

**INVESTIGATION REPORT**  
**Confidential Information**  
**Not for Distribution**

**To:** Senator John Cooke, Colorado General Assembly

**Subject:** Senator Daniel Kagan Investigation

**Conducted**

**By:** Maureen Murphy Batson, J.D., Workplace Investigator, Employers Council, Inc.

**Report Date:** June 5, 2018

**Investigation**

**Active:** May 8 – June 5, 2018

**Procedure:** Kevin Grantham, Senate President, Colorado General Assembly, contacted Michele Sturgell of Employers Council, Inc. to perform a workplace investigation into allegations of inappropriate conduct. Ms. Sturgell explained the investigation process to Senator Grantham and clarified the investigator's role and the necessary expectations in this process as communicated to all participants and referenced below.

The undersigned, Maureen Murphy Batson, assumed the role of investigator in this matter. I conducted personal interviews and prepared written summary statements for each witness. I communicated similar introductory remarks to each witness. These remarks addressed the purpose of the investigation and my role as a neutral fact finder, the Colorado General Assembly's prohibition against retaliation for participation in the investigation and/or making complaints under the equal employment opportunity policy, the expectation to be truthful and complete in responses to questions, and the importance of treating the entire matter confidentially. Each witness reviewed his or her statement with me. I encouraged each witness to make any additions, deletions or other modifications necessary to accurately reflect his or her statement. Each witness attested to the completeness and accuracy of the statement by signing his or her summary statement.

Interviews took place on the dates and at the locations specified below:

May 8, 2018, Colorado State Capital, 200 E. Colfax Ave., Denver 80203:

1. Beth Martinez Humenik, Colorado State Senator
2. Witness #1

May 9, 2018, Colorado State Capital, 200 E. Colfax Ave., Denver 80203:

1. Witness #2
2. Witness #3

3. Witness #4

May 11, 2018, Employers Council, 1799 Pennsylvania Street, Denver 80203:

1. Witness #5
2. Beth Martinez Humenik, Colorado State Senator (cont'd)

May 18, 2018, Employers Council, 1799 Pennsylvania Street, Denver 80203:

1. Witness #6

May 21, 2018, Employers Council, 1799 Pennsylvania Street, Denver 80203:

1. Daniel Kagan, Colorado State Senator

**Attachments:**

1. Beth Martinez Humenik summary statement
  - a. Initial complaint
  - b. Documents and photos received from Senator Martinez Humenik
2. Witness #5 summary statement
3. Witness #4 summary statement
4. Daniel Kagan summary statement
  - a. Documents received from Senator Kagan
5. Witness #1 summary statement
6. Witness #2 summary statement
7. Witness #6 summary statement
8. Witness #3 summary statement
9. Investigator emails to Witness #7

**Background and Summary of Issues**

Beth Martinez Humenik is a Colorado State Senator affiliated with the Republican Party. She was elected in 2014 and represents Colorado Senate District 24 which includes the communities of Northglenn, Thornton, and Westminster.

Daniel Kagan is a Colorado State Senator affiliated with the Democratic Party. He was elected in 2016 and represents Colorado Senate District 26 which includes the communities of Aurora, Cherry Hills Village, Centennial, Englewood, Greenwood Village, Littleton, and Sheridan.

On March 22, 2018, Senator Martinez Humenik filed a “workplace harassment complaint” against Senator Kagan alleging that on more than one occasion since his election to the Colorado Senate, he has used the private, women-only restroom located adjacent to the Senate President’s Office. While this restroom was not a gender-designated facility until very recently, Senator Martinez Humenik alleges that it has been known as the women’s restroom reserved for female Senators and staff members, a point which Senator Kagan failed to recognize through his conduct of frequently using it.

Senator Martinez Humenik's allegation is addressed specifically, below.

### **Investigator Findings**

This section identifies the pertinent allegations, followed by identification of specific sources of supporting or refuting information. Investigator commentary follows to develop specific areas of concern, address credibility assessment, or provide other subjective commentary. *For a comprehensive understanding of the issues presented here, it is recommended that each witness statement be reviewed individually.* Unless otherwise noted, all information quoted below comes from the summary statements.

**Allegation 1:** Senator Martinez Humenik alleges that on more than one occasion since Senator Kagan's election to the Colorado Senate, he has used the private, women-only restroom located adjacent to the Senate President's Office.

#### **Supporting**

**Information:** Beth Martinez Humenik, Colorado State Senator, states: "During the last two-three weeks of the 2017 legislative session [about April 20 – May 10, 2017] there was an evening when Senator [Daniel] Kagan used the women's restroom while I was in there. I had used my key-card/badge to access the restroom. I was in the handicapped stall which is larger. The smaller stall is to the left of the handicapped stall. These are the only two stalls. On this particular evening, I was seated in the large, handicapped stall when I heard someone else entering the restroom. The person went into the smaller stall and underneath the partition I could see a pair of men's brown dress shoes and cuffed pants which were green/brown flecked. I could also hear breathing which sounded like a man. I hurried up to wash my hands and then waited to see which man was using the women's restroom. I didn't want to make any judgments before I actually saw the individual. That's when Senator Kagan came out of the stall; I asked him, 'What are you doing in here?' He mumbled something about not feeling well. I told him that he couldn't be in the women's restroom. I didn't hear him throw up or have diarrhea. As we walked out the door, I told him that he couldn't be in the bathroom again and his behavior 'was not okay.' There were two lobbyists who saw us coming out of the women's restroom. I talked with one of these lobbyists and he didn't recall the situation, so I don't want to give his name to you. The other lobbyist no longer works at the Capital. In any event, I walked immediately to the [REDACTED] and told Witness #4 what had happened. Witness #4 said he'd take care of it. I believe that Witness #5 may have been present during this conversation; or Witness #4 may have been the one to tell her about what had happened to me because they work closely together. Senator Kagan returned to the Senate floor at that time, as did I. I thought that the situation had been handled. Nothing else happened that evening with respect to this situation. I looked under the stalls the second time I used the restroom that night. The incident made me quite uncomfortable and I told my husband about it that

evening when I got home. I personally, have never seen Senator Kagan in the women's restroom again."

Senator Martinez Humenik continues: "However, on March 16, 2018, Witness #7 posted something on Face Book about Senator [Daniel] Kagan using the women's restroom. A constituent alerted me to this, she sent me a link to the post. It should be accessible on Witness #7's public Face Book page. I'll get you a copy. Witness #7 posted about taking his two daughters to let them in to the same restroom I was using last year, and apparently Senator Kagan had come out of the restroom before Witness #7's two daughters entered. Witness #7 didn't allow his daughters to use the restroom because of it. I talked with Witness #7 about his Face Book post the following day, but I didn't ask him details. The Face Book post suggests that Witness #7 was upset with Senator Kagan about what had happened on the Senate floor concerning the resolution of the sexual harassment allegations against Senator [Randy] Baumgardner. Senator Kagan was very graphic on the floor about how sexual assault can occur, I thought he was inappropriate because the sessions are public and there were school children present at the time in the gallery (albeit a short time when the graphic details were made.) I believe that Senator Kagan's speech was either on March 15 or 16 and that is the reason for Witness #7's post on Facebook."

Senator Martinez Humenik further states: "The following Monday, after Witness #7's Face Book post, I spoke with Witness #5 about potentially wanting to file a complaint against Senator [Daniel] Kagan's conduct last session when he used the women's restroom while I was in there. Witness #5 is now the [REDACTED], but she was [REDACTED] last session. Witness #5 said that the same thing happened to her. This was the first time that I had spoken with Witness #5 directly about Senator Kagan's conduct, so I didn't know that he used the women's restroom more than one time. Witness #5 did not want to be identified when I spoke to her; she said that she didn't want to be a part of the situation at that time, she needed to remain anonymous. Witness #5 also told me that [th]is had also happened to another female staff member, however, but I'm not going to disclose that individual because Witness #5 said that person didn't want to be named. I asked Witness #5 whether anything had been done about the situation that I reported last session, or whether a log of complaints was kept, and she said that the Senate Minority Leadership was told. Witness #5 said they don't keep any type of complaint log. Witness #5 asked me if I wanted to file a formal complaint about Senator Kagan's actions. I told her that I wanted to think about the situation. Although I was very upset about Senator Kagan's conduct, we've had a lot of issues at the Capital this session that have hurt people. I really pondered filing a complaint against Senator Kagan, I didn't take this type of action lightly."

Senator Martinez Humenik continues: "During the same week, the week of March 20, 2018, we had finished on the floor and Witness #1 and I along with perhaps a few others, were on the Senate floor. Reporter #1 asked Witness #1 a question...After the interaction between Reporter #1 and Witness #1, I

immediately decided to speak with Witness #1 about Senator [Daniel] Kagan's use of the women's restroom; I wanted to know how the situation had been handled last session. Witness #1 told me that she knew about Senator Kagan doing this one-time last session, but it was her understanding that he had made a mistake and never did it again. I told Witness #1 that the situation had happened more than once, with other women. I also told her that I now check the restroom for Senator Kagan's presence. Witness #1 told me that she had asked Witness #2 to speak with Senator Kagan about his behavior when it had happened the one time she knew about during the 2017 session. I believe that Witness #2 spoke with Senator Kagan. I asked Witness #1 how she would feel if the same thing happened to her. She's a reflective person and I believe that she listened to me; we have always had a very good rapport with one another. Witness #1 asked me if I was going to file a formal complaint, I told her I was still thinking about it. She asked me to notify her if I filed a formal complaint against Senator Kagan, and I agreed to do that. We also talked about other issues relating to our work."

Senator Martinez Humenik further states: "I thought about it, talked to my husband and decided that I wanted to file a formal complaint so went in and talked with Witness #5. I told her it would be a workplace harassment complaint, not a sexual harassment complaint. She told me to put my complaint in writing, which I did... After filing my complaint, I went to speak with Witness #1 given our prior conversation as a courtesy before leaving for the day. Witness #1 was meeting with somebody in her office, as was Witness #2, his office is next to Witness #1's. When Witness #1 briefly came out of her office and I told her about my action, she immediately crossed her arms and her demeanor changed. We were in front of four staff members when she did this. I don't know their names, one was female and the other three were male. She said, 'Why did you do that? He only did it once and it was a mistake.' I said that we had discussed the situation before and that Witness #7's Face Book post was an important factor in my decision because he mentioned his two daughters and it bothered me that they may have experienced the same thing as I did in the Capital. I mentioned to her that female staff members and female Senators can defend themselves and speak up, however, children may not have been told what to do or how to handle a situation like that."

Senator Martinez Humenik adds: "I believe that Witness #1 thought the situation with Senator [Daniel] Kagan's use of the women's restroom was handled when she spoke with Witness #2 last session. I am not alleging that any foul-play occurred with respect to Witness #1 and my particular incident with Senator Kagan in the women's restroom, and I don't know whether other instances of him using the women's restroom were ever reported to her, however, Witness #5 did tell me that three instances had been reported. Witness #5 had previously told me about herself, another woman, and myself, so those were the three instances. A couple of weeks ago Senator Kagan approached me on the floor. He told me that he was sorry about what happened last year in the women's restroom."

Senator Martinez Humenik further states: “When Senator [Daniel] Kagan came into the women’s restroom last session while I was in there, apparently the code-pad/key-badge may not have been working properly due to construction at that time. So it’s possible that the bathroom was open for anybody to use. I learned this from Person #1 when I spoke with her within the last month or so. I did not know that the construction may have had an impact on the women’s restroom lock. Nonetheless, I believe that Senator Kagan has been in the legislature long enough to know the bathroom he used was only for women. As someone enters the restroom, there is a full-length mirror on the left wall and two wicker chairs and a table on the opposite wall in the corner. Prior to adding my decorations, these things should have alerted Senator Kagan that he was in the women’s restroom. Then, upon turning the corner into the stall and sink area, there is a tampon dispenser on the opposite wall, and there are no urinals.”

Senator Martinez Humenik concludes: “I do not want to see or hear that Senator [Daniel] Kagan has used the women’s restroom - anymore, that is the resolution I am seeking. His behavior must change. All he has said is that he made a mistake on one occasion. He has never seriously apologized. It would have been nice if he had apologized to me and the others because the situation was very uncomfortable for me and for them. Apparently he did not change his behavior. I haven’t seen Senator Kagan using the women’s restroom during this legislative session, and I don’t know when the other women saw him in there or if it has occurred this year.”

Witness #5 states: “My office is right next to the women’s restroom that Senator [Daniel] Kagan used. That restroom had no gender signage until very recently, all that the door said something like, ‘Private. Staff Only.’ However, everybody who works in the Senate has known that the door led to the women’s restroom. They tell us this during orientation, including Senators being told. The door has always had a keypad/badge-pad so it’s locked. There have been a few time periods when it hasn’t been locked due to construction, and during those times we’ve been told to not use the restroom by the Senate Secretary.”

Witness #5 continues: “The first time that I became aware of Senator [Daniel] Kagan using the women’s restroom was toward the end of the 2017 legislative session. This was around mid- to end of April 2017. I was told this by Person #2 who was a staff member last session, she was [REDACTED]. She was very upset and came to speak with me in our office. She told me that she was in the women’s restroom when Senator Kagan came in. She didn’t confront him because she was upset and flustered; instead she came directly to me. She also told Witness #4 because he was our boss [REDACTED]. It’s our protocol to do this so he could address the situation with the [REDACTED]. Witness #4 had a good relationship with Witness #6 and Witness #3, who were both serving as the [REDACTED] at the time. Witness #4 also had a good relationship with Witness #1. We didn’t want to embarrass Senator Kagan especially if it was an accident and one-time incident.

Person #2 wanted the situation to be handled discreetly, as well. So, Witness #4 talked with Witness #3 and Witness #6. At that point I thought the situation was handled.”

Witness #5 further states: “A few days later, however, I was at the work very late at night, like 10:00 pm. I was walking out of the women’s restroom and Senator [Daniel] Kagan came ‘stumbling’ past me. I was in the restroom in front of the full-length mirror and the door pushed open and Senator Kagan was there. He just said, ‘Oh, sorry,’ and walked passed me to use the women’s restroom. He appeared intoxicated at that time. We had been done for hours, we had probably been in committees during earlier in the evening, but we were certainly done with work, I’m not sure why he was even in the building. I was scared by Senator Kagan’s presence in the women’s restroom. I went back to my office, packed up my things, and left the building, I didn’t want to be there any longer. I brought the situation up to Witness #4 the next morning. I told Witness #4 that the situation was concerning to me, it had been late in the evening and there was nobody around to intervene if I needed them to. I hadn’t finished my work the night before so Witness #4 needed to know what happened. Both Witness #4 and I went to talk with Witness #3 together on the Senate floor. She said to us, ‘Are you serious? Again?’ She told us that she’d talk with Witness #1 and they’d talk with Senator Kagan and deal with the situation. Witness #3 is a friend and somebody I trust, so I thought that the situation would be handled and Senator Kagan wouldn’t use the women’s restroom again.”

Witness #5 continues: “During the end of April and beginning of May 2017, Senator [Daniel] Kagan used the women’s restroom two more times. One time I was washing my hands at the sink and Senator Kagan came out of the larger handicapped stall. He didn’t say anything to me. I’m not a confrontational person and suffer from social anxiety, so I just left. This was in the early evening. I told Witness #4 again. Before we could address the situation, the same thing happened to Senator [Beth] Martinez Humenik. I believe this happened the following day, in the late afternoon or early evening. We work together frequently because I’m one of the staff members she frequently uses. It is not uncommon for a legislator to choose a staff member as their sort of ‘point person’ for anything they need. Senator Martinez Humenik said to me, ‘Senator Kagan was just in the bathroom with me.’ She said that he walked into the restroom and she confronted him. Senator Kagan said that he was sick. That made no sense because he had just walked passed the male restroom, if he was sick he wouldn’t have taken the extra steps to use the women’s restroom. She was very upset about the situation. I told Senator Martinez Humenik that we’d handle the situation, but I didn’t tell her that it had happened before to me and somebody else. We were in the middle of working and I didn’t want her to make a confrontation; she can be very protective. I told Witness #4 immediately. We went to the Senate floor and they were on a break, so we pulled Witness #1 to the side and told her what had happened to Senator Martinez Humenik, we also said that it had happened to other staff members. I didn’t disclose myself because I didn’t want to be involved in a

confrontation, I just wanted the situation rectified. Witness #1 laughed at us, she had her head thrown back and was literally laughing, like it was a joke. She was inebriated, she was drinking on the Senate floor, so openly drinking, and she smelled of alcohol. This was common with her last session, she struggled a lot last year, but [REDACTED] there wasn't anyone who felt comfortable addressing that with her. I walked off the Senator floor because I was so upset, I didn't want to reveal that I was involved in the complaint. I'm not sure what follow-up was taken at that time. However, I assumed and expected that the situation would be dealt with by the Minority leadership. A few days [later], however, I was walking out of the women's restroom and Senator Kagan walked in. Again, I was shocked and didn't address him. I immediately went straight to Witness #3 and told her that Senator Kagan was just in the women's restroom again. She told me that Witness #2 had spoken with Senator Kagan. She also said that she'd make sure that she'd let Witness #2 know it happened again. That was the last conversation I had last session about the situation with Senator Kagan using the women's restroom. I never told Person #3 last session about what had happened. Witness #4 was my supervisor last session so I felt comfortable bringing this situation to him and knew he would help me solve it. I don't know whether Witness #4 talked with Person #3 about the situation last session, either. We weren't trying to officially complain about Senator Kagan, we just tried to handle the matter discreetly to not embarrass Senator Kagan, so it would have been appropriate if Witness #4 didn't tell Person #3 last session. I wouldn't have wanted him to tell Person #3 because I didn't want to file a formal complaint."

Witness #5 further states: "Senator [Beth] Martinez Humenik came to me in early February 2018 after Senator [Daniel] Kagan had talked to the press about the sexual harassment allegations lodged against other Senators. I think she did this because Senator Kagan had really taken the lead about this issue for the Democrats, and she was very upset because she saw Senator Kagan's leadership to be hypocritical. Senator Martinez Humenik pulled me into the [REDACTED] and talked about filing a complaint against Senator Kagan. It was then that I told her Senator Kagan came into the women's restroom while I was using it last session, and he had done so when another woman was using it, as well. Senator Martinez Humenik was furious when she heard this. According to our workplace policies, Senator Martinez Humenik is one of the Senators who I can go to with workplace harassment issues. She is also up for re-election in a highly contested seat and her challenger is Representative Faith Winter. Representative Winter is the face of the #MeToo campaign and she was the one who filed the sexual harassment complaint against Senator [Steve] Lebsack. So, Senator Martinez Humenik feared that her credibility would be questioned if she filed a complaint against Senator Kagan, meaning it would be perceived as backlash and untrue. She encouraged me to file a complaint because she felt it would seem less political because I'm not an elected official. I wasn't comfortable doing this because in my job [REDACTED], I need to have credibility to work with [REDACTED]. I'm also graduating from law school this December, so I don't want my credibility questioned with future employers once I move on from the

Capital. I don't want this issue to affect my future as an attorney. I told all of this to Senator Martinez Humenik, so she suggested that Person #2 come forward, however she's left the Capital and is working for a non-partisan job. I knew Person #2 wouldn't be interested in bringing up the situation, as she still works with Senator Kagan, they're on 'the same team' now."

Witness #5 concludes: "Senator [Beth] Martinez Humenik waited a few weeks after our conversation to decide what action she wanted to take... Then, Senator [Daniel] Kagan made a speech on the Senate floor about sexual harassment. The speech was very graphic and vulgar, meaning he was describing rape and what it looked like. I heard part of the speech but turned it off because it was inappropriate and it really bothered me. I don't know what point Senator Kagan was trying to make, he was raising issues about illegal criminal rape and it didn't seem to connect with the sexual harassment issues in the Senate. This speech occurred toward the end of February/early March 2018. Senator Martinez Humenik was furious and she talked to me again about filing a complaint. She asked me again if I would consider filing a complaint, and I asked her to do so for the reasons I've previously explained. Senator Martinez Humenik filed her complaint even though she knew that the Democratic party would attack her and it may cost her being reelected. She chose to file the complaint to protect me from having to come forward."

Witness #4 states: "The first time that Senator [Daniel] Kagan used the bathroom I found out from a female staffer. She came to my office and said that Senator Kagan was in the women's restroom. This was soon after Senator Kagan was elected into the Senate, probably December 2016; but he wasn't the first person to do this. I went [to] Witness #6, so that Witness #6 could handle the situation. I didn't want to embarrass Senator Kagan. I assumed that Witness #6 or somebody else spoke with Senator Kagan. I also told Person #3 about what I had been told. Person #3 seemed embarrassed for Senator Kagan and thanked me for telling Witness #6. At this time, the women's restroom wasn't marked by gender at that time, but it had a lock on it and a key code and said 'Staff Only.' Sometimes it was locked, but other times it wasn't. The men's restroom wasn't marked by gender either, and it just had a room number on it, like 255, and had no lock, so anyone could use it. But once someone walked into each restroom, I think it should have been obvious which was for men and which was for women, one would have had urinals while the other didn't."

Witness #4 continues: "A couple months later I was alerted that Senator [Daniel] Kagan used the same women's restroom again. One of the female staff members told me this, I believe it was a different staff member. I know that one time Witness #5 told me this, and another time it was somebody else. The second instance was before the legislative session started in January 2017. I talked with Witness #6 again and told him what happened, and I also included Witness #3 in the conversation because the situation had occurred again. They both laughed

uncomfortably and said that they'd make sure somebody talked with him. I can't recall whether I told Person #3 about this second instance."

Witness #4 further states: "I believe the third time that I knew about Senator [Daniel] Kagan using the women's restroom was when Senator [Beth] Martinez Humenik told this to Witness #5, and then Witness #5 told me. Witness #5 was [REDACTED] at the time and she worked in [REDACTED], as well. This happened when the Senate was in session, and I was on the Senate floor when Witness #5 informed me. Witness #5 said that Senator Martinez Humenik had caught Senator Kagan in the women's restroom. I immediately confronted Witness #1 and Witness #3 on the floor. This was in the evening in the end of March/early April 2017. I told them both that Senator Kagan was using the women's restroom again while one of the female Senators was in there, as well. Witness #1 'laughed,' meaning she belted out laughing. Witness #1 was drunk at the time, I could smell it on her breath and she was slurring her words. She has this reputation and I've talked with her before when she's had alcohol on her breath. All I remember is that she thought it was funny. Witness #3 didn't say anything but that's not unusual when she's with a Senator. I don't remember whether I took any follow up action internally with Person #3 about Senator Kagan's use of the women's restroom. I know that I didn't talk with Person #3 about Witness #1 being drunk, there is alcohol at the Senate and people drink. I know that Witness #5 was near me when I had my interaction with Witness #1 and Witness #3, so I talked with Witness #5 about the situation and expressed my frustration that Witness #1 wasn't going to do anything about Senator Kagan's conduct. I don't know whether Witness #5 followed up with Senator Martinez Humenik or Person #3. The topic came up in subsequent conversations between me and Witness #5, we'd ask one another whether anyone else had seen Senator Kagan in the women's restroom. I only heard about the three instances I've referenced above. I then left my position as [REDACTED] at the end of the 2017 legislative session."

### **Refuting**

**Information:** Daniel Kagan, Colorado State Senator, states: "I definitely recall using the women's restroom that is primarily used by the Senate, which is located next door to the Senate President's Office. This occurred probably in March 2017. The evening prior, I had been ill with a gastrointestinal virus. I called Person #5 in the morning and said that I wasn't coming into work. Person #5 said that it was the budget vote and I had to come into work. I told him, 'I wasn't even fit to drive.' He was insistent that I come into work, so my daughter drove me to the Capital at 9:00 AM. I felt very ill and uncomfortable throughout the day, but I stuck it out. In mid-afternoon/early evening we were still in session when I had a fairly urgent need to use the restroom. Let me say that this was a time when I was still getting used to the Senate, but I did know that the restroom was in the right-side corridor. I also knew that the restroom was unmarked and next to the Senate President's office door. I did not have to use my badge to access the restroom that evening, it was unlocked. As I was using the facilities, I

saw women's shoes in the stall next to mine. It was only then that I realized I had entered the wrong restroom. I wanted to leave without being seen to avoid any embarrassment, but I heard the sink being used, so I waited a little while, hoping for a moment when no one would be at the basins. But people were coming and going, so I had to just up and leave. As I left I was highly embarrassed. When I was outside of the restroom in the corridor, I noticed many people standing around so many people saw me exiting the restroom and knew of my mistake. In hindsight, I believe it was Senator [Beth] Martinez Humenik who berated me that evening. She seemed to believe that I had used the women's restroom deliberately. I found that strange."

Senator Kagan continues: "I resumed my seat on the Senate floor that evening. As we continued working, people were stating to me, 'Hey Kagan, I heard you used the women's restroom!' They were joking, giving me a hard time. I believe Person #6 said something to me. My point is that many people knew, it wasn't a secret that I had made a mistake. I believe it was the next day that Witness #2 talked to me. He said that he was told to speak with me about my use of the women's restroom the evening prior. I admitted this occurred and apologized for it. I had the impression that somebody had asked Witness #2 to have a word with me, but I don't know who did this."

Senator Kagan further states: "I thought this would be the end of the situation, but it wasn't. Throughout the rest of the 2017 legislative session I heard stories that I had used the women's bathroom many times. For example, there was a story going around that I had used the women's restroom in the middle of the night while drunk. I can't recall who told this to me. It wouldn't surprise me if Person #5 told me these stories; Person #5 was my main source of information about gossip going around at the Capitol. He would likely know the source of the gossip, as he was very 'clued in' to that sort of thing. The rumors disappointed me. However, nothing more came of my use of the women's restroom last session other than these rumors."

Senator Kagan continues: "During the 2018 legislative session, I heard that the Senate Republicans were 'shopping' the story of my use of the women's restroom last session to the press. I heard this from Person #4. I believe I heard this from reporters, as well. Person #4 said that the press 'weren't buying it.' He mentioned Reporter #1, who is a reporter with Colorado Public Radio. She was closely covering the sexual harassment allegations that occurred in the Senate earlier this year."

Senator Kagan further states: "If someone is referencing a period of December 2016-January 2017 as to when I used the women's restroom, that time period is inaccurate. The legislative session generally starts on or about January 10, 2017. I have talked with Person #5 and he said that I used the women's restroom in March 2017, when I had been ill and he insisted that I come into work. That's

how I know the December 2016-January 2017 timeframe is inaccurate. The time I used the women's restroom was during the amendments to the Long Bill, which to my best recollection happened in March 2017. I don't believe this occurred in mid- to end- of April 2017. If somebody is saying that I used the women's restroom 'again' or a 'second time' in mid-end of April 2017, that is wrong. If somebody has said that I used the women's restroom 'again' or 'a second, third, or fourth time' at the end of April or beginning of May 2017, that is wrong. I don't believe that anybody is lying if they've said this. I believe that the rumors within the Senate about the one time that I used the women's restroom in 2017 have been misconstrued. I don't believe that my colleagues would intentionally fabricate me engaging in this behavior multiple times, but I do believe that, as the story of the one incident has been told, passed on, and repeated, it has become distorted into more than one incident. It was an embarrassing occurrence; I wouldn't have done that more than once."

Senator Kagan continues: "I believe I talked with Witness #1 last session about my use of the women's restroom. I don't recall a specific conversation but I'm sure that I talked with all of the Democratic Senators about it, there are only 17 of us. It wasn't that big of a deal, but it became a big deal within five minutes of me emerging from the women's restroom that one afternoon/early evening. Before this occurred, I used the second floor restrooms on the other end of the corridor. I knew that those restrooms didn't need a swipe card and were unisex so one of them was typically free to use. The bathrooms at the Capital are a confusing business. Some of them are marked by gender, while some of them have no gender markings. Many aren't marked as restrooms at all. Some are marked as unisex restrooms. Some need to be accessed with a swipe card, while others don't. There is good reason for the confusion because on days when the Capitol has a lot of public visitors, it's difficult for those who work at the Capitol to go to the restroom. This has been an ongoing issue at the Capitol."

Senator Kagan further states: "The speech I gave on the Senate floor during the 2018 legislative session was explicit about sexual assault. At some time prior to my speech, the Senate President had said that the sexual harassment allegations against Senator [Randy] Baumgardner 'was closed unless and until he is convicted of a crime.' I thought that was a horrible standard to use in relation to the allegations against Senator Baumgardner. I am a former criminal defense attorney, so I looked up the crimes relating to sexual harassment and there are only three: harassment, unlawful sexual contact, and sexual assault. I described the 'penetration' needed for the crime of sexual assault, and I admit it was graphic, because I was quoting the language of the law, and the law is itself graphic. Many Republican Senators were horrified at my speech and Witness #7 posted a Face Book message about it. My opinion is that the Republicans thought the Democrats were making too big of a deal about Senator Baumgardner's behavior, so they turned the tables on the Democrats with the complaint against me. I believe the Republicans genuinely believed that I used the women's restroom on multiple occasions during the 2017 legislative session due

to all of the rumors and gossip that I've talked about. I also believe that Witness #7 may have been one of the individuals in the corridor last session when I exited the women's restroom; I don't know that for certain, but that may be the case."

Senator Kagan concludes: "It is not accurate that a female has seen me entering or exiting the women's restroom more than once, that did not happen. I cannot explain why this person would believe that or have that impression."

Witness #6 states: "It was reported to me at the beginning of the 2017 legislative session that Senator [Daniel] Kagan had incorrectly used the private women's restroom that is used by the Senate. I cannot recall who reported this to me, it may have been either Witness #4 or Witness #5, but I remember being told. It was likely a female staffer. I didn't know that the women's restroom had a keypad on it. The details of what I was told inferred that Senator Kagan was having a health emergency, which was apparent because of what he or she allegedly heard. Senator Kagan had been in the House of Representatives before being elected to the Senate, so this may have been the first time that he used the private Senate restrooms. There are two restrooms in the corridor but they were both unmarked as to gender. I was asked to discreetly handle the situation. I immediately told Witness #1. I was embarrassed for Senator Kagan, and I believe so was Witness #1. I believe she acknowledged being told about the situation and I was not involved in any follow up. That is typical, it is up to the Leadership to determine how to directly address the Senators. I also didn't follow up because it was a situation where the complaint I received indicated no malicious intent with regard to Senator Kagan's actions, and any alleged harassment was not included in the original notification I received; from my understanding when it had been reported to me, he had been struggling in the restroom. In other words, I was never given any impression that Senator Kagan's conduct was seen as harassing or malicious or anything like that. And those bathrooms weren't widely used. I believe they were unmarked so that they were more reserved for the elected Senators and their staff, it was an 'unspoken rule' with the lobbyists that they didn't use those restrooms."

Witness #6 concludes: "I don't recall being told that Senator [Daniel] Kagan used the women's restroom again. The only time I recall it happening was early in the legislative session. I didn't know for quite a while that the restroom in question was even located there, they weren't marked and nobody told me. I didn't have any orientation or training regarding restroom location when I started working, except for somebody showing me my computer and desk, nobody pointed out those restrooms at all."

Witness #3 states: "I know about Senator [Daniel] Kagan's use of the women's restroom, this happened in March 2017. When it happened, Witness #4 told me about it, he was [REDACTED] at the time.

He left at the end of last session. Witness #4 told me that Senator Kagan had just used the

wrong restroom. Witness #4 said that he felt uncomfortable addressing the Senator directly because it was an embarrassing situation, so he wanted to let me know so the Democratic caucus could address it. Witness #4 works in the President's Office, which is right next to the women's restroom. The door to the President's Office is usually open so they can see people coming in and out of the corridor where the restrooms are located. I don't know whether Witness #4 saw Senator Kagan or another staff member did, but he knew about it and then told me. This was in the evening during the week of the budget. Senator Kagan had been sick and out all day, and he told us to call him if we needed him to come and vote. We did call him and he did come in that evening. I was [REDACTED] when this occurred. I thanked Witness #4 and told him that I'd take care of it. I immediately went to the senate floor and told Witness #1 and Witness #2. We were in recess when I told them. Witness #1 told me to inform Witness #2, and then Witness #2 said that he'd talk with Senator Kagan. I knew that Witness #2 and Senator Kagan were having lunch the next day, so I assumed that's when Witness #2 would speak with Senator Kagan about the incident. From that point, I heard nothing more about this situation."

Witness #3 continues: "Then, a few weeks ago during April 2018, [REDACTED] named Person #4 told me that Reporter #1 (she is a news reporter with CPR/NPR public radio) was trying to confirm a story. Apparently Senator [Beth] Martinez Humenik told Reporter #1 about Senator Kagan using the women's restroom last session and that Witness #1 had 'laughed it off.' I told Person #4 that I was the person who was informed about the situation last session by Witness #4, and that Reporter #1 could speak with me further to get the accurate story about what had occurred. Reporter #1 never contacted me and she dropped the story. This was the first time that the incident came up again since last year. Soon thereafter, a reporter named Reporter #2 from Channel 9 contacted Person #4 about the same story. Person #4 told Reporter #2 the same information that I had given him to pass on to Reporter #1. I know that Person #4 told the press that Witness #1 was never directly informed about Senator Kagan's use of the women's restroom last session; rather, it was me who was initially informed by Witness #4 and then I told Witness #1 and Witness #2. Reporter #2 told me that he was going to confirm my recollection of what happened with Witness #4. I assume that Witness #4 gave Reporter #2 the same information that I did because Reporter #2 dropped the story and it was never reported. Nothing happened after that time until a formal complaint was filed by Senator Martinez Humenik... From my perspective, the story changed. When reporters first inquired about the incident, the story concerned Witness #1 'laughing off' the incident when it was brought to her last session by Senator Martinez Humenik. When I clarified what actually happened last session, there was no story. That's when the story changed to Senator Kagan using the women's restroom all of the time as a 'serial offender.' I read the new version of the story in the press, like everybody else."

Witness #3 concludes: "There has always been a lock on the women's restroom that Senator [Daniel] Kagan used. I don't know why that has been the case. But

the lock didn't work last session, so anybody could have entered and used it. The men's restroom that is next door to the women's restroom has never had a lock, so anybody has always been able to enter. Neither bathroom was marked as 'men's' or 'women's' until very recently. I don't know how people are made aware of which bathroom to use. I believe that I knew which one was the women's bathroom because I asked when I first started working here. Within the Capital, there are other bathrooms that are unisex and unmarked. On the third floor, there is a unisex bathroom for Senators and staff members; we can all access that bathroom with our badges, and we just lock the door behind us because there are multiple stalls. I've never been told about anyone else having an issue with somebody using the incorrect restroom. I can imagine that it's happened before because the bathrooms were unmarked until recently."

Witness #2 states: "Last session I was made aware that an issue had arose about Senator [Daniel] Kagan entering the women's restroom. I was told about this from Witness #3, who at the time was [REDACTED] (I forget her exact title). Witness #3 approached me right outside of the Senate and told me that she was told by someone that Senator Kagan had entered the women's restroom. I understood that this happened the previous evening; Witness #3 talked to me about it in the morning. I told Witness #3 that I'd speak with Senator Kagan, which I did the following day. I pulled Senator Kagan to the side of the Senate floor and told him that I understood he had used the women's restroom. He seemed to be aware of what he had done and was embarrassed by the situation. This was during the week concerning the long-bill which is the budget bill, it's a very long week, and I recall that Senator Kagan was sick that week. We had called Senator Kagan that week to come in and vote despite being sick because it was an important week. Senator Kagan acknowledged that he had used the women's restroom and was very apologetic. That was the end of my involvement in this issue."

Witness #2 continues: "I didn't hear about the issue of Senator [Daniel] Kagan using the women's restroom until this session in March 2018, when the current complaint arose. My opinion is that this issue was brought up this session due to the resolution concerning the allegations of sexual harassment against Senator [Randy] Baumgardner. During last session when Senator Kagan used the women's restroom, there was never any request for action to be taken, or an investigation to be conducted, at least that I'm aware of. This term Senator Kagan became very vocal about Senator Baumgardner being expelled; this has been the position of our entire caucus. Senator Kagan spoke out at the podium to exercise his voice and express the legalities of what had come out in Senator Baumgardner's report. Senator Kagan asked for a specific action to be taken; as background, there had been a written resolution asking for Senator Baumgardner's resignation and his party 'sat' on the resolution without it being brought to the floor. It was after this occurred that a formal complaint for an investigation concerning Senator Kagan was made. I believe the complaint was made as retaliation for what Senator Kagan spoke out against concerning Senator

Baumgardner. As far as I am aware, Senator Kagan used the women's restroom on one occasion last session. I've never been made aware of any other instance of this happening; nor have I been made aware of any other inappropriate conduct by Senator Kagan during his tenure here at the Capital. I served with Senator Kagan in the House several years ago, and there was no 'gossip' or issues about his conduct. Like I said, when I approached Senator Kagan last session about him using the women's restroom, he acknowledged what happened and apologized to it."

Witness #2 further states: "It would not be taken light-heartedly if Senator [Daniel] Kagan was using the women's restroom on a repeated basis. As I've said, I've never heard about this happening on more than the one occasion last session, which I've discussed. It's never come up in the Senate that Senator Kagan has used the women's restroom more than once. It's only come up that what happened last year was going to be used against Senator Kagan due to our caucus' position about Senator [Randy] Baumgardner. I believe this complaint and investigation is retaliation against Senator Kagan. There are other issues of retaliation occurring in the Senate and we have to reform our policies and culture because of it."

Witness #2 concludes: "In the Capital, there are some restrooms that are marked 'men's' versus 'women's,' while others aren't marked at all. On the bathroom in question, there's only a placard that says 'Senators Only' and 'Private.' Why does it say this, while the other restroom immediately next door does not have the same marking and only has a cautionary sticker? Neither restroom was marked 'male only' or 'female only' until very recently. When Senator [Daniel] Kagan used the women's restroom, it wasn't marked as such. Throughout the Capital, there is no uniformity in how the restrooms are marked or identified, it varies."

Witness #1 states: "I recall when the issue came up that Senator [Daniel] Kagan was using a women's restroom in the Capital. One of my staff members told me this, Witness #3. Witness #3 told me that she had been told this information by someone in [REDACTED], by a staff member. I don't recall the name of this staff member. I know that this happened during the 2017 session, so in the springtime, maybe a month before we ended session. I recall that Senator Kagan was ill and we urgently called him to ask him to come in and vote on the budget. This was important, so I remember this. The budget had a large financial item and we needed to win this vote. We are in the minority so we need every vote plus a few on the other side. When Senator Kagan came in, he was very ill and didn't look well, he had a severe flu bug. I recall it was around this time period that Witness #3 told me about Senator Kagan possibly using the women's restroom. I asked Witness #3 to tell Witness #2 about the situation so that he could speak with Senator Kagan. I thought it would be better if a male Senator talked with him."

Witness #1 continues: “The bathroom in question is adjacent to the President’s Office, so very close to the Senate Chamber, it’s in the southwest corner of the second floor. This is the restroom that the Senators and staff members use. It’s not a public restroom. I use my badge to get in, and there is a code that I can also use to access the restroom. There have been times when the code didn’t work. The bathrooms always need upgrading, so sometimes the code didn’t work and anybody could push the door open to get in. Around the time that Senator [Daniel] Kagan allegedly used the restroom, the code didn’t work. One time when I used the restroom, there was a male worker in the stall next to me; I knew this because I could see his big work boots. I sat in my stall and waited until he left. Another time a male was doing work in that restroom so I didn’t use it, I went to another restroom.”

Witness #1 further states: “We have always been told during Senate Orientation which restroom is for the women and which restroom is for the men. Everyone who is brand new to the Senate goes through Orientation. But Senator [Daniel] Kagan wasn’t brand new, he came in through the House so he didn’t go through Senate Orientation. Before the signs were posted, it wasn’t obvious that the doors led to restrooms, either for males or females. He came into the Senate in January 2017, so this incident occurred during his first session. I’m not sure who told him about the restrooms and which one to use.”

Witness #1 continues: “I have talked to Senator [Daniel] Kagan about the issue because I was [REDACTED] at the time he allegedly used the women’s restroom. He said that he was very ill and recalled using the restroom only because he saw women’s shoes in the stall next to him. He was very embarrassed and didn’t see anything else until he walked out of the door. He ran into Senator [Rachel] Zenzinger upon leaving. He said that he didn’t use that restroom at any other time. But he was very sick, he had diarrhea, so maybe he used it more than once on that particular day. I told him that I was furious about an accusation about his behavior. I really was furious because Witness #7 had gone onto Face Book and posted something about Senator Kagan being a ‘creepy Senator’ and ‘afraid for his girls.’ This infuriated me. Witness #7 mentioned Senator Kagan by name on Face Book due to issues happening on the floor. It was during the time that we had the sexual harassment allegation against Senator [Randy] Baumgardner and nothing had been resolved. Every day when there wasn’t resolution, our Caucus members would make a statement about urging for a resolution. So, Senator Kagan talked one day about sexual harassment and used legal statutes to do so. He was trying to differentiate between workplace and criminal sexual harassment. A decision had been made to move the issue regarding Senator Baumgardner to the District Attorney, and Senator Kagan disagreed. Senator Kagan is a lawyer. I believe that Witness #7 didn’t like the language being used by Senator Kagan on the floor because he was using explicit terms as used in the statutes. Witness #7 thought that Senator Kagan was being vulgar by saying terms like ‘vagina’ on the floor. I believe that’s why Witness #7 sent out the Face Book post mentioning Senator Kagan by name.”

Witness #1 further states: “From my conversation with Senator [Daniel] Kagan, my opinion is that it was an honest mistake. He was ill and used the wrong restroom. I know that women have mistakenly used the men’s restroom because of the lack of signage outside of the restrooms. We have public restrooms in the Capital that are non-gender, meaning that both males and females can use them. They are individual bathrooms, so the person just locks the door upon entering. I believe the Capital also has restrooms on the third floor that are non-gender specific. I’ve been told there are 8 stalls that both genders use. Also, on the first floor on the south side, there is a restroom that doesn’t have a gender-specific sign. The door doesn’t lock but the individual stalls within the bathroom can be locked. I’ve used that bathroom before. I believe a woman has come into it when I’ve used it, but never a man.”

Witness #1 concludes: “Senator [Beth] Martinez Humenik talked with me several months ago about Senator Kagan using the women’s restroom during the 2017 session; she implied that nothing was done about the situation when it occurred and people had been scared by his conduct. I told her that was preposterous, that wasn’t the situation presented to me at all.”

**Comments:** Despite receiving a large amount of speculative information during this investigation, there is plausible support for three separate occasions when Senator Kagan used the private, women-only restroom located adjacent to the Senate President’s Office during the 2017 Legislative Session.

First, Witness #6 and Witness #4, provided consistent accounts of a situation around early January 2017 when a female staff member complained about Senator Kagan incorrectly using the restroom in question. Although Witness #6’s and Witness #4’s recollections are not identical, the similarity of information expressed by them about the time-frame and surrounding circumstances of this January 2017 incident led this investigator to find their perspectives credible. Specifically, Witness #4 stated that when a female staff member initially told him about Senator Kagan using the women’s restroom, he immediately told Witness #6 because that was the protocol for handling issues concerning Democratic Senators. Witness #6 confirmed that he was told about this situation and stated that he immediately told Witness #1, [REDACTED], because that was the protocol for handling Senator-related issues within his own party. Both Witness #4 and Witness #6 stated that because Senator Kagan was new to the Senate in January 2017, they perceived that he mistakenly used the restroom in question due to the lack of gender-signage at the time. Thus, from their perspectives, they handled the situation discreetly and properly according to their roles [REDACTED]. Although Senator Kagan denied that this incident took place, this investigator concludes that it most likely occurred given the congruent, bi-partisan perceptions of Witness #4 and Witness #6.

Second, Senator Martinez Humenik stated that she was directly involved in another situation when Senator Kagan misused the restroom in question around late April 2017. Senator Kagan admitted to this mishap but believed it occurred while he was sick during the Long-Bill debate and voting sometime in March 2017. Because Senator Kagan's time-frame was substantiated by Witness #1, Witness #2, Witness #3, and Witness #4, this investigator is persuaded that this incident occurred in March 2017. Curiously, Witness #1 failed to disclose being told by Witness #6 about Senator Kagan's prior use of the women's restroom in January 2017. While this discrepancy detracts from Witness #1's credibility, Witness #2 corroborated her recollection of the events surrounding the March 2017 situation. Of all the Senators interviewed, this investigator found Witness #2's eye contact, tone of voice, and demeanor to be the most candid and believable. It appeared highly plausible to this investigator that Witness #2 was told only about the March 2017 incident and addressed only that situation with Senator Kagan, even though Senator Kagan had likely misused the women's restroom two months prior, as well.

Third, Witness #5 recalled an incident when she perceived that Senator Kagan "appeared intoxicated" and "stumbled past her" into the women's restroom around 10:00 p.m. one night during the 2017 Legislative Session. Significantly, Senator Kagan also described this situation but did so in the form of a "rumor" allegedly circulating in 2017. Specifically, Senator Kagan said, "Throughout the rest of the 2017 legislative session I heard stories that I had used the women's bathroom many times. For example, there was a story going around that I had used the women's restroom in the middle of the night while drunk." Attachment 4, p.2. Senator Kagan could not definitively recall how he knew about this alleged rumor and the comment was unsolicited by this investigator. Thus, the remark came across as suspect and lent credibility to the veracity of Witness #5's perceptions. Also, both Witness #4 and Senator Martinez Humenik corroborated Witness #5's disclosure of one situation involving herself and Senator Kagan in the women's restroom. Although Witness #5 perceived she was personally involved in three total situations with Senator Kagan, this investigator concludes there is sufficient corroboration for the one incident occurring late at night sometime after the March 2017 incident described above.

Notably, Senator Martinez Humenik also described a situation when Senator Kagan used the women's restroom in question while Witness #7's two daughters were visiting the Capital. In support of this incident, Senator Martinez Humenik provided this investigator with a Face Book post by Witness #7 dated March 16, 2018. See Attachment 1b. However, Witness #7 failed to appear for his phone interview with this investigator, as well as failed to respond to this investigator's follow-up emails. See Attachment 9. Witness #7's refusal to participate in this investigation casts doubt on this aspect of Senator Martinez Humenik's claim.

Based on the information and circumstances presented, this investigator finds it more likely than not that on three occasion during the 2017 Legislative Session,

Senator Kagan used the private, women-only restroom located adjacent to the Senate President's Office; however, this investigator finds it less likely than so that Senator Kagan continued to engage in such conduct in 2018.

### **Conclusion**

Senator Martinez Humenik's allegation in this report demonstrates that she perceives Senator Kagan has used the private, women-only restroom located adjacent to the Senate President's Office on more than one occasion since his election to the Colorado Senate in November 2016. There is sufficient corroboration and support by neutral witnesses that Senator Kagan engaged in such conduct on three occasions during the 2017 Legislative Session. Also, at times, Senator Kagan's own statements substantiate Senator Martinez Humenik's claim. However, there is no information suggesting that Senator Kagan continued to engage in such conduct in 2018.

### **Summary of Findings**

1. This investigator finds it more likely than not that on three occasion during the 2017 Legislative Session, Senator Kagan used the private, women-only restroom located adjacent to the Senate President's Office; however, this investigator finds it less likely than so that Senator Kagan continued to engage in such conduct in 2018.

### **Analysis**

Decision-makers for the Colorado General Assembly are responsible for assessing whether the facts of this matter support the allegations presented or otherwise establish unacceptable conduct and corrective action. This investigation report is intended to be the tool for making that analysis by identifying the relevant allegations and addressing corroboration of facts. Subjective comment is also shared, but it is important to recognize that another person, like a judge or juror, might draw a different perspective from the same or additional facts.

### **END REPORT**

Respectfully submitted,

EMPLOYERS COUNCIL, INC.

Maureen Murphy Batson, J.D.  
Workplace Investigator

MMB/Attachments

