RECORDS ACT	

Petitioner Denver Public Schools (the “District”) by and through undersigned counsel, hereby submits its Reply in Support of Petitioner’s Application Regarding Disclosure of Records Pursuant to Section 24-2-204(6)(a) of the Colorado Open Records Act (“CORA”). The District takes no position as to the release of Section G.2; however, the District respectfully requests this Court issue an order denying the requests of Respondents, The Denver Post and The Denver

North Star (“News Media Respondents”), which seek disclosure of the Investigations Law Group Investigation Report (“ILG Report”) with Section G.3 unredacted. In support, the District states the following:

I. BACKGROUND INFORMATION

Petitioner filed its Application Regarding Disclosure of Records Pursuant to Section 24-72-204(6)(a) of the Colorado Open Records Act (“Petition”) on October 12, 2020. Prior to filing, undersigned counsel conferred with representatives for Respondents Auon’tai Anderson (“Anderson”), The Denver Post, and The Denver North Star (collectively the “News Media Respondents”).

At that time, the News Media Respondents seemingly agreed, notwithstanding their request for an unredacted version of the ILG Report, that Section G.3 of the Report would remain redacted due to privacy concerns surrounding the confidentiality of student records and investigations into claims of sexual harassment. News Media Respondents submitted various Colorado Open Records Act (“CORA”) requests and acknowledged their willingness to accept the Report with only Section G.2 unredacted.¹ With that understanding in mind, and

¹ See Denver North Star Cora Request, attached as **Exhibit B** to News Media Respondents Response to Petition (“We understand that section 3 contains redacted sections because of student allegations and Title IX and to be clear we are not asking for a version with those sections unredacted. Per the board statement on 9/15/21, portions of section 2, however, were redacted at Director Anderson's request, which we do not believe have the same exemption from Colorado's open records laws. We are seeking a version of the document without the redactions in section 2.”); Denver Post’s Second Cora Request, attached as **Exhibit C** to News Media Respondents Response to Petition (requesting “Any and all previously redacted portions of the ILG report into Director Tay Anderson. If all redacted sections cannot be made available, I'm specifically requesting Section II of the report.”); Denver Post’s First CORA Request, attached as **Exhibit D** to News Media Respondents Response to Petition (requesting “1. Any complaints filed against Tay Anderson, in his capacity as an employee and a school board director, under the districts harassment and discrimination policy, 2. Any investigative reports on Mr. Anderson produced under that policy. 3. Any disciplinary or corrective action taken against Mr. Anderson as a result of those complaint or investigations.”).

understanding Respondent Anderson opposed the release of an unredacted ILG Report, the District filed the instant declaratory action.

Based on the District's understanding that News Media Respondents would not be pursuing Section G.3, the District indicated in its Petition that the content of Section G.3:

[S]hould remain redacted due to other concerns related to student privacy and the restrictions in the Colorado Open Records Act prohibiting release of sexual harassment 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).

See Petition at fn. 2. The District did not elaborate on the above listed authorities due to its understanding the News Media Respondents' CORA requests were limited in scope.

The parties next participated in a status conference before the Court on November 30, 2021. During the conference, the News Media Respondents indicated for the first time they were also requesting Section G.3 of the Report. Although the District does not take a position as to whether Section G.2 should be released unredacted, the District objects to the release of Section G.3 due to the privacy interests of the student Complainant and other witnesses who participated in interviews, provided documentation, and specifically requested their identity remain confidential.

For the reasons alluded to in the Petition, the District objects to the release of Section G.3. The legal bases for the District's objection are discussed more fully below.

II. ARGUMENT

A. *Complainant Has a Constitutional and Statutory Right to Privacy Concerning Sexual Harassment Complaints*

As a preliminary matter, CORA and interpretive case law recognize an individual's right to privacy with regard to matters concerning sexual harassment. CORA exempts from public inspection:

Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file . . . Disclosure of all or a part of any records of sexual harassment complaints and investigations to the person in interest is permissible to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved. . . .

C.R.S. § 24-72-204(3)(a)(X)(A). A person in interest under this subparagraph includes the person making a complaint and the person whose conduct is the subject of such a complaint.

C.R.S. § 24-72-204(3)(a)(X)(B).

Regardless of whether Section G.3 contains protected investigation records under Title IX or education records under FERPA as discussed in section II.B and II.C, *infra*, the Complainant's constitutional privacy rights prohibit disclosure or inspection. Further, while redacting names and basic identifiers is typically sufficient to protect identities, redaction is constitutionally insufficient if disclosure of the remaining information would allow someone to deduce an individual's identity through a skillful internet search or limited inquiry.

As the Colorado Supreme Court noted, CORA clearly evidences the intent of the legislature to treat matters concerning sexual harassment allegations and investigations with discretion and care. *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 606 (Colo. 1999) ("In sum, we find nothing in the Open Records Act that would cause us to conclude that the

General Assembly intended that this sort of information should always be disclosed. Rather, we find expressions of concern regarding such matters that dictate caution in analyzing application of the right to public inspection under such circumstances.”).

Furthermore, CORA includes a specific exemption for records containing information that, if disclosed, would constitute an unwarranted invasion of privacy. C.R.S. § 24-72-204(6)(a) (permitting the state to refuse to disclose records if it would cause substantial injury to public interest, including privacy harms); *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.”); *Denver Post Corp. v. Ritter*, 230 P.3d 1238, 1240 (Colo. App. 2009), *aff’d*, 255 P.3d 1083 (Colo. 2011) (same). Here, disclosure of Section G.3 of the ILG Report would adversely impact the Complainant and witnesses by potentially exposing these individuals to public scrutiny, ire, or embarrassment.

An individual’s interest in preventing the dissemination of personal information becomes stronger when the dissemination could subject them to adverse repercussions, stigma, or reprisal. Private citizens like the Complainant retain more than a *de minimis* interest in the confidentiality of their personally identifiable information collected from them by the state. This interest increases as the nature of the information becomes more intimate and sensitive and as the possible consequences of disclosure become more adverse. Likewise, victims of sexual assault or sexual harassment at the hands of a public school employee have more than a *de minimis* interest in the confidentiality of the personally identifiable and sensitive information they provide to enable the state to investigate alleged misconduct. *Purzel Video GmbH v. St. Pierre*, 10

F.Supp.3d 1158, 1167 (D. Colo. 2014) (recognizing claim for “unreasonable publicity given to one’s private life”).

Importantly, the Complainant and witnesses repeatedly requested confidentiality and were told their identities would remain confidential. (See Unredacted ILG Report, attached to Petition as **Exhibit B** at pp. 51, 58). As such, these individuals had a legitimate expectation of privacy in their statements and releasing Section G.3 unredacted would improperly invade these individuals’ right to privacy.

In support of their request for Section G.3, News Media Respondents argue there can be no legitimate expectation of nondisclosure of information concerning unlawful activity. First, there has been no adequate demonstration that unlawful activity occurred in this case. Although there were certain allegations made, there has been no arrest or conviction. Accepting the News Media Respondents’ position would substantially broaden the ambit of available records without regard to the statutory exemptions provided under CORA. Under the News Media Respondents’ reading, any allegation of unlawful activity would be sufficient to overcome the exemptions provided by CORA as well as any individual’s privacy interest. As such, this Court must require some further indication that unlawful activity was afoot (i.e., either arrest, conviction, or admission) before these important protections are laid to the wayside. **Second, this argument fails to recognize the privacy rights of Complainant with regard to these same materials. Section G.3 does not concern Respondent Anderson alone. To the contrary, Section G.3 concerns the alleged victimization of Complainant thus any discussion regarding disclosure should properly consider those privacy interests as well.**

Due to the important privacy interests at stake, this Court should decline to order the release Section G.3 unredacted.

B. Title IX Protects Sexual Harassment Investigation Records Against Disclosure and Public Inspection

Federal law also militates against the release of Section G.3 and operates to restrict public access to records concerning sexual harassment/assault investigations and to student records. Section G.3 of the ILG Report contains both.

While much of the ILG Report concerns matters outside of the Title IX context, Section G.3 falls squarely within its parameters and the incidents described therein were investigated using the District's Title IX policy as required by federal law. For this reason, and for the reasons discussed below, Section G.3 should not be made publicly available in its unredacted form.

As noted, a federal regulation enacted pursuant to statutory authority can provide an exemption to public disclosure under CORA. *See* C.R.S. § 24-72-204(1)(b) (creating exemption where inspection would be contrary to any federal statute). The implementing regulations for Title IX provide for such an exemption and protect information regarding participants in a Title IX investigation. In short, Title IX provides a safe harbor for an individual complainant's personal information and privacy. 34 CFR § 106.71(a); 20 USC § 1682 (authorizing the federal government to prescribe regulations necessary to achieve the objectives of Title IX).

Under Title IX, a recipient institution² receiving U.S. Department of Education funding must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including ensuring the recipient institution is free of sex-based harassment – which encompasses sexual assault and other forms of sexual violence. Title IX also requires recipient institutions to investigate claims of sexual harassment. 34 CFR § 106.45.

In addition to investigative mandates, Title IX makes the following information within a Title IX investigation confidential: the identity of any individual who makes a complaint of sex discrimination; the identity of the alleged perpetrators of sex discrimination; and the identities of any respondent or witness. 34 CFR 106.71(a) (recipient must “keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness except as may be permitted by FERPA, or required by law. . . .”). As such, the District, adhering to its federal obligations, must decline to release Section G.3 for public inspection.

Even more importantly, disregarding a Complainant’s desire to report confidentially and anonymously would deter reporting by future victims and would hamper the District’s efforts to investigate future claims. Complainant concerns about confidentiality are one of the principal reasons victims of sexual harassment do not report. *See* U.S. Dep’t. of Justice, Office of Justice

² 45 CFR § 2555.105 (“Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.”); *cf.* 34 CFR § 106.2(i) (defining recipient as any public entity which operates an education program which receives federal financial assistance).

Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (2005).³

Research also shows complainants are deterred from reporting sexual harassment and assault due to policies that compromise or restrict the victim's ability to make informed choices about how to proceed; concerns about confidentiality; a desire to avoid public disclosure; the desire to avoid the perceived or real stigma of having been victimized, and institutional betrayal. *See e.g., id.*; Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 *JOURNAL OF TRAUMATIC STRESS* 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 *YALE J. OF L. & FEMINISM* 123, 140-141 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private").⁴

Releasing Section G.3 of the ILG Report without consent or consultation with the Complainant and witnesses would have a lasting detrimental effect, which is why Title IX forbids it.

Therefore, the District requests to withhold from public disclosure the information contained in Section G.3 and requests these materials remain in redacted form.

³ Available at: <https://www.ojp.gov/pdffiles1/nij/205521.pdf> (last viewed January 7, 2022).

⁴ Available at: <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7089/MerleHWeinerLegalCounsel.pdf?sequence=2&isAllowed=y> (last visited January 7, 2022).

C. The Family Educational Rights and Privacy Act (FERPA) protects Educational Records Such As Section G.3

As stated in its Petition, the District relies, in part, on FERPA, 20 U.S.C. § 1232g *et seq.*, to resist disclosure of an unredacted version of Section G.3 of the ILG Report. *See* Petition at fn.2. This Court should accept this federal statute as a basis for nondisclosure because allowing inspection in this circumstance would be contrary to federal statute. C.R.S. § 24-72-204(1)(b) (creating exemption where inspection would be contrary to any federal statute).

FERPA, a funding statute, imposes conditions on the availability of federal funds to educational institutions and controls the use and disclosure of educational records pertaining to students. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (acknowledging Congress enacted FERPA under its to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student related materials). FERPA aims to protect the privacy of student information and to prohibit educational institutions from disclosing the personally identifiable information in those records. As pertinent here, “personally identifiable information” includes:

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3(f)-(g). Tellingly, the News Media Respondents have no objection to and, in fact, requested the redaction of any information that personally identifies the Complainants. News Media Respondents have, in essence, conceded these materials are afforded greater protection

than other sections of the Report. Even so, protection of the Complainant's privacy interests will entail redaction of more than simply names and addresses. *See Todd*, 371 P.3d at 713.

Much of the material in Section G.3 either constitutes personally identifiable information or would allow a reasonable person in the school community, without personal knowledge of the relevant circumstances, to identify the Complainant with reasonable certainty. The Report provides sufficient information for members of the public, teachers, administrators, classmates, other students, and Respondent Anderson, to ascertain the identity of the student Complainant.

The unredacted ILG Report includes information concerning the Complainant's school, race, sex, age, hair color, location of the interactions at issue, Complainant's connection or relationship to Respondent Anderson, approximate dates of interactions, and the content of their communications. (*See Ex. B* to Petition at pp. 49-61). The Report is replete with explicit details of the alleged incidents and other facts submitted by the Complainant and witnesses. Although the Report also contains information, which could reasonably be redacted to exclude personally identifiable information, the Report is so thoroughly detailed that redaction alone would either not protect the Complainant or witnesses or would render the resulting report unreadable.

The Complainant was in a very small, male-dominated program. The small pool of individuals who could potentially be a complainant or witness heightens the risk these individuals could be readily identified. When also considering the allegations originated at identifiable on and off-campus events, the possibility of outing the Complainant or witnesses becomes even more certain. Revealing information such as Complainant's particular area of study, dates of contact with Respondent Anderson, or information about advisors, could very well lead to the Complainant's identification. In viewing the content of Section G.3 as a whole, if

the records are released even with the names of minors redacted as requested by the News Media Respondents, the identities of the Complainant and witnesses still will be known within reasonable certainty. *See Osborn v. Bd. of Regents of Univ. of Wisc. Sys.*, 634 N.W.2d 563 (Wis. App. 2001) (“University was not required to produce students’ records after redacting personally identifiable information; confidential nature of the records was not changed simply because the names of the students were removed.”).

Furthermore, although Respondent Anderson did not request the information at issue, he will certainly have access to Section G.3 if the Report is released. Although the District has no direct knowledge of whether Respondent Anderson knows the identity of the Complainant, and Respondent Anderson has denied having any knowledge of the underlying incident, the possibility he could ascertain the Complainant's identity based on additional materials included in Section G.3 cannot be ignored. This possibility weighs in favor of maintaining Section G.3 in its current redacted form and denying further inspection.

What is more, FERPA is a recognized exemption under CORA. C.R.S. § 24-72-204(3)(d)(III) (recognizing FERPA exemption); *see also* The Student Data Transparency and Security Act, C.R.S. § 22-1-123(3) (“school district shall not release the education records of a student to any person, agency, or organization without the prior written consent of the parent or legal guardian of the student except as otherwise permitted in [FERPA].”); *People v. Wittrein*, 221 P.3d 1076, 1084-85 (Colo. 2009) (same). CORA shields FERPA protected materials from public view absent certain enumerated conditions. *See* C.R.S. § 24-72-204(3)(e)(I)(A)-(E) (enumerated exceptions). None of the enumerated conditions are presented here. And, as the

News Media Respondents have made no showing they have sought parental or student permission for the release of these records, their request for Section G.3 should be denied.

Finally, as discussed, the Complainant and Respondent Anderson were both engaged in the District's Title IX investigative process. As such, both received certain information regarding the investigation in the form of separate Title IX closure letters to each. In those letters, both Complainant and Respondent Anderson received all of the information to which they were legally entitled. The information presented in the closure letters was presented with additional information to the Board for review in Section G.3. Therefore, Section G.3 contains information protected as an educational record (i.e. all of the information contained in the Complainant's Title IX closure letter) and other information concerning Respondent Anderson which is also protected from disclosure. 34 CFR 10.71(a). Releasing this information would provide Respondent Anderson and the Complainant information to which they are not and have never been legally entitled and which are part of the District's response. For this reason, and for the reasons articulated above, the District requests Section G.3 remain available only in its redacted form.

III. CONCLUSION

Because CORA, FERPA, and Title IX, all operate to protect the privacy interests of a student complainant as well as records concerning investigations into sexual harassment, the District respectfully requests this Court decline to order the release of Section G.3 unredacted for public inspection and for all such further relief this Court deems just and proper.

DATED this 7th day of January 2022,

/s/ Aaron J. Thompson
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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 January 7, 2022 a true and complete copy of the foregoing REPLY IN SUPPORT OF PETITIONER'S 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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