

<p>DISTRICT COURT, DENVER CITY AND COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p>DATE FILED: September 15, 2021 3:21 PM FILING ID: 558ACCBDE48C9 CASE NUMBER: 2014CV34530</p>
<p>STATE OF COLORADO, <i>ex rel.</i> PHILIP J. WEISER, ATTORNEY GENERAL, AND MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE,</p> <p>Plaintiffs,</p> <p>v.</p> <p>CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company, <i>et al.</i>,</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p>PLAINTIFFS' RESPONSE TO DEFENDANTS' APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY</p>	

Plaintiffs, the State of Colorado, upon relation of Philip J. Weiser, Attorney General for the State of Colorado, and Martha Fulford, Administrator of the Uniform Consumer Credit Code (the "State" or "Plaintiffs"), respectfully submit this *Response to Defendants' Application for Order to Retain Confidentiality*.

Introduction and Background

Colorado courts do not hide the records of public trials. This transparency is crucial to the rule of law in Colorado: it allows the public to evaluate the evidence on the most pressing questions of the day and ensures trust and confidence in Colorado's courts.

On August 26, 2021, the Attorney General received a Colorado Open Records Act ("CORA") request from a National Public Radio (NPR) reporter, seeking trial exhibits 764, 764.1, 764.5, 760.2, 778.2, which are admissions recordings played in open court and discussed in this Court's Final Judgment.¹ *See* Exhibits A-C to Defendants' 9.7.21 Application; *see also* August 21, 2020 Final Judgment ¶ 169.

NPR joins a long and growing list of third parties—the United States Department of Education, the United States Department of Veterans Affairs, the Consumer Financial Protection Bureau, the United States House of Representatives, researchers, members of the public, and consumer advocates—that have inquired about or requested the trial record. *See* Affidavit of M. Bailey, ¶¶ 2-3, attached to Plaintiffs' Response to Defendants' 1.27.21 Application; *see also* Non-party Intervenor's Combined Motion (1) To Unsuppress and Unprotect Records from the Public Trial and Cited in the Court's Ruling, and (2) To Intervene for that Limited Purpose; *see also* Plaintiffs' 3.22.21 Notice of Receipt of Request for Case Information. They have diverse reasons for requesting this record; their reasons range from public

¹ While it is true that the entirety of trial exhibit 764 was not played in open court, critical and significant portions of it were played multiple times (by both parties) and extensively discussed in the Final Judgment. *See* Final Judgment ¶¶ 169, 453-455, 590, 601.

education to pursuing crucial loan forgiveness before the U.S. Department of Education. But all these parties seek the same thing: that a public trial result in public records.

With respect to the NPR CORA request, the State reviewed each requested trial exhibit. The recordings were entered into evidence during admissions representative Mary Gordy’s trial testimony and include representations about the types of wages students could expect with a CollegeAmerica degree. Final Judgment ¶¶ 168-169. The State gave notice to Defendants on August 30, 2021 and simultaneously sought an extension to respond to the NPR CORA request. Defendants objected and filed their 9.7.21 Application.

Argument

I. The admissions recordings are not confidential

As an initial matter, the requested trial exhibits contain no personal identifying or student information other than a first name, nor do they contain any information that might reasonably be called a trade secret or “other confidential research, development, or commercial information.” Amended Protective Order ¶ 1.² In addition—and decisively—each exhibit was introduced in open court during the public trial on this matter. *See* Final Judgment ¶¶ 169, 303, 451, 453-455, 590, 601, 612, 620. Information previously presented to the public cannot be said to be

² Not only are Defendants’ arguments in favor of confidentiality meritless: the basic facts supporting Defendants’ assertions of confidentiality have changed. While Defendants previously argued in their 1.27.21 Application that they would suffer competitive harms by the disclosure of information produced at trial, as of August 1, 2021, all of the CEHE schools are closed. Defendants face no competitive disadvantage by disclosure of any business strategies. Even if these exhibits contained trade secrets or business information (and they do not) there is simply no corporate interest left to protect here.

confidential or secret. *Nat'l Polymer Prod., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981) (holding that it is a “well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates a waiver of any rights a party had to restrict its further use”); *See Rambus, Inc. v. Infineon Technologies AG*, 2005 WL 1081337, *3 (E.D. Va. 2005) (“[T]he previous public use effectively stripped the documents of any protection under the protection order.”).

This Court has advised Defendants (on multiple occasions) that the materials that were publicly admitted into evidence at trial are public records. In the May 15, 2019 hearing on Defendants’ motion for sanctions, the Court stated plainly that documents entered into evidence—including those previously marked confidential—“are a matter of public record.” **Ex. 1**, *Transcript of Proceedings*, May 15, 2019 at 64:2-67:1. In the July 2, 2019 hearing on the State’s motion for reconsideration, the Court again stated that trial exhibits are a matter of public record. **Ex. 2**, *Transcript of Proceedings*, July 2, 2019 at 10:16-14:2. Later, the State reiterated that trial exhibits lose any confidential status once they are publicly admitted. *Id.* at 16:18-17:6. The Court interjected and stated,

And let, and let me just add to that observation. It doesn’t sound to me like the Defendants really disagree with that very much, because the bottom line is, paragraph 7 allows you to disclose ‘em. In other words, they’re not being treated as confidential litigation materials if they’re being requested. All you have to do is give ‘em notice that they’ve been requested and you intend to comply with that request and you’re gonna do it. . . . They, they could even, you, they could come in here and ask me to, you know, keep you from doing that, I suppose, but as, if I have an order that you can’t do it, I think you’re entitled to do it.

Id. at 17:7-19.

Defendants previously agreed that these trial exhibits were not confidential. When the Court gave Defendants the opportunity to address the question of waiver in the July 2, 2019 hearing, Defendants agreed with the common-sense principle that publicly admitted exhibits are public records. *See* **Ex. 2** at 20:21-23:15. More than a year and a half later, Defendants changed their position and argued that some publicly admitted trial exhibits were still confidential. On January 27, 2021, Defendants filed an Application to Retain Confidentiality. At that time, Defendants asserted that “the parties submitted 391 exhibits into evidence at trial, of which 186 exhibits—nearly half—were designated as confidential.” Defendants’ 1.27.21 Application at 4. They argued that those trial exhibits designated as confidential should retain their confidential status. *Id.* Defendants attached a list of the trial exhibits with annotations as to which ones were designated as confidential. *See* Ex. F to Defendants’ 1.27.21 Application. Defendants did not list the audio recordings covered by the NPR CORA request and in fact identified one other admissions interview that was played in open court and discussed in the Final Judgment, Exhibit 785.2, as public. *Id.*; *see* Final Judgment ¶¶ 169 and 180.

Based on the forgoing, the State concluded that it did not have a basis to withhold the recordings that NPR sought under CORA. Under C.R.S. 24-72-203(1)(a), “All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law” Public record

is defined at 24-72-202(6)(a)(I) and writing is defined to include recordings at 24-72-202(7). To comply with the Court’s prior explanation of Paragraph 7 of the Protective Order (“PO”), the State advised Defendants of the CORA request and explained its understanding of the law in an August 30, 2021 email. *See* Ex. A to Defendants’ 9.7.21 Application. Defendants responded that *all* of the admissions recordings—including every single recording played in open court—“should be maintained as confidential going forward” and that it was “an oversight to not include that as confidential in the past.” *See* 8.31.21 Email, attached hereto as Exhibit 3.

The State is therefore stuck. On one hand, it has a statutory obligation to the public under CORA—a public that is justifiably interested in this important matter and the evidence supporting the State’s case. On the other hand, Defendants’ position appears to be that they can designate any publicly admitted exhibit as confidential at any time regardless of the information it contains. Without guidance from the Court, which would address the entirety of the public trial record, the State is subject to the whims of Defendants who pick and choose portions of the trial record to designate, de-designate and redesignate as confidential after the fact and when it suits them.

II. The State complied with the PO

Defendants assert (incorrectly) that the trial exhibits requested by NPR were always designated confidential and the State’s notification amounted to an objection pursuant to paragraph 6 of the PO. *See* 9.7.21 Application 3-4. Defendants then suggest that the State’s long-standing position that these exhibits are public as a

“continued” effort “to breach” the PO. Application 2-3. They even speculate—without any basis—that the State colluded with NPR to “advance its improper political agenda.” *Id.* Defendants’ accusations are curious given that the State followed the exact notification procedure set out in paragraph 7 of the PO when it received the NPR CORA request. Even though the Defendants previously indicated the trial exhibits were not confidential, the State sent a notification. Once notified, Defendants had the opportunity to “intervene at [their] own expense to object to the production” of the requested materials (PO ¶ 7). And although Defendants did not ultimately file a motion to object to the State’s production, the State is treating their 9.7.21 Application as an objection and, thus, has not produced the requested trial exhibits to NPR.

Conclusion

Defendants’ inexplicable vitriol should not distract the Court from their untenable position regarding the trial record. The trial here was public, and the evidence presented in open court—in the presence of members of the press and the public—is simply no longer factually or legally confidential. Accordingly, the State renews its objection to continued treatment of the public trial record as confidential, and specifically objects to any confidential treatment of the admissions recordings introduced at the public trial in this matter.

Respectfully submitted this 15th of September 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2021 a true and correct copy of the foregoing *Response to Defendants' Application for Order to Retain Confidentiality* was filed and served via Colorado Electronic Filing System upon the following:

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