

<p>DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO</p> <p>Court Address: 7325 S. Potomac St. Centennial, CO 80112</p> <hr/> <p>Petitioner: CITY OF AURORA, COLORADO</p> <p>vs.</p> <p>Respondent: RONDA CLARK</p> <p>and</p> <p>Movants/Proposed Intervenor Respondents: KCEC-TV, Channel 50; KCNC-TV, Channel 4; KDEN-TV, Channel 25; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOA-AM 850 Radio; KUSA-TV, Channel 9, and KWGN-TV, Channel 2</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Movants: Steven D. Zansberg, #26634 Thomas B. Kelley, #1971 Christopher P. Beall, #28536 LEVINE SULLIVAN KOCH & SCHULZ, LLP 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Phone: (303) 376-2400 FAX: (303) 376-2401 szansberg@lskslaw.com</p>	<p>Case No. 14-CV-31595</p> <p>Division: 408</p>
<p>MEDIA INTERVENOR RESPONDENTS' MOTION TO INTERVENE TO BE HEARD IN RESPONSE TO PETITION</p>	

Movants, KCEC-TV, Channel 50; KCNC-TV, Channel 4; KDEN-TV, Channel 25; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOA-AM 850 Radio; KUSA-TV, Channel 9; and KWGN-TV, Channel 2 (collectively, the "Media Respondents"), by and through their undersigned counsel at Levine Sullivan Koch & Schulz, LLP, hereby respectfully move for leave to intervene so that they may be heard in response to the City of Aurora's Petition.

As grounds for their Motion, the Media Respondents state as follows:

CERTIFICATE OF CONFERRAL

Pursuant to C.R.C.P. 121(c) § 1-15, the undersigned hereby certifies that he has attempted to confer in good faith with both parties, prior to filing this motion, and has been authorized to notify the Court that the City of Aurora opposes the Motion. As of the time of filing, the undersigned has been unable to obtain Ms. Hodges' position with respect to the Motion.

INTRODUCTION

The Court conducted a hearing on August 14, 2014, concerning whether any order of court or state statute prohibits the disclosure of any portion of the After Action Review Report prepared for the City of Aurora by Tri-Data, and completed in April 2014. Although Media Respondents have requested access to this public record, they were not apprised of the hearing in time to participate therein. (The undersigned counsel was not contacted about this matter until *after* the hearing had been completed.) Because no member of the public who requested access to the public record at issue was participated in the hearing, no party asserted the “the public’s right to know,” which is at the heart of the Colorado Open Records Act, § 24-72-201, *et seq.*, C.R.S. (“CORA”). Accordingly, the Media Respondents respectfully ask that they be permitted to intervene, now, to present that position to the Court.

Under the statutory provision upon which the Petition is premised, no showing has been made by the City that disclosure of any portion of the report is “prohibited” from being disclosed by any federal or state statute, or by any court order or rule. Accordingly, there is no basis for the Court to grant the Petition. Because the report is not subject to any mandatory non-disclosure provision of the CORA or any other state statute, court rule or order, it must be released in its entirety.

Even if the court were to find that extraordinary circumstances have been shown such that disclosure of the entirety of the report would cause “substantial injury to the public interest,” such finding could not possibly extend to portions of the report unrelated to the actions or mental state of James Egan Holmes.

THE INTEREST OF THE MEDIA RESPONDENTS

1. Each of the Media Respondents is engaged in gathering news and other information on matters of public concern, including the terrible shooting incident of July 20, 2012 and the response of various governmental agencies thereto, and disseminating it, on various platforms—print, broadcast, cable, internet and mobile devices—to the general public.

2. Media Respondents appear before this Court on their own behalf, as members of the public, entitled to the rights afforded them by the CORA. Indeed, one of the Media Respondents (KUSA-TV) has formally submitted a CORA request to inspect the After Action Review Report that is the focus of the Petition. In addition, the Media Respondents appear on behalf of the broader public who receives the news and information gathered and disseminated

by these media outlets. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-74 (1980) (the print and electronic media function “as surrogates for the public”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press “acts as an agent of the public at large”).

ARGUMENT

I. MEDIA RESPONDENTS SHOULD BE GRANTED LEAVE TO INTERVENE IN ORDER TO ASSERT THEIR INTERESTS AS PARTIES WHO ARE SEEKING ACCESS, UNDER CORA, TO THE PUBLIC RECORD AT ISSUE

3. As indicated above, one of the Media Respondents (KUSA-TV, Channel 9) has formally sought access to the After Action Review Report (“AAR Report”). The Petition itself sought a ruling that would apply to future requests to inspect the report by members of the news media. Because the Media Respondents’ rights to access the AAR Report would be forever precluded by an adverse judgment entered herein and the existing parties (those present at the hearing on August 14, 2014) do not adequately represent the Media Respondents’ rights or interests, intervention is not only proper, but mandated. *See* C.R.C.P. 24(a).

I. BECAUSE NO BASIS HAS BEEN SHOWN FOR GRANTING THE PETITION, IT SHOULD BE DENIED IN TOTO

4. On its face, the Petition purports to seek guidance from the Court whether the public record at issue, the AAR Report, is prohibited from being disclosed to the public, in whole or in part, citing § 24-72-204(6)(a), C.R.S. Thus, the custodian had not sought to establish the “catch-all” exception, that disclosure of the AAR Report, despite the absence of any statutory provision requiring or even authorizing the custodian to withhold disclosure, that its disclosure would nonetheless cause “substantial injury to the public interest.”

5. What is missing from the Petition, and, on information and belief, from the hearing on August 14, 2014, was any citation to any state or federal statute, or any order of any court, that declares that the AAR Report *shall not* be disclosed. This is a necessary condition for an order of this Court to grant the petition: § 24-72-204(6)(a), C.R.S. authorizes a records custodian to petition the Court for an order authorizing non-disclosure *only if* the custodian (after conducting reasonable diligence and investigation) is unable, in good faith, to determine whether disclosure of the public record “*is prohibited* pursuant to this part 2” of the CORA. *Id.* (emphasis added). This means that the only basis for granting such a petition is a judicial finding that a provision of the CORA itself prohibits the disclosure of the public record at issue. *See, e.g.,* § 24-72-204(1)(a)–(c), C.R.S. (declaring that non-disclosure is permitted if disclosure is “contrary to a state [or federal] statute,” or “by the order of any court.”). In other words, unless there is a statute or court order *already in place* that *prohibits* the disclosure of the AAR Report, this Court does not have the authority, under § 24-72-204(6)(a), C.R.S., to grant the Petition.

6. Here, the Petition admits, in paragraph 4, that in the most recently entered order in *People v. Holmes*, 12-CR-1522 (Arapahoe Cnty. Dist. Ct. Feb. 11, 2013) (Judge Sylvester’s

Order re: Motion Regarding Reconsideration of Pre-Trial Publicity Orders (D-2a)), the Court expressly lifted any “gag order” on the City Aurora, and instead *authorized the City to exercise its own discretion* in responding to all CORA requests, using the ordinary standards and statutory provisions set forth in that Act on a case-by-by case basis. *See* Ex. 3 to Petition at 5 (“The City of Aurora must conduct the proper statutory analysis to determine whether to release information that is subject to requests under CORA.”). Thus, **there is no order currently in place that prohibits the City of Aurora from releasing the AAR Report**. Accordingly, the Petition must be denied.

7. Even if the Court were to find, notwithstanding the above, that the City had made the requisite evidentiary showing that in the unique circumstances of the present set of events, disclosure of the entirety of the AAR Report would cause “substantial injury to the public interest,” the appropriate remedy would be to limit such a finding only to the discreet portions of the AAR Report that discuss Mr. Holmes’ possible culpability and state of mind at the time of the crimes charged—none of which is even remotely implicated by the portions of the report that discuss the response of Aurora Police, Fire Department, Sheriffs’ offices, EMS, 911 operators, etc. in the early morning of July 20, 2012. *See, e.g., Landowners United LLC v. Waters*, 293 P.3d 86, 99 (Colo. App. 2011) (noting that a district court has “discretion to direct redaction of specific confidential information” (citation omitted)); *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff’s Dep’t*, 196 P.3d 892, 900 n.3 (Colo. 2008) (“Redaction, as an alternative, may often be a proper choice to carry out the General Assembly’s intent because the CCJRA [and the CORA] favor disclosure tempered by protection of privacy interests and dangers of adverse consequences at stake in the record’s release.”); *Denver Publ’g Co. v. Bd. of Cnty. Comm’rs*, 121 P.3d 190, 205 & n.13 (Colo. 2005) (requiring custodian to redact private information from public records on remand).

CONCLUSION

Wherefore, the Media Respondents respectfully request that their Motion to Intervene be granted and that the Court enter an order denying the Petition and ordering the City of Aurora to provide them, and the public, with access to the public record that is the subject of the Petition.

Respectfully submitted this 19th day of

August, 2014, by:

LEVINE SULLIVAN KOCH & SCHULZ,
LLP

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THIS PLEADING WAS FILED WITH THE COURT THROUGH THE ICCES ELECTRONIC FILING SYSTEM, PURSUANT TO C.R.C.P. 121(C), § 1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH LEVINE SULLIVAN KOCH & SCHULZ LLP.

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of August, 2014, a true and correct copy of this **MOTION TO INTERVENE AND BE HEARD IN RESPONSE TO THE PETITION** was served on the following through the ICCES electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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