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CASE NUMBER: 2021CV33225

DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
IN THE MATTER OF THE REDACTION OF THE INVESTIGATIONS LAW GROUP INVESTIGATION REPORT DATED SEPTEMBER 13, 2021 Petitioner: DENVER PUBLIC SCHOOLS, v. Respondents: THE DENVER POST, THE DENVER NORTH STAR, and AUON'TAI ANDERSON	**COURT USE ONLY** Case Number: 21CV33225 Courtroom: 215

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

THIS MATTER comes before the Court on Petitioner Denver Public Schools' ("DPS") Application Regarding Disclosure of Records Pursuant to Section 24-72-204(6)(a) of the Colorado Open Records Act, filed on October 10, 2021. Respondents The Denver Post and The Denver North Star (collectively "Media Respondents") filed a Response on December 3, 2021. Respondent Auon'tai Anderson ("Anderson") filed a Response on December 21, 2021. DPS filed a Reply on January 7, 2022. A "Supplemental Response" was filed by the Media Respondents on January 21, 2022, pursuant to leave of Court. The Court, having reviewed the related pleadings and relevant portions of the Court's file, FINDS and ORDERS as follows:

BACKGROUND

The Petitioner's Application sets forth that in March, 2021, Black Lives Matter 5280 ("BLM5280") issued a statement alleging that Mr. Anderson, the Denver Public School Board of Education Director, had sexually assaulted a female community member. Following BLM5280's statement, six members of Never-Again Colorado ("NAC"), who worked alongside Mr. Anderson when he was President of NAC in 2018, issued a statement alleging that Mr. Anderson made young women on the NAC board feel uncomfortable through unwanted sexual advances and other inappropriate behavior.

Mr. Anderson denied the allegations made by BLM5280 in their statement, but largely admitted to the complained-of conduct in the statement by NAC, and apologized. The Denver Public Schools Board of Education ("the Board") determined that an investigation was

necessary, citing two reasons: 1) the desire to afford a fair investigative process to Mr. Anderson; and 2) the obligation, pursuant to the Claire Davis School Safety Act ("CDSSA"), to respond to potentially unlawful sexual contact allegations to ensure that students in the district are protected.

A third-party organization, Investigation Law Group ("ILG"), was retained to investigate certain topics, some of which are central to the present action. Much of the overall report was published, unredacted. However, large portions of Section G.2 were redacted at Mr. Anderson's request. Though the Board initially intended to publish Section G.2 unredacted, the Board ultimately published the report with those portions of Section G.2 redacted, and later submitted the question whether such redactions are required to this Court for review.

The report was published, in redacted form, on September 15, 2021, and shortly thereafter the Media Respondents submitted Colorado Open Records Act requests for a copy of the report with certain of the redactions lifted.

The Petitioner takes no position with respect to the propriety of releasing Section G.2 in its unredacted form. Respondent Anderson objects to the release of the unredacted version of Section G.2. Media Respondents argue that Section G.2 should be released in fully unredacted form, and that additionally Section G.3 should be released in largely unredacted form, save for redactions concerning the names and addresses of certain people who participated in that portion of the investigation. Both Petitioner and Mr. Anderson object to the modification of any redactions as to Section G.3.

LEGAL STANDARD

The general policy of the Colorado Open Records Act ("CORA") is that all public records are open to inspection unless specifically excepted by law. *Carpenter v. Civil Service Com'n*, 813 P.2d 773, 777 (Colo. App. 1990). Such exceptions are to be narrowly construed. *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998). CORA contains no express exception for disclosure of information which would violate an individual's privacy rights. *Todd v. Hause*, 371 P.3d 705, 711 (Colo. App. 2015). However, Colorado Courts have construed C.R.S. § 24-72-204(6)(a)[1] to include, "under appropriate circumstances," protection of information collected by the government, the disclosure of which would violate an individual's right to privacy. *Id.*

[1] C.R.S. § 24-72-204(6)(a) provides that if a custodian believes that disclosure of an otherwise disclosable record would do substantial injury to the public interest, the custodian may apply to the district court for a determination as to the propriety of its disclosure.

ANALYSIS

CORA provides that "the custodian of any public records shall allow any person the right of inspection of such records or any portion thereof" unless otherwise excepted. C.R.S. § 24-72-204(1). The threshold determination for this Court, then, is whether the ILG report is a "public record" under CORA.

I. Public Record

As is relevant, "public records means and includes all writings made, maintained, or kept by the state…or political subdivision of the state…for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." C.R.S. § 24-72-202(6)(a)(I). The definition is two-pronged, focusing on who made the record and why. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). The first prong is easily satisfied. DPS is a "political subdivision of the state." C.R.S. § 24-72-202(5). It "made" the ILG report by "direct[ing] creation" of the report and continues to "keep" the writing as custodian. *See Ritter*, 255 P.3d at 1091. No party disputes this.

Mr. Anderson, however, argues that the ILG report was neither made, maintained, or kept for "the use in the performance of public functions" nor is it "involved in the receipt and spending of public money." *Id*. at 1090; C.R.S. § 24-72-202(6)(a)(I). He maintains that the ILG report, as a whole, fails to meet this definition, but argues that Section G.2, which details the investigation into allegations of conduct that took place before he ran for the Board and before he was a DPS employee, particularly fails to meet this standard. Mr. Anderson also argues that the public funds qualification does not apply just because DPS spent public money in order to generate the report. Lastly, Mr. Anderson argues that, for many reasons, the Board's action in commissioning the report was arbitrary and capricious and thus was not made "for use in the exercise of functions required or authorized by law or administrative rule."

In response, the Media Respondents argue that the ILG report was commissioned so that Petitioner could meet its obligations under the CDSSA. Both Petitioner and the ILG report itself echo this sentiment, stating that "the Denver Public Schools Board of Education determined that an investigation of these allegations was necessary for two primary reasons. First, the District conveyed its desire to afford a fair investigative process to Director Anderson….second, the District stated that it is obligated under the Claire Davis School Safety Act to respond to notice of potentially unlawful sexual contact allegations, to investigate and to ensure that students are protected." Ex. A to Application, p. 4; Application, pp. 3-4.

Mr. Anderson responds to this position by noting that, while it may be noble to want to afford a fair investigation, there is no statute or regulation authorizing or requiring such noble deeds, and so the first basis is insufficient.

With respect to the CDSSA, Mr. Anderson argues that a "belief" by the Board that it is obligated to investigate thusly is insufficient. He argues that the Board had insufficient information at the time it commissioned the ILG report to give rise to an obligation to investigate under the CDSSA. Mr. Anderson's position is that, because the statements from BLM5280 and the NAC members were, in his view, unreliable, and because they concerned conduct separate and distinct from his public functions and the DPS system, it was not reasonably foreseeable that he posed a threat to DPS students and staff, and that therefore, the obligation to investigate was not manifest. He advances several other arguments as well, such as that it is law enforcement's job to investigate sexual assault crimes, that the payment of compensation to ILG "alone" suggests arbitrary and capricious action on the part of the Board, and that one of the areas of conduct investigated by ILG, sexually coercive behavior, is so nuanced and subjective that it gives rise to the inference that the Board behaved in an arbitrary and capricious manner. Anderson's Response, pp. 9-13. Succinctly, Mr. Anderson's position is that the Board lacked a justification to pursue an investigation, and as such, it was not authorized or required by law or regulation.

a. The ILG Report was Made, Maintained, and Kept Pursuant to the Exercise of a Function Required or Authorized by Law

The Court rejects Mr. Anderson's arguments and finds that the Board was acting within the scope of its authorized duties in investigating the allegations made against Mr. Anderson by commissioning the ILG report.

The CDSSA recognizes, among other things, a duty of care possessed by all school districts and their employees to "exercise reasonable care to protect all students, faculty, and staff from harm from acts committed by another person when the harm is reasonably foreseeable, while such students, faculty, and staff are within the school facilities or are participating in school-sponsored activities." C.R.S. § 24-10-106.3.

This duty, in the context presented here, is not unlike an employer's duty under theories of negligent hiring and supervision. An employer who knows or should know that an employee's conduct would subject third parties to an unreasonable risk of harm may be directly liable to third parties for harm proximately caused by his conduct. *Keller v. Koca*, 111 P.3d 445, 448 (Colo. 2005). In such cases, liability is predicated on the employer's "antecedent ability to

recognize" an employee's attributes of character or prior conduct which would create an undue risk of harm to those with whom the employee comes in contact in executing his employment responsibilities. *Id*.

Mr. Anderson's position is that there was nothing the Board knew that gave rise to this antecedent ability to recognize a risk of reasonably foreseeable harm. But his theory ignores entirely the purpose of an investigation. Furthermore, even outside the duty imposed by the CDSSA, investigating employee wrongdoing is an authorized function of a school board.

There can be no serious dispute as to the authority of a school board to investigate claims of sexual assault and sexual harassment. *Shelton v. Tucker*, 364 U.S. 479, 485 (1960) ("There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools…"). The failure to do so can lead to liability on the part of the school board. *Jones v. Bd. of Educ. of Sch. Dist. 50, Archuleta & Hinsdale Ctys.*, 854 P.2d 1386, 1390 (Colo. App. 1992) ("[P]ublic school officials have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards of which the school officials know or should know."). Boards of education are vested with broad powers to supervise public schools. *Pierce v. St. Vrain Valley School Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999). Implicit in those powers is the authority to discharge the responsibility. *Id*. Protecting the school community from harm is a legitimate interest of the state. *Weissman v. Bd. of Educ.*, 547 P.2d 1267, 1273 (Colo. 1976). A reviewing court may not substitute its judgment for a school board's appraisal of the harm inflicted on the school community by particular instances of teacher conduct. *Pierce*, 981 P.2d at 605.

It hardly matters that the initial allegations against Mr. Anderson concerned conduct outside the direct purview of DPS premises and activities. *Shelton*, 364 U.S. at 485 ("There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness.'") (internal citation omitted). Additionally, it is absurd to suggest, as Mr. Anderson does, that a school board is without the authority to investigate the commission of crimes by its staff simply because law enforcement agencies also investigate such conduct. Fitness as an employee extends to conduct beyond mere compliance with the Colorado criminal code. *Shelton*, 364 U.S. at 485 ("Fitness for teaching depends on a broad range of facts."). Regardless, two agencies can investigate the same conduct for different purposes. The Court likewise sees no merit in the non-sequitur that because DPS hired a third-party to conduct the investigation, paying them significant compensation, they necessarily were acting in bad faith. The Court simply fails to perceive how hiring a vendor to complete a task is evidence of bad

faith, and this argument, undeveloped as it is, offers no insight. And, of course, the relative nuance of an investigative subject[2] is not at all evidence of bad faith.

The bottom line is that Mr. Anderson was accused of serious recent sexual impropriety. It is certainly within a school board's power to investigate such claims to determine what action, if any, is appropriate in order to promote the safety of students in its charge, given the nature of the allegations and Mr. Anderson's proximity to students. In addition to the Board's unassailable interest in evaluating and investigating Mr. Anderson's fitness to serve as an employee of the district, C.R.S. § 24-10-106.3 imposes a duty of care on a school district to exercise reasonable care to protect all students, and waives immunity when a breach of that duty results in, among other things, felony sexual assault. Inaction in the face of allegations or information that would lead a reasonable person to investigate can serve as the basis for liability in negligence actions against employers which carry supervisory responsibility. *See Jones*, 854 P.2d at 1390 ("Public school officials have a duty to police the misconduct of their subordinates and to protect schoolchildren from hazards which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them."); *Doe v. Sch. Dist. No. 1, Denver, Colorado*, 970 F.3d 1300, 1314 (10th Cir. 2020). It is a general rule that an actor cannot remain content in his ignorance by refusing to investigate a situation once he is aware of facts which would compel a reasonable person to inquire. *Cherrington v. Woods*, 290 P.2d 226, 228 (Colo. 1955) ("Whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led."); *Silver v. Colorado Cas. Ins. Co.*, 219 P.3d 324, 331 (Colo. App. 2009) (general rule for insurer's duty to investigate representations made in an application for insurance is that duty is triggered if insurer has sufficient information that would put a reasonably prudent insurer on notice of a possible misrepresentation and would have caused said insurer to begin an inquiry); *Mackey v. Fullerton*, 4 P. 1198, 1200 (Colo. 1884) ("Willful ignorance is equivalent, in law, to actual knowledge. A man who abstains from inquiry when inquiry ought to be made, cannot be heard to say so, and to rely upon his ignorance.").

Ultimately, the ILG report is the result of investigations into claims of misconduct that occurred both prior to Mr. Anderson's direct association with DPS and while an employee and board member. Conducting such investigations is without question within the Board's authority. Consequently, the ILG report was made, maintained, or kept in furtherance of the Board's functions, and as such, it is a public record.

[2] In the Court's view, sexually coercive behavior is not a subject of appreciable nuance.

II. Exceptions to CORA

Having found that the ILG report is a "public record" under CORA, the Court considers whether any of the statutory exemptions to disclosure apply. Mr. Anderson argues that the ILG report is subject to the personnel file exception and the exception for sexual harassment complaints and investigations, and that, regardless, disclosure would violate his right to privacy. He also argues that disclosure would violate a valid agreement he had with the Board.

a. The ILG Report is Not Subject to the Personnel Files Exemption

C.R.S. § 24-72-204(3)(a)(II)(A) provides that the custodian shall deny the right of inspection for personnel files. "Personnel files" means "home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure." C.R.S. § 24-72-202(4.5). It does not include applications, employment agreements, severance agreements, performance ratings, final sabbatical reports, or any compensation. *Id*.

Mr. Anderson argues that under *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. App. 1987), the personnel file exception is a "blanket protection" for all personnel files, except applications and performance ratings. Because "neither Petitioner nor News Media Respondents claim that the ILG Report is an application or performance rating," the personnel file exemption "clearly applies. Anderson's Response, p. 15. This argument presupposes that the ILG report is a "personnel file."

The Court notes that the statute defining "personnel files" has been amended significantly since cases like *Denver Post Corp.* were decided. Courts interpreting the current version of the statute have interpreted the definition of "personnel files" to be limited to personal demographic information. C.R.S. § 24-72-202(4.5) lists several discrete examples of personnel files, and then includes a general qualifier, "other information maintained because of the employer-employee relationship." Applying the cannon of *ejusdem generis,* and coupled with the admonition that exemptions under CORA must be construed narrowly, Colorado Courts have construed the general qualifier to be limited to the types of information similar in kind to the specific preceding examples (*i.e.* personal demographic information). *Jefferson Cty. Educ. Assoc. v. Jefferson Cty. School. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016); *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999). Courts have also held that a custodian cannot shield a document from disclosure simply by placing it in an employee's personnel file. *Daniels*, 988 P.2d at 651.

Having reviewed the ILG report thoroughly, none of the disputed information contained therein qualifies as a "personnel file" under the statutory definition. It is simply not the sort of banal demographic information contemplated by the exemption. Neither section G.2 nor section G.3 of the ILG report are exempted from disclosure pursuant to the personnel file exemption.

b. Sections G.2 and G.3 Concern Sexual Harassment Complaints and Investigations

Mr. Anderson argues that the ILG report, in particular section G.3, pertains to sexual harassment complaints and investigations, and is thus exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(X)(A). Petitioner takes no position on the application of this exemption to section G.2 but contends that it (among other bases) prohibits disclosure of section G.3. Media Respondents argue that this exemption is inapplicable to the ILG report because: it is a "summary of findings" not made up of specific complaints and investigations submitted to the Board; the ILG report has not remained confidential but has rather been disclosed, in part, to the public; and because a copy of the unredacted ILG report was submitted to this court's record under seal.

The Court is not persuaded by the Media Respondents' arguments. First, regarding the argument that the ILG report is a "summary of findings," the Court is not persuaded that this has any impact on the applicability of the exemption. While the Court is mindful of its obligation to construe exceptions to the disclosure requirement narrowly, this exception nonetheless applies to "any" record of sexual harassment complaints and investigations.[3] C.R.S. § 24-72-204(3)(a)(X)(A). Further, there is little in the way of case law interpreting this section of the statute, but those few which discuss it, such as *In re Bd. of Cty. Com'rs of Cty. of Arapahoe*, 95 P.3d 593 (Colo. App. 2003), *rev'd in part on other grounds*, 121 P.3d 190 (Colo. 2005)[4], support the conclusion that the ILG report qualifies as a record of sexual harassment complaints and investigations. There, the Court of Appeals considered whether a "subreport" on sexual harassment and hostile work environment complaints contained within a larger report concerning not only the aforementioned issues, but also allegations of violations of open meetings law, the Campaign Practices Act, and the misuse of county property, met the statutory exception. *Id*. at 596. The Court of Appeals, in cursory fashion, simply noted that "the plain language of the

[3] "Any," in this context, means "all." *See, e.g., Donohue v. Zoning Bd. of Appeals of Town of Norwalk*, 235 A.2d 643, 646 (Conn. 1967) ("The word 'any' has a diversity of meanings and may be employed to indicate 'all' or 'every' as well as 'some' or 'one.'").

[4] The Supreme Court only granted certiorari on issues relating to the disclosure of certain e-mails under a constitutional privacy right analysis.

statute prohibits disclosure of the 'sexual harassment/hostile work environment' subreport." *Id.* at 598.

Other cases concerning this section of the statute (or a version of this section similar to the extant provision), including *Pierce*, 981 P.2d 600, 606 and *Daniels*, 988 P.2d 648, are of little help. First, in *Daniels*, though the custodian relied on C.R.S. § 24-72-204(3)(a)(X)(A) to deny inspection, it apparently did so because it considered the privacy interests of the victims and accused to be paramount to the public's interest in inspecting the requested documents. 988 P.2d at 650. The Court of Appeals reviewed only the trial court's decision under the personnel file exemption and the public interest exemption, and did not discuss the applicability of C.R.S. § 24-72-204(3)(a)(X)(A). *Id.* at 651-52. *Pierce* similarly glosses over the section, noting that the exception at the time applied if the reports were maintained "pursuant to any rule of the general assembly on a sexual harassment policy," and that the record was devoid of any indication that the school district's actions were based on any such rule. 981 P.2d at 606. The *Pierce* court noted only that the provision "evidences the intent of the legislature to treat matters concerning sexual harassment allegations and investigations with discretion and care." *Id.*

Thus, the Court has little beyond the plain language of the statutory section, which broadly covers "any records of sexual harassment complaints and investigations." C.R.S. § 24-72-204(3)(a)(X)(A). This Court has already determined that the ILG report is an investigation of allegations of sexual harassment or sexual assault for the purposes of determining that it is a public record. Section I(a), *supra*. The Court cannot reconcile a finding that the ILG report is a record of an investigation into allegations of sexual impropriety for the purposes of determining it to be a public record while also not being a record of an investigation into allegations of sexual impropriety for the purposes of C.R.S. § 24-72-204(3)(a)(X)(A).

The Court recognizes that due to Mr. Anderson's position as an elected official, and particularly as one in the context of school administration, the contents of this report are of the utmost concern to the public. There is, of course, the public's interest in assessing the efficacy and fairness of such investigations. *See, e.g., Daniels*, 988 P.2d at 652. Further, potential illegal and amoral conduct by government officials is inherently a matter of public concern. *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1206 (10th Cir. 2007); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (public concern defined as speech "relating to any matter of political, social, or other concern to the community"); *Wulf v. City of Wichita*, 883 F.2d 842, 860 (10th Cir. 1989) ("Allegations of sexual harassment have been found to involve matters of public concern"), citing *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). The Court further notes that a specific statutory exemption for such complaints and investigations is somewhat unusual, and other states resolve the question of whether such public

records should be made public by balancing the privacy interest of those involved with the public's interest in the content of the documents, not unlike the analysis employed under C.R.S. § 24-72-204(6)(a). *See, e.g.*, *Martin v. Riverside Sch. Dist. No. 416*, 329 P.3d 911, 914 (Wash. App. 2014) (action by former teacher to enjoin disclosure of investigation of allegations of sexual misconduct to reporter under request pursuant to Public Records Act analyzed under personal information exemption); *Rocque v. Freedom of Info. Comm'n*, 774 A.2d 957 (Conn. 2001) (analyzing claim for disclosure of sexual harassment complaint and investigation under privacy/public interest balancing test); *State J.-Reg. v. Univ. of Illinois Springfield*, 994 N.E.2d 705 (Ill. App. 2013) (applying same balancing test to determine propriety of disclosure of certain parts of an employee's personnel file concerning sexual harassment investigations and settlement).

But CORA, unlike the open records acts in the states mentioned above, contains a clear exemption to disclosure for "any record" of sexual harassment complaints and investigations. Contrary to the Media Respondents' position, the Court does not read *Daniels* as allowing a Court to override an exemption whenever it finds there is a compelling public interest. The language in *Daniels* quoted by Media Respondents comes from an analysis under C.R.S. § 24-72-204(6)(a), the public interest/personal privacy balancing exception. But that analysis only comes into play if the record were otherwise subject to disclosure. Here, the ILG report is not otherwise subject to disclosure; disclosure is excepted pursuant to C.R.S. § 24-72-204(3)(a)(X)(A). Nor does the admonition that disclosure of certain documents is excepted "unless otherwise provided by law" in C.R.S. § 24-72-204(3)(a) authorize the Court to disclose such records whenever it feels that it is very important to do so. *See Martinelli v. Dist. Ct. In and For City and Cty. of Denver*, 612 P.2d 1083, 1093 (Colo. 1980) (construing the language "otherwise provided by law" or "except as prohibited by rules promulgated by the supreme court or by the order of any court" as "a reference to the rules of civil procedure and as expressive of the legislative intent that a court should consider and weigh whether *disclosure* would be contrary to the public interest" and that such language indicates a legislative intent to not have CORA "supplant discovery practice in civil litigation.").

Regarding the Media Respondents' observation that some of the ILG report has been publicized, the Court finds no basis within CORA (or in case law) for disclosing the remainder of the report. The argument conceivably is relevant to the public's interest in a document, but that interest is not relevant to the application of the statutory exception.

Lastly, the Court rejects out of hand the notion that the filing of the unredacted ILG report with the Court, under seal, pursuant to a Court order, vitiates the applications of C.R.S. §

24-72-204(3)(a)(X)(A) because the report is now "included in court files and records of court proceedings." Such an exception would practically swallow the rule, an absurd result.

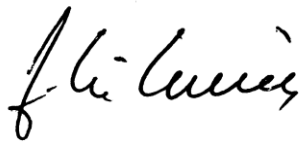
The Court finds that Sections G.2 and G.3 of the ILG report are a record of a sexual harassment complaint or investigation such that disclosure is not required under CORA.

CONCLUSION

For the reasons stated above, the Court ORDERS Petitioner to maintain the confidentiality of the current redactions to the public ILG report.

SO ORDERED on February 14, 2022.

BY THE COURT:



J. Eric Elliff
District Court Judge