DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	DATE FILED: December 3, 2021 3:00 PM FILING ID: 1104718778117 CASE NUMBER: 2021CV33225
IN THE MATTER OF THE REDACTION OF THE INVESTIGATIONS LAW GROUP INVESTIGATION REPORT DATED SEPTEMBER 13, 2021 DENVER PUBLIC SCHOOLS **Petitioner**, v. THE DENVER POST; THE DENVER NORTH STAR, **Respondents**; and AUON'TAI ANDERSON, **Respondent.**	**COURT USE ONLY** Case Number: 2021CV33225 Division: 215
Attorney for Respondents The Denver Post and The Denver North Star: Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org	

RESPONSE OF RESPONDENTS *THE DENVER POST* AND *THE DENVER NORTH STAR* TO PETITONER'S APPLICATION AND REQUEST FOR DECLARATORY RELIEF

Respondents *The Denver Post* and *The Denver North Star* (collectively, the "News Media Respondents"), by and through their undersigned counsel, respectfully request that the Court

order the release of Section G.2 and Section G.3 of the Investigations Law Group Investigation Report ("ILG Report") in unredacted form, and submit the following in support of this request:

INTRODUCTION

On September 15, 2021, Petitioner Denver Public Schools publicly released a redacted version of the ILG Report, which concerns an investigation into sexual misconduct allegations against Denver Public School Board Director Tay Anderson ("Mr. Anderson"). Specifically, the Denver Public School Board ("DPS Board") had engaged ILG to investigate the following:

1. Whether Director Anderson committed sexual assault of an unnamed woman, whose allegations were made public by the organization BLM5280 on March 26, 2021;
2. Whether Director Anderson made unwelcome sexual comments and advances and/or engaged in unwelcome sexual contact with members and associates of the NAC Board of Directors in the spring and summer of 2018;
3. Whether Director Anderson committed any sexual or other serious misconduct while he was a DPS employee;
4. Whether Director Anderson committed sexual assault, rape and/or sexual misconduct against 62 DPS students, as alleged by Reporter 1 on May 25, 2021; and
5. Whether Director Anderson has committed any sexual or other serious misconduct while running for, or since he has been a member of, the Board of Directors, including any retaliation related to the investigation.

See Public ILG Report at 9. A true and correct copy of the ILG Report, in redacted form, is attached hereto as **Exhibit A**.

Before and after release of the redacted ILG Report, reporters for *The Denver Post* and *The Denver North Star* separately filed Colorado Open Records Act ("CORA") requests seeking access to certain redacted portions of the report. Both News Media Respondents sought access to the redacted portions of Section G.2 ("Never Again Colorado" (NAC)); in addition, reporters for *The Denver Post* sought access to Section G.3 ("Conduct While a DPS Employee"). Instead of issuing a response either denying or granting those CORA requests, Petitioner instead filed the instant Declaratory Judgement Application on October 12, 2021, asserting that it could not determine whether the redacted material in the ILG Report was a public record and subject to

disclosure under CORA and §24-72-204(6)(a), C.R.S. For the reasons herein, the redacted portions of Sections G.2 and G.3 of the ILG Report are public records and should be released to the News Media Respondents under CORA.

FACTUAL BACKGROUND

There are two redacted sections of the ILG Report at issue, Section G.2 and Section G.3. On October 4, 2021, David Sabados, publisher of *The Denver North Star* submitted a CORA request to Petitioner seeking "the document titled 'Investigation Report' by ILG without portions of section 2 redacted." A true and correct copy of Mr. Sabados' October 4 CORA request is attached hereto as **Exhibit B**. In his request, Mr. Sabados stated that *The Denver North Star* was not seeking the information redacted in Section G.3 of the ILG Report.

On October 5, 2021, reporter Sam Tabachnik of *The Denver Post* submitted a CORA request to Petitioner via email seeking: "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." A true and correct copy of Mr. Tabachnik's October 5 CORA request is attached hereto as **Exhibit C**.

Petitioner did not respond to either request as required under §24-72-203(3)(b)[1], C.R.S.

On April 7, 2021, before Petitioner released a redacted version of the ILG Report in September 2021, Noelle Phillips, a reporter for *The Denver Post*, submitted a CORA request for, among other things, the equivalent of the entirety of the ILG Report, which includes the information that has been redacted in Section G.3 of the ILG Report (*i.e.,* Mr. Anderson's

[1] The CORA presumes a "reasonable" response time to a public records request to be three days or less. § 24-72-203(3)(b), C.R.S.

"Conduct While a DPS Employee"). Specifically, her April 7, 2021 CORA request sought the following:

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

A true and correct copy of Ms. Phillips' April 7, 2021 request is attached hereto as **Exhibit D**.

Two days later, on April 9, 2021, Petitioner denied Ms. Phillips's request, stating: "Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to personnel file exemption, C.R.S. 24-72-204(3)(a)(II) as defined in C.R.S. 24-72-202(4.5)." **Exhibit D**.

In its application for declaratory relief, Petitioner does not address *The Denver Post's* CORA request for the entirety of the ILG Report, including the redacted portions of Section G.3.

APPLICABLE LAW

I. The ILG Report is a public record under CORA.

CORA declares that it is the "public policy of this state that all public records shall be open for inspection by any person at reasonable times," unless specifically exempt from disclosure by statute. § 24-72-201, C.R.S. Any exemption under CORA must be narrowly construed in favor of disclosure. *Shook v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 411 P.3d 158, 160 (Colo. App. 2015). Further, there is a general presumption in favor of public access to government records, which must be weighed against any privacy interest found to be at stake. *Daniels v. City of Commerce City*, 988 P.2d 648, 650–51 (Colo. App. 1999).

CORA defines "public records" to include "all writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state . . . and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule." § 24-72-202(6)(a)(I), C.R.S. The ILG Report is unquestionably a public record. It is a writing that was made, maintained, or kept by Petitioner; the Report was commissioned by the DPS Board and submitted to Petitioner by the Investigations Law Group for use in the exercise of Petitioner's functions required or authorized by law or administrative rule. Petitioner is a political subdivision of the state, and its records are subject to the CORA. *See Bagby v. School Dist. No. 1*, *Denver*, 186 Colo. 428, 435 528 P.2d 1299, 1302 (1974) (stating that "school districts and the boards which run them are considered to be political subdivisions of the state."). Further, the ILG Report was commissioned by the DPS Board based on its obligations under the Claire Davis Safety Act. *See* Petitioner's Application at 3-4. Because the ILG Report consists of a writing, maintained by a political subdivision of the state for use in the exercise of functions required or authorized by law, it plainly meets the definition of a "public record" subject to disclosure under CORA.

Denver Pub. Co. v. Board of County Com'rs of County of Arapahoe, 121 P.3d 190 (Colo. 2005), is not to the contrary. In that case, the Court held that certain sexually inappropriate e-mails between elected officials that did ***not*** have any demonstrable connection to the performance of a public function, or involve the receipt or expenditure of public funds, were not public records. *Denver Pub. Co.,* 121 P.3d 190, 202. No such circumstances are present here.

In this case, the ILG Report is an investigative report that was specifically commissioned by the DPS Board, a political subdivision of the state, to determine whether there were credible instances of alleged sexual misconduct against Mr. Anderson, a public official. The ILG Report

is thus not the "correspondence[] of an elected official" (*see* § 24-72-202(6)(a)(II)(B), C.R.S.), as in the *Denver Pub. Co*. case, nor is any portion of the ILG Report a private document (such as a person's diary that was not "made, maintained, or kept" by a stage agency, *see Wick Communications Co. v. Montrose Bd. Of County Comm'rs,* 81 P.3d 360 (Colo. 2003)). The ILG Report is an official document that was solicited, maintained and kept by Petitioner in the performance of a public function. Indeed, according to Petitioner itself, the ILG Report was commissioned by the DPS Board to comply with its obligation under the Claire Davis Safety Act to "respond to potentially unlawful sexual contact allegations to ensure District students are protected." *See* Petitioner's Application at 3-4. It is thus unquestionably directly connected to Petitioners' performance of its public functions. Further, there is no dispute that the ILG Report was commissioned with public funds[2] for use in the exercise of Petitioner's functions as required or authorized by law. *Cf. Denver Pub. Co.,* 121 P.3d at 196. (explaining that "the issue of whether the e-mails sent and received by Baker are 'public records' turns on whether the reason the records were 'maintained or kept' was 'for use in the exercise of functions required or authorized by law or administrative rule or involve[d] the receipt or expenditure of public funds.'"). For these reasons, the entirety of the ILG Report, including Sections G.2 and G.3, is a public record and must be disclosed unless an exception applies.

II. Disclosure of the redacted portions of the ILG Report will not cause substantial injury to the public interest.

[2] Indeed, the DPS Board reportedly spent $190,000 in public funds on the investigation. *Denver DA won't charge Tay Anderson, records show school board spent $190,000 on investigation*, The Denver Post (September 24, 2021), https://perma.cc/26Q5-ZRKL (last visited Nov. 19, 2021); *see also Here's what the Tay Anderson investigation cost Denver Public Schools*, KDVR-TV, Sept. 14, 2021. https://perma.cc/5BCC-LL7M (last visited Nov. 22, 2021).

The custodian of a public record may not deny access to a public record unless there is a specific exemption that permits the withholding of that record. § 24-72-203(1)(a), C.R.S. As Petitioner concedes, there is no exemption to disclosure of the ILG Report under the CORA. *See* Petitioner's Application at 9; § 24-72-203(1)(a), C.R.S. Instead, Petitioner argues that Mr. Anderson's privacy interests amount to a "unique and extraordinary" circumstance that the General Assembly could not have foreseen and that disclosure of the ILG Report would cause substantial injury to the public interest. Petitioner's Application at 9; § 24-72-204(6)(a), C.R.S.

Petitioner relies on *Todd v. Hause,* 371 P.3d 705 (Colo. App. 2015), as purported support for its argument that disclosure of the redacted portions of the ILG Report might violate Mr. Anderson's constitutional right to privacy and, thus, could cause "substantial injury to the public interest[.]". Petitioner is wrong. Under *Todd*, Colorado courts look to three factors to determine whether the disclosure of personal information under CORA would violate an individual's constitutional right to privacy: (1) whether the individual has a legitimate expectation of nondisclosure; (2) whether disclosure nonetheless is required to serve a compelling public interest; and (3) if so, how disclosure may occur in the least intrusive manner with respect to the individual's privacy right. *Id.* at 712 (citing *Martinelli v. Dist. Ct. In & For City & Cnty. of Denver*, 612 P.2d 1083 (1980)). Application of the three-part *Todd* test makes clear the ILG Report should be released.

i. Whether the individual has a legitimate expectation of nondisclosure

First, there can be no legitimate expectation of nondisclosure of information concerning unlawful activity. *Todd*, 371 P.3d at 712. According to Petitioner, one of the reasons the DPS Board decided to commission the investigation into Mr. Anderson's behavior was because "the Board believed it was obligated under the Claire Davis School Safety Act to respond to

potentially ***unlawful sexual contact*** allegations to ensure District students are protected." *See* Petitioner Application at 3-4 (emphasis added). Further, based on the allegations made against Mr. Anderson—the same allegations investigated and addressed in the ILG Report—the Denver Police Department investigated and referred the matter to the District Attorney's office. *See Denver DA won't charge Tay Anderson, records show school board spent $190,000 on investigation*, The Denver Post (Sept. 24, 2021), https://perma.cc/26Q5-ZRKL (last visited Nov. 19, 2021). Even though the District Attorney elected not to charge Mr. Anderson, there is no question that the Denver Police Department and the DPS Board's investigation pertain to alleged unlawful activity.

Likewise, an individual cannot have a legitimate expectation of nondisclosure of information already available to the public. *Todd*, 371 P.3d at 712 (citing *Nilson v. Layton City,* 45 F.3d 369, 372). A great deal of information about Mr. Anderson's alleged misconduct is already public. Dozens of news articles[3], numerous public statements—many made by Anderson himself[4]—and public testimony[5] about those allegations is publicly available. Further, and as the

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[3] *See New sexual assault allegations against Denver school board member Tay Anderson emerge during legislative testimony*, The Denver Post, May 28, 2021, https://perma.cc/DU7Q-MNJA (last visited Nov. 23, 2021)**;** *see also Investigation into Tay Anderson sexual assault allegations to be released Wednesday*, The Colorado Sun, Sept. 13, 2021, https://perma.cc/FBB9-G3AX (last visited Nov. 23, 2021); *Tay Anderson sexual misconduct investigation finds most serious allegations not substantiated*, The Denver Channel, Sept. 15, 2021, https://perma.cc/7K3J-V82K (last visited Nov. 23, 2021).

[4] *See DPS Board Member Tay Anderson press conference*, The Gazette, Sept. 17, 2021, https://perma.cc/7ZXZ-ARC4 (last visited Nov. 23, 2021); *see also 'I did not sexually assault anyone': 4 months after the initial allegation, no charges have been filed against Tay Anderson*, 9News, July 15, 2021, https://perma.cc/FBM4-ECHX (last visited Nov. 23, 2021); *'The truth will be revealed': Tay Anderson's lawyer releases statement*, KDVR-TV, May 31, 2021, https://perma.cc/V4MR-ZJVB (last visited Nov. 23, 2021).

[5] *See Evidence Emerges; Tay Anderson Controversy*, Yellow Scene Magazine, June 29, 2021, https://perma.cc/HA4T-Y7T9 (last visited Nov. 23, 2021); *Tay Anderson, Denver Public School*

Petitioner points out, the statements in the redacted report are attributable to private citizens who could speak out about them at any time. Petitioner's Application at 12.

Petitioner is correct to note that the existence of a highly personal or intimate relationship, and the nature of the information at issue, are factors that may indicate a person's reasonable expectation of nondisclosure. *Martinelli v. Dist. Ct. In & For City & Cnty. of Denver*, 612 P.2d 1083, 1091 (1980). But the type of personal relationship at issue in *Martinelli* involved private conduct between consenting adults—not alleged sexual misconduct by a public official that resulted in formal complaints.

Moreover, on November 17, 2021, Mr. Anderson—who has not shied away from addressing the allegations against him in the news media and on social media—filed a defamation suit against several individuals, including BLM 5280, arising out of some of the same allegations of sexual misconduct addressed in the ILG Report. By filing the defamation lawsuit, which will be litigated in public, Mr. Anderson cannot now assert that he has a legitimate expectation of nondisclosure of the redacted portions of the ILG Report, which address allegations of sexual misconduct and are directly relevant to (a very) public controversy. In short, Mr. Anderson cannot point to the contents of the Report in a publicly filed lawsuit, claiming that it unequivocally absolves him of any wrongdoing, yet simultaneously urge this Court to shield that very document from public scrutiny.

For these reasons, Mr. Anderson has no reasonable expectation of nondisclosure of any portion of the ILG Report and Petitioner's argument fails under the first prong of the test in *Todd*. Therefore, Section G.2 and G.3 of the ILG Report—exclusive of the names of minors or

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*Board Member, Faces New Sexual Assault Allegatio*n, CBS News KCNC-TV, May 29, 2021, https://perma.cc/9ZUV-Q49N (last visited Nov. 23, 2021).

alleged minor victims—should be unredacted. *See, e.g., Huspeni v. El Paso Cnty. Sheriff's Dep't (In re Freedom Colo. Info., Inc.),* 196 P.3d 892, 904 n.3 (Colo. 2008) ("the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary," and "[a] custodian should redact sparingly"); *Land Owners United, LLC,* 293 P.3d 86, 99 (Colo. App. 2012) (holding that District Court has "discretion to direct redaction of specific confidential information").

ii. Whether disclosure nonetheless is required to serve a compelling public interest

Even assuming Mr. Anderson had a reasonable expectation of nondisclosure of any portion of the ILG Report—which he does not—disclosure is nonetheless required. There is a compelling public interest in access to the ILG Report. As is evident from the numerous news reports, social media mentions, podcast interviews, and public testimony that the allegations against Mr. Anderson have spurred, the public has a strong (and legitimate) interest in understanding whether there are any safety concerns with students interacting with Mr. Anderson, a member of the DPS Board; and there's also a strong public interest in evaluating the investigation that the DPS Board conducted to ensure the process was fair. Lastly, there is compelling public interest in being able to independently assess the veracity of Mr. Anderson's publicly filed claims that the Report completely exonerates him of any wrongdoing.

Colorado courts have determined that the public interest requires disclosure of public records under CORA even in the face of privacy concerns. For example, in *Daniels v. City of Commerce City, Custodian of Records,* 988 P.2d 648, 651 (Colo. App. 1999), the requestor sought, under CORA, "all public records ... related to complaints of sexual harassment, gender discrimination and retaliation based upon complaints of sexual harassment and gender discrimination for the years 1995 through 1997." The City denied the request, asserting, *inter*

alia, that releasing the information would do substantial injury to the public interest under §24-72-204(6)(a) because the "confidential reporting system" used to investigate sexual harassment complaints would impinge on the privacy concerns of victims and the accused.

The appellate court, however, held that the City's records relating to complaints of sexual harassment, gender discrimination, and retaliation were not exempt from disclosure under CORA's public interest exception, even though the City maintained a confidential reporting system for investigation of such complaints. *Daniels*, 988 P.2d at 651-652. It affirmed the trial court's reasoning that "the general public and members of the general public have a compelling interest to see that public entities, when conducting internal reviews of these kinds of matters, do so efficiently and clearly and effectively"; and "there is a strong public interest in access to such records which this Court believes balances in favor of the public as against the necessity for confidentiality that may exist with reference to the individual public entity employers." *Id.*

Here, too, the public has a strong interest in knowing that the private organization retained by the DPS Board conducted a fair investigation of the allegations against Mr. Anderson, ***and*** that the process was also fair to the public, who has a strong interest in knowing that students in the DPS system are safe from unlawful and improper sexual conduct or contact. For example, the Denver Public School Board has viewed the ILG Report in its entirety, unredacted, and voted unanimously to censure Anderson after their review of the report.[6] The

[6] *See Denver School Board Votes to Censure Tay Anderson*, Chalkbeat Colorado, Sept. 17, 2021, https://perma.cc/J7SW-7QF6 (last visited Dec. 1, 2021)("Olson said the purpose of the censure was not to shame Anderson but to take a stance about what behavior is acceptable by elected officials; "…But I hope that you learn and know what is acceptable for what you can control and do with your own hands and mouth."); see also *Tay Anderson Censured by Denver Public School Board*, The Denver Post, Sept. 17, 2021, https://perma.cc/W457-G7BC (last visited Dec. 1, 2021) (Anderson had allegedly "flirted online with a 16-year-old student before knowing her age and made coercive and intimidating social media posts.")

public has a strong interest in understanding what information in the report urged the members of the school board to take the action to censure him.

Thus, given the compelling public interest in access to the redacted portions of the ILG Report, even if Mr. Anderson has a reasonable expectation of nondisclosure, disclosure would still be required under the second prong of the test in *Todd*.

iii. If so, how disclosure may occur in the least intrusive manner with respect to the individual's privacy right

The first two prongs of the *Todd* test make clear that disclosure of the redacted portions of the ILG Report is warranted, with only the names of minors and alleged minor victims redacted from Section G.3, if necessary, which would be the "least intrusive" manner of redaction. *Todd,* 371 P.3d 705, 712. Having seen the unredacted ILG Report and being fully aware of the information in Section G.2, Petitioner "does not take a position as to the propriety of releasing the report with Section G.2 unredacted." Petitioner's Application at 8. Because Petitioner does not assert that any further redactions to that section are necessary, News Media Respondents respectfully request that the Court order the release of Section G.2 in fully unredacted form. As for Section G.3, to the extent the names of minors or alleged minor victims would be revealed if G.3 is fully unredacted, the News Media Respondents do not object to redaction of the names of minors or alleged minor victims pursuant to § 24-72-204(3)(a)(X)(A) C.R.S. of CORA.

CONCLUSION

As detailed above, the ILG Report is a public record under CORA and its disclosure will not cause a substantial injury to the public interest. The News Media Respondents respectfully

request that the Court order the redacted portions of Section G.2 and Section G.3 (exclusive of the names of minors or alleged minor victims) be unredacted.

Respectfully submitted this 3rd day of December 2021.

By 

Rachael Johnson
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2021, a true and correct copy **RESPONSE OF RESPONDENTS THE DENVER POST AND THE DENVER NORTH STAR TO PETITONER'S APPLICATION AND REQUEST FOR DECLARATORY RELIEF** was served on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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