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| Denver District Court<br>1437 Bannock Street, #256<br>Denver, CO 80202 | |
| **STEPHEN NASH, an individual,**<br>**VICKIE NASH, an individual, and**<br>**AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**GERALD WHITMAN, in his official capacity as the Chief of Police of the City and County of Denver, and THE CITY AND COUNTY OF DENVER,**<br><br>**Defendants.** | **This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:**<br><br>**This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).** |
| John A. Culver, Esq., #21811<br>Dean H. Harris, Esq., #35017<br>Benezra & Culver, L.L.C.<br>141 Union Blvd., #260<br>Lakewood, CO 80228<br>(303) 716-0254<br>(303) 716-0327 facsimile<br>jaculver@bc-law.com<br><br>Mark Silverstein, Esq., #26979<br>ACLU of Colorado<br>400 Corona Street<br>Denver, CO 80218<br>(303) 777-2490<br>msilver2@att.net<br>*Attorneys for Plaintiffs* | **Case Number:**<br><br>**Div.: Ctrm:** |

**DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT**

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases.

2. Check the boxes applicable to this case.

☑ Simplified Procedure under C.R.C.P. 16.1 applies to this case because this party does not seek a monetary judgment in excess of $100,000.00 against another party, including any attorney fees, penalties or punitive damages but excluding interest and costs and because this case is not a class action or forcible entry and detainer, Rule 106, Rule 120, or other expedited proceeding.

☐ Simplified Procedure under C.R.C.P. 16.1, does not apply to this case because (check one box below identifying why 16.1 does not apply):

- ☐ This is a class action or forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, or
- ☐ This party is seeking a monetary judgment for more than $100,000.00 against another party, including any attorney fees, penalties or punitive damages, but excluding interest and costs (see C.R.C.P. 16.1(c)), or
- ☐ Another party has previously stated in its cover sheet that C.R.C.P. 16.1 does not apply to this case.

3. ☐ This party makes a Jury Demand at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: 6/14/05

Signature of Party or Attorney for Party

NOTICE
- ✓ This cover sheet must be filed in all District Court Civil (CV) Cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.
- ✓ This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.
- ✓ This cover sheet shall not be considered a pleading for purposes of C.R.C.P. 11.

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| **STEPHEN NASH, an individual,**<br>**VICKIE NASH, an individual, and**<br>**AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**GERALD WHITMAN, in his official capacity as the Chief of Police of the City and County of Denver, and THE CITY AND COUNTY OF DENVER,**<br><br>**Defendants.** | **This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:**<br><br>**This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).** |
| John A. Culver, Esq., #21811<br>Dean H. Harris, Esq., #35017<br>Benezra & Culver, L.L.C.<br>141 Union Blvd., #260<br>Lakewood, CO 80228<br>(303) 716-0254<br>(303) 716-0327 facsimile<br>jaculver@bc-law.com<br><br>Mark Silverstein, Esq., #26979<br>ACLU of Colorado<br>400 Corona Street<br>Denver, CO 80218<br>(303) 777-2490<br>msilver2@att.net<br>*Attorneys for Plaintiffs* | **Case Number:**<br><br>**Div.: Ctrm:** |
| **COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE** | |

Plaintiffs, Stephen Nash, Vickie Nash, and the American Civil Liberties Union of Colorado ("ACLU"), through their attorneys, the law firm of Benezra & Culver, L.L.C., and Mark Silverstein of the ACLU of Colorado, for their Complaint and Application for

Order to Show Cause against the Defendants, Gerald Whitman and the City and County of Denver, allege the following:

## I. INTRODUCTION

1. In 2002, the public learned that the Intelligence Unit of the Denver Police Department ("DPD") had been systematically monitoring the peaceful protest activities of Colorado residents, keeping files on the expressive activities of law-abiding activist organizations, many of which were falsely branded in the files as "criminal extremist," and disseminating these files to third parties. The resulting controversy over what came to be known as the Denver Police "Spy Files" prompted a class action lawsuit and at least three internal investigations within the Denver Police Department.

2. This lawsuit seeks disclosure of public records relating to three internal investigations that the Denver Police Department conducted as a result of the Spy Files controversy. Plaintiffs seek relief from this Court under the Criminal Justice Records Act ("CJRA"), C.R.S. § 24-72-301, et seq., because Defendants have refused to produce the requested information without legitimate justification under the CJRA. While Defendants have refused inspection and copying on the grounds that disclosure is "contrary to the public interest," the public interest actually compels public disclosure of this information.

## II. JURISDICTION AND PARTIES

3. This Court has jurisdiction to consider Plaintiffs' claims, pursuant to C.R.S. §§ 24-72-305(7).

4. Plaintiff Stephen Nash, an individual, is a citizen of the State of Colorado, residing in the City and County of Denver. As such, it is a "person" as defined in the CJRA, C.R.S. 24-72-302(9).

5. Plaintiff Vickie Nash, an individual, is a citizen of the State of Colorado, residing in the City and County of Denver. As such, it is a "person" as defined in the CJRA, C.R.S. 24-72-302(9).

6. Plaintiff ACLU is a not-for-profit public interest organization incorporated in Colorado and headquartered in Denver, Colorado. As such, it is a "person" as defined in the CJRA, C.R.S. 24-72-302(9).

7. Defendant Gerald Whitman is the Chief of Police of the City and County of Denver, Colorado, and is both the "custodian" and the "official custodian" of the criminal justice records at issue in this case. (See C.R.S. § 24-72-302(5) and (8).) He is sued in his official capacity only.

8. The City and County of Denver is a home-rule political subdivision of the State of Colorado and is also a "custodian" of the criminal justice records at issue in this case pursuant to C.R.S. § 24-72-302(5).

## III. APPLICABLE LAW

9. All records "made, maintained, or kept" by the DPD are "criminal justice records" as defined by C.R.S. § 24-72-302(4). Unless specifically exempt, C.R.S. § 24-72-305 requires that all criminal justice records should be made available for public inspection and copying.

10. Upon application to the District Court for the District in which the criminal justice records can be found, the Court is to enter an order to show cause "at the earliest practical time" at which time the custodian of records must demonstrate why the records at issue should not be disclosed. (See C.R.S. § 24-72-305(7).) Unless the Court finds that the custodian's refusal to permit access to the records at issue was proper, the Court shall order the custodian to permit such access. (Id.)

11 Upon a finding that the custodian's denial of access was arbitrary or capricious, the Court may order the custodian to pay the applicant's court costs and attorney fees in an amount to be determined by the Court. (Id.)

## IV. FACTUAL ALLEGATIONS

### A. Factual Context Giving Rise to the Records Request.

12. Stephen and Vickie Nash are longtime Denver residents who have been married for 29 years. They are political activists who frequently participate in peaceful educational and advocacy activities to express their views on political and social issues. They have worked actively with Amnesty International and End The Politics Of Cruelty. In recent years, they have focused on issues of police accountability through their leadership of Denver Copwatch. In 2002, the Nashes learned that the Denver Police Department had recorded information about them and their constitutionally-protected political activities and associations in the "Spy Files." Although neither Stephen Nash nor Vickie Nash has a criminal record, the "Spy Files" listed them as members of organizations that were falsely labeled as "criminal extremist."

13. On July 2, 2002, the Nashes filed a written complaint with the Public Safety Review Commission ("PSRC") in which the Nashes alleged that the DPD had been improperly and unjustifiably collecting information and building files about their political views, political associations, and the exercise of their First Amendment rights. It asserted that these files listed them as members or political associates or groups that were falsely labeled as "criminal extremist." It further alleged that DPD was disseminating information and documents containing this defamatory and erroneous

information to third parties, despite the fact that the DPD never had any evidence that the Nashes were involved in criminal activity. (See Nash Complaint, attached as Exhibit A.)

14. In their complaint, the Nashes requested an investigation into their allegations. In particular, they wanted to know who had authorized the political spying, who had carried it out, who authorized the dissemination of false information, and who authorized and applied the label "criminal extremist" to various peaceful and non-criminal activist organizations and to the Nashes. (Id.) The Nashes further asserted that without a full investigation and appropriate discipline, it would appear that the highest levels of the DPD were engaged in a cover-up designed to protect the responsible officers from accountability for their actions. The letter further requested the strongest possible discipline for the officers responsible. (Id.)

15. Pursuant to standard procedure, the PSRC referred the Complaint to the DPD. At some point in September 2002, an Internal Affairs investigation was opened regarding the Nashes' Complaint.

16. On information and belief, the DPD decided to delay any investigation or resolution of the Nashes' Complaint until after the resolution of the pending "spy files" case, American Friends Service Committee v. City and County of Denver, No. 02-N-0740, United States District Court, District of Colorado. On information and belief, the DPD investigated the Nashes' Complaint sometime after the Federal District Court approved a settlement of the spy files case on May 7, 2003.

17. In a letter dated March 16, 2004, the Nashes finally received a response to their Complaint (attached as Exhibit B). In that letter, Defendant Whitman stated that the Complaint had been "thoroughly investigated by the Internal Affairs Bureau and reviewed by the senior command of the Denver Police Department." (Id.) The letter pointed out that a violation of Department rules and regulations must be substantiated by a preponderance of the evidence. The letter then concluded that, "In this case, there was a preponderance of evidence to support the sustaining of violations." (Id.) The letter further stated that as a result of the investigation, "Changes have been made to Denver Police Department policy and procedures." (Id.) No further information was provided, including the specific department rules and regulations that were found to be violated, the individual's responsible, whether discipline was imposed, or how policies were changed and modified. (Id.)

**B. Defendants' Denial of Plaintiffs' Request for Access to Records.**

18. On April 14, 2004, Mark Silverstein, on behalf of the ACLU and the Nashes, submitted a request for records under the CJRA and the Colorado Open Records Act ("CORA") (attached as Exhibit C). In that correspondence, Mr. Silverstein requested records of three related internal investigations: (1) the investigation resulting

from the complaint filed by the Nashes on July 2, 2002; (2) the internal investigation opened on or about March 11, 2002, shortly after it was publicly revealed that the DPD was keeping files on political activists; and (3) the internal investigation prompted by the discovery of six file cabinets containing hard-copy documents relevant to the then-pending lawsuit over the Spy Files. The discovery of these documents contradicted previous assertions that all hard-copy intelligence files had already been purged and destroyed.

19. Mr. Silverstein's April 14, 2004, CJRA request contained an express exception to protect the potential privacy rights of DPD officers. Specifically, the request provides:

> There is one exception: this letter should not be construed as a request for any portions of any documents that contain highly personal and private information about any officer's off-duty activities that is not directly related to the discharge of their official duties. Accordingly, this is not a request for, and you may redact, such information as social security numbers, home addresses, home phone numbers, personal medical and financial information, and similar information.

(Id., p. 3.)

20. On April 30, 2004, the City and County of Denver responded to Mr. Silverstein's request. In that response, Defendants refused production of all requested information (attached as Exhibit D). According to Defendants:

> . . . The Police Department considers its investigative files to be confidential and disclosure of the files . . . would be contrary to the public interest. It is critical to internal investigations that the Police Department obtain frank and complete information with regard to matters under investigation. Disclosure of the files sought could have a chilling effect on the Department's ability to obtain that information. In turn, the Department's ability to properly discipline its employees could be damaged, as well as the public's confidence in the Police Department.
>
> In addition, release of the documents would infringe upon the officers' privacy interests. Furthermore, at least some of the information in those files is protected by the deliberate process privilege. Finally, there is a court order that may preclude disclosure of some of the documents [sought].

(Id.)

21. On May 13, 2004, the Police Department promised to provide Plaintiffs with a "sworn statement explaining why the deliberative process privilege is applicable to records . . . requested" (attached as Exhibit E). No such statement has been provided.

22. On June 7, 2005, Plaintiffs wrote to Defendant Whitman to renew their request for records. In that correspondence, Defendants were notified that Plaintiffs would file a Complaint and Request for Order to Show Cause unless the requested information was provided (attached as Exhibit F).

23. On June 13, 2005, counsel for Defendants informed Plaintiffs' counsel that no production would be forthcoming.

**C. Defendants' Pattern of Obstruction.**

24. Defendants' refusal to disclose any of the requested records was made pursuant to a longstanding policy and practice of DPD to resist public disclosure of information concerning the DPD's investigation of allegations of police misconduct. Pursuant to that policy and practice, the DPD has refused to disclose records similar to those requested by the Nashes and the ACLU unless and until an action is filed in court. Even though the Denver District Court has repeatedly rejected the Defendants' legal rationale for withholding documents and has ordered disclosure of requested records, Defendants nevertheless have reasserted the identical arguments as grounds for withholding disclosure in this case.

25. For example, in Brotha 2 Brotha v. City and County of Denver, Denver Dist. Ct. Case No. 96-CV-6882, Defendant refused inspection of Internal Affairs Bureau ("IAB") files, because it asserted the files fell within the personnel files exception, deliberative process privilege, and public interest exception. Nonetheless, this Court ordered production of all but a handful of documents and expressly rejected Defendant's contention that the production of IAB files was contrary to the public interest. (Brotha 2 Brotha Order, attached as Exhibit G.)

26. Moreover, in American Civil Liberties Union of Colorado v. City and County of Denver, Denver Dist. Ct. Case No. 97-CV-7170, Defendant refused production of an IAB investigative file because it asserted that its self-investigatory process would be undermined if promises of confidentiality to public officers were not maintained and because police officers supposedly have a right to privacy in those files. (ACLU Order, attached as Exhibit H.) After holding that Defendant had failed to meet its burden of demonstrating that disclosure would be "contrary to the public interest," the District Court expressly held that: " . . . **disclosure promotes the public interest** in maintaining confidentiality in the honesty, integrity, and good faith of Denver's Internal Affair's Bureau." (Id., p. 3, ¶ 6, emphasis added.)

27. Finally, in American Civil Liberties Union of Colorado and Terrill Johnson v. Whitman, et al., Denver Dist. Ct. Case No. 04-CV-700, DPD again refused production of IAB files based upon an asserted constitutional right of privacy. In holding that the public interest promoted by disclosure outweighs the officer's minimal privacy interest, the Court noted that:

> Commander Lamm testified that the Department is keenly interested in allegations of racial profiling and that it serves the public interest to dispel concerns that racial profiling is occurring. He also acknowledged that maintaining the standing, respect and integrity of the Police Department is in the public interest. In this case, **there is a compelling state interest in allowing the public to see how the Police Department is policing itself that its internal investigations are performed in a thorough and unbiased manner.** I find that this interest outweighs the limited expectation of confidentiality the officers have in their statements to IAB.

(Whitman Order, p. 6, attached as Exhibit I, emphasis added.) Because their refusal of production was "arbitrary and capricious," attorney fees were assessed against Defendants. (Id.)

## V. CLAIM FOR RELIEF

### Order to Show Cause and Award of Reasonable Attorney Fees Pursuant to C.R.S. § 24-72-204(5)

28. Plaintiffs hereby incorporate Paragraphs 1 through 27 above as if fully set forth herein.

29. The information requested by the Plaintiffs on April 14, 2004, has been made, maintained and kept by Defendants and constitutes public records under C.R.S. § 24-72-203.

30. Defendants have refused to provide access to public records pursuant to Plaintiffs' request.

31. No statutory exception under the CJRA warrants Defendants' decision to deny access to the public records requested by Plaintiffs.

32. Defendants' denial of access to the records sought by Plaintiffs violates the CJRA.

33. There is no good faith basis or grounds to support Defendants' refusal to provide access to the CJRA records sought by Plaintiffs herein, thereby entitling them to an award of attorney fees and costs.

WHEREFORE, Plaintiffs ACLU, Stephen Nash and Vickie Nash, ask this Court to enter judgment in their favor and award the following relief:

(a) The Court enter an Order directing the Defendants to show cause why they should not permit inspection and copying of the requested records as described herein. An Order to Show Cause has been filed separately from this Complaint.

(b) The Court conduct a hearing pursuant to such Order "at the earliest practical time," at which time the Court should make the Order to Show Cause absolute and order production of the requested documents;

(c) The Court enter an Order directing Defendants to pay Plaintiffs' court costs and reasonable attorney fees; and

(d) The Court order any other and further relief that the Court deems just and proper.

Respectfully submitted this 14th day of June, 2005.

**BENEZRA & CULVER, L.L.C.**

John A. Culver, Esq.
Dean H. Harris, Esq.
141 Union Blvd., #260
Lakewood, CO 80228
(303) 716-0254

Plaintiffs' Addresses
ACLU
400 Corona Street
Denver, CO 80218

Stephen and Vickie Nash
1276 S. Vallejo Street
Denver, CO 80223

In cooperation with the American Civil Liberties Union Foundation of Colorado
Mark Silverstein, Esq., #26979
ACLU of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

In accordance with C.R.C.P. 121, § 1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

To: Public Safety Review Commission
303 W Colfax, Suite 1600
Denver, CO
Internal Affairs - Denver Police Department

# COMPLAINT AGAINST ACTIONS BY OFFICERS OF THE DENVER POLICE DEPARTMENT

July 2, 2002

I, Stephen B. Nash, and my wife, Vicki Nash, are the victims of serious human rights violations by Denver Police Department officers, probably working out of the Intelligence Unit. We have been subjected to years of police surveillance without reasonable suspicion, targeted for voicing our political beliefs and specifically, as indicated in documents created by the DPD (the "spy" files), for our work on police accountability issues. This spying violates our constitutional guarantee to free speech and assembly. Police surveillance and recording of constitutionally protected activities violate our right to privacy.

The files themselves categorize my wife and I as "criminal extremists" without any definition of the term and without any evidence, besides constitutionally protected activities, to back up the claim. This malicious slander was provided to other law enforcement agencies as legitimate police intelligence. This was a deliberate effort to criminalize my wife and I, an attempt to associate our names with criminal acts, to "frame" us. It is an attempt to destroy our lives through lies and gross misuse of authority.

These allegations are documented by the DPD itself, documents obtained by my wife and I, about ourselves, cover a period of time between 3/30/00 to 12/11/00. Information includes descriptions of our vehicles and home address and drivers license numbers. The documents connect us with several groups labeled "criminal extremist." Specific DPD personnel, Detective David J. Pontarell (apparently one of the spies) and Kathleen Miklich ( who possibly maintained the database). Statements by various city officials including Mayor Webb and City Attorney Wortham make it clear that the spying continued well past the period covered by the documents we now possess. Our possession of these documents proves the DPD was distributing the files to other parties. Copies of this information are provided with this complaint.

**The surveillance, the keeping of secret, false, spy files and the deliberate dissemination of false information constitute a pattern of harassment. We believe the surveillance continues. The DPD has failed to take action against the officers responsible.**

**The officers who engaged in collecting information for and the maintaining of these spy files directly violate written City guidelines. These guidelines are based on federal law.** These regulations include the "Denver Police Department

PLAINTIFF'S EXHIBIT A

Intelligence Systems Information." The City's written policy forbids the police to collect information on political views and political activities that are protected by the First Amendment "unless such information directly related to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity." These two paragraphs apply:

> The Denver Police Department shall only collect and maintain criminal intelligence information concerning an individual if there is "reasonable suspicion" that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity.
>
> The Denver Police Department shall not collect or maintain criminal intelligence information about the political, religious, or social views associations or activities of any individual or any group, association, corporation, business, partnership, or other organization, unless such information directly related to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involve in criminal conduct or activity

**Despite the Mayor's assurances that the spying would cease, we have continued to document police surveillance of our activities since the Mayor's statement.** Specifically on the evening of Friday, March 15, 2002, the police helicopter followed my car as my wife and I drove downtown to a COPWATCH demonstration. Many participants expressed concern over the large police presence. The Rocky Mountain News article published on March 16 noted the continuing surveillance. Three police cruisers also watched a COPWATCH demonstration on Saturday, April 20, 2002 at 38th and Federal between 11am and 1pm We can provide video documentation of the surveillance at the two events.

**The three judge panel hired by the Mayor to look into the spy files is not authorized to assign responsibility or to discipline the officers responsible.** In fact no governmental agency, the DPD, the city attorney's office, the district attorney's office or any other entity has moved to discover who is responsible. The effort was large, including maintaining over 3,000 files on individuals. The documents indicate that I, Stephen B. Nash, am the subject of at least three "associated"reports. This indicates a large number of officers were involved and that supervisors were aware of the database and information gathering efforts.

Our complaint seeks to redress this. We want to know who authorized the spying and files, who did the spying, who authorized the dissemination of deliberately fabricated information, who authorized and entered the malicious label of "criminal extremist."

Why has the DPD failed to investigate who is responsible for the spying. Who is responsible for the decision to protect these officers from the consequences of their actions? We believe the DPD is covering up for these officers to protect individuals at the highest levels in the DPD. Protecting those who have committed these illegal acts also violates the law and departmental guidelines.

If officers were acting without the consent or knowledge of civilian authority we believe

the strongest discipline possible should be meted out to those responsible for misusing their authority and violating our rights.

Stephen B. Nash

Vicki Nash

1276 S. Vallejo St.
Denver CO 80223

303-742-9928
svnash@aol.com

WELLINGTON E. WEBB
Mayor

# CITY AND COUNTY OF DENVER

DEPARTMENT OF SAFETY

DENVER POLICE DEPARTMENT
ADMINISTRATION BUILDING
1331 CHEROKEE STREET
DENVER, COLORADO 80204-2787
PHONE: 720-913-2000

March 16, 2004

Mr. Stephen B. Nash
Ms. Vicki Nash
1276 S. Vallejo Street
Denver, CO 80223

Re: Internal Affairs Case Number 2002C0188
Intelligence Bureau Investigation

Dear Stephen and Vicki Nash:

I apologize for the delay in sending this letter regarding your complaint of September 9, 2002. Your complaint has been thoroughly investigated by the Internal Affairs Bureau and reviewed by the senior command of the Denver Police Department. In order to substantiate a violation of rules or regulations against a police officer there must be a preponderance of evidence to support that the officer committed a violation of Department rules or regulations. In this case, there was a preponderance of evidence to support the sustaining of violations.

As a result of this investigation, changes have been made to Denver Police Department policy and procedures. Thank you for bringing this matter to my attention. If you have any questions regarding this investigation, please feel free to contact Deputy Chief Marco Vasquez at 720-913-6016.

Sincerely,

Gerald R. Whitman
Chief of Police

PLAINTIFF'S EXHIBIT B

ACLU
AMERICAN CIVIL LIBERTIES UNION of COLORADO
FOUNDATION

Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

April 14, 2004

Gerry Whitman, Chief of Police
Denver Police Department
1331 Cherokee, Room 402
Denver, Colorado 80204
**By facsimile to 720-913-7029 and United States Mail**

Dear Chief Whitman:

Please consider this to be a written request to inspect and copy records pursuant to the Colorado Open Records Act and the Colorado Criminal Justice Records Act.

I make this request on behalf of the American Civil Liberties Union as well as Steve and Vicki Nash.

On July 2, 2002, the Nashes filed a written complaint with the Public Safety Review Commission asserting that the Denver Police Department had been improperly and unjustifiably collecting information and building files about their political views, their political associations, and how they exercise their First Amendment rights. It asserted that these files listed them as members or political associates or groups that were falsely labeled as "criminal extremist." It further asserted that the Denver Police Department was disseminating information and documents containing this defamatory and erroneous information to third parties, despite the fact that the Police Department has no evidence that the Nashes are involved in any criminal activity.

The complaint asserted that the political surveillance was continuing despite the Mayor's assurance in March, 2002, that it would stop.

The complaint sought to hold officers accountable for this surveillance. It pointed out that none of the inquiries that had been conducted so far had resulted in any discipline of any officers nor had it produced an adequate public accounting of who was responsible and why.

In their complaint, the Nashes said that they wanted an investigation that would ask and answer such important questions as: who authorized the political spying; who carried it out; who authorized the dissemination of the false information; and who authorized and applied the label "criminal extremist" to various peaceful and noncriminal activist organizations.

PLAINTIFF'S EXHIBIT C

400 Corona Street • Denver, CO 80218-3915 • 303-777-5482 • FAX 303-777-1773 • www.aclu-co.org

The complaint asserted without a full investigation and appropriate discipline, it would appear that the highest levels of the Denver Police Department were engaged in a cover-up designed to protect the responsible officers from accountability for their actions

The letter requested the strongest possible discipline for the officers responsible

Pursuant to standard procedure, the Public Safety Review Commission referred the complaint to the Denver Police Department. For some reason, the referral from the PSRC apparently did not reach the Denver Police Department until two months later. It is my understanding that at some point in September, 2002, you opened an internal affairs investigation into the issues raised by the Nashes' allegations.

The Nashes' complaint, which requests an internal affairs investigation and administrative discipline, raises questions that are different from those that were currently pending in the Spy Files case, American Friends Service Committee v. City of Denver Nevertheless, it was my understanding that the Denver Police Department made a decision to delay any investigation or resolution of the Nashes' complaint until after that litigation was concluded. After the federal district court approved a settlement of the Spy Files case on May 7, 2003, I understood that you would proceed with the investigation and the resolution of the Nashes' complaint.

In a letter dated March 16, 2004, you finally responded to the Nashes' complaint. More than 21 months had passed since they filed their complaint; 19 months had passed since you opened the internal affairs investigation; and more than 10 months had passed since the settlement of the Spy Files case.

In your letter of March 16, 2004, you state that the complaint has been "thoroughly investigated by the Internal Affairs Bureau and reviewed by the senior command of the Denver Police Department." The letter points out that a violation of Department Rules and Regulations must be substantiated by a preponderance of the evidence. The letter then states: "In this case, there was a preponderance of evidence to support the sustaining of violations " The letter further states that as a result of this investigation, "changes have been made to Denver Police Department policy and procedures."

The letter fails to provide the Nashes with any additional information about the investigation and resolution of their complaint. It fails to provide such elementary information as the specific department regulations that were found to have been violated. It does not identify the officers who were found to be responsible, nor does it say

whether the violations even resulted in any discipline. Although the letter states that policy changes were made as a result of the investigation, it fails to identify which policies were changed and how they were modified. While the Nashes and the ACLU are certainly aware of the policy changes that were adopted as a result of the settlement of the Spy Files litigation, the letter does not even allude to that litigation, nor does it suggest that the policy changes to which it refers are the same ones adopted as part of the settlement agreement.

Please consider this a written request for the entire record of the Denver Police Department's investigation of the Nashes' complaint, as well as the entire record of two additional internal investigations described in this letter. There is one exception: this letter should not be construed as a request for any portions of any documents that contain highly personal and private information about any officers' off-duty activities that is not directly related to the discharge of their official duties. Accordingly, this is not a request for, and you may redact, such information as social security numbers, home addresses, home phone numbers, personal medical and financial information, and similar information.

This request specifically includes, but is not limited to, all documents related to any and all witness interviews, photographs, summary narrative reports, and other documents of any kind generated that reflect any investigation, administrative or criminal, by the Denver Police Department, including but not limited to the Internal Affairs Bureau, concerning the conduct of any public officers or employees involved in any way in the activities that Steve and Vicki Nash describe in their complaint.

If the complaint filed by the Nashes prompted the Department to expand its investigation beyond the specific allegations of the Nashes' complaint, then please provide all documents connected with that expanded investigation.

This request also includes a request for documents identifying the specific officers who were found to have violated Department regulations, the specific regulations found to have been violated, and the discipline imposed, if any. It also includes, but is not limited to, documents showing what policy changes were adopted as a result of the investigation of the Nashes' complaint.

It is my understanding that you may have initiated a separate internal investigation shortly after the first public revelation, on March 11, 2002, that the Denver Police Department was keeping files on political activists and falsely labeling peaceful advocacy organizations as

"criminal extremist." Please consider this to be written request for all documents connected with that investigation, too.

Finally, I understand that some time in September 2002, you discovered that there were at least six file cabinets in the Denver Police Department's Intelligence Unit that contained hard-copy intelligence files relevant to the then-pending lawsuit over the Spy Files. The discovery of these hard-copy documents contradicted previous assertions that all of the hard-copy intelligence files had already been purged and that the only remaining files were contained in the Orion computer database. I understand that you then ordered a number of actions that included searching the desks of all the officers in the Intelligence Unit and making copies of the hard drive of each of the detectives in the unit. I also understand you opened an internal investigation to determine whether any department rules had been violated. Please consider this to be a request for all documents connected to that investigation, too.

I know that the City may consider denying this request for records and taking the position that release of the requested documents would be "contrary to the public interest."

I urge you to reject that option. When serious allegations of police misconduct are made, the Denver Police Department should not attempt to shield its officers from public scrutiny. A full public accounting is appropriate. On four prior occasions in recent years, the American Civil Liberties Union has gone to court when the Denver Police Department has refused to disclose documents relevant to widely-publicized allegations of police misconduct. On each occasion, the ACLU obtained most or all of the requested records. On a fifth occasion last year, the ACLU successfully sued to obtain a copy of the Denver Police Department's Memorandum of Understanding with the Joint Terrorism Task Force. I hope that this time a sixth lawsuit under the Open Records Act and the Criminal Justice Records Act will not be necessary.

If the quantity of documents to be disclosed is voluminous and there will be a charge for copying, I request that you call me first to discuss the number of copies and the cost. If the cost is too much, then I would prefer to inspect the documents first and select a subset for copying. I can be reached at 303-777-5482 ext 114.

If you do refuse to permit inspection and copying of the requested records, then I ask that you send me a written statement explaining your grounds for refusing access, as described in the following paragraphs.

The Criminal Justice Records Act provides as follows:

> If the custodian denies access to any criminal justice record, the applicant may request a written statement of the grounds for the denial, which statement shall be provided to the applicant within seventy-two hours, shall cite the law or regulation under which access is denied or the general nature of the public interest to be protected by the denial, and shall be furnished forthwith to the applicant.

C.R.S. § 24-72-305 (6). The Colorado Open Records Act provides:

> If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied and shall be furnished forthwith to the applicant.

C.R.S. § 24-72-204(4). If you deny access to the requested records, then I will expect you to provide, within 72 hours, a written statement explaining your reasons.

Sincerely,

Mark Silverstein
ACLU Legal Director

cc: Mayor John Hickenlooper

# CITY AND COUNTY OF DENVER

**DEPARTMENT OF SAFETY**

JOHN W. HICKENLOOPER
Mayor

DENVER POLICE DEPARTMENT
ADMINISTRATION BUILDING
1331 CHEROKEE STREET
DENVER, COLORADO 80204-2787
PHONE: (720) 913-2000

April 30, 2004

Mark Silverstein
ACLU of Colorado
400 Corona St.
Denver, CO 80218-3915

Re: Response to CJA request for records relating to complaint by Nashes

Dear Mr Silverstein:

On behalf of your clients Steve and Vicki Nash, you have requested, pursuant to the Colorado Open Records Act ("ORA") and the Colorado Justice Records Act ("CJA"), that the Denver Police Department provide you with records of any internal investigations resulting from: (a) a complaint filed by the Nashes on July 2, 2002; (b) a "public revelation, on March 11, 2002, that the Denver Police Department was keeping files on political activists"; or (c) the alleged discovery by the Police Department in September 2002 of files relating to a lawsuit involving so called "spy files." For the reasons set forth below, the Police Department denies your request.

The Police Department considers most of its records, including those you are seeking, to be criminal justice records. Both the ORA and the CJA provide that the custodian of records may deny access to records of investigations conducted by a police department where disclosure would be contrary to the public interest. C.R.S. §§ 24-72-204(2)(a)(I), 24-72-305(5), respectively. Here, the Police Department considers its investigative files to be confidential and disclosure of the files you are seeking would be contrary to the public interest. It is critical to internal investigations that the Police Department obtain frank and complete information with regard to matters under investigation. Disclosure of the files sought could have a chilling effect on the Department's ability to obtain that information. In turn, the Department's ability to properly discipline its employees could be damaged, as well as the public's confidence in the Police Department.

In addition, release of the documents would infringe upon the officers' privacy interests. Furthermore, at least some of the information in those files is protected by the deliberative process privilege. Finally, there is a court order that may preclude disclosure of some of the documents you are seeking.

Sincerely,

Gerald R. Whitman
CHIEF OF POLICE

Sergeant Ronald J. Lopez, 81004
Civil Liability Bureau
1331 Cherokee Street
Denver, CO 80204-4507

PLAINTIFF'S EXHIBIT D

# CITY AND COUNTY OF DENVER

**DEPARTMENT OF SAFETY**

DENVER POLICE DEPARTMENT
ADMINISTRATION BUILDING
1331 CHEROKEE STREET
DENVER, COLORADO 80204-2787
PHONE (720) 913-2000

JOHN W. HICKENLOOPER
Mayor



May 13, 2004

Mark Silverstein, Legal Director
ACLU of Colorado
400 Corona St.
Denver, CO 80218-3915

Re: Sworn Statement on Applicability of Deliberative Process Privilege to Request for Investigative Records Arising from Complaint Filed by Nashes

Dear Mr. Silverstein:

On April 14, 2004, you requested that the Denver Police Department provide your clients, the ACLU of Colorado and Steve and Vicki Nash, with access to investigative files arising from a complaint filed by the Nashes. You graciously agreed to three extensions of time – until April 30, 2004 – for the Police Department to respond to your request. On April 30, 2004, the Police Department sent you a letter denying that request and setting forth the reasons for that denial. As soon as possible (which should be no later than Tuesday, May 18, 2004), the Police Department will send you a sworn statement explaining why the deliberative process privilege is applicable to records you have requested.

Sincerely,

Gerald R. Whitman
CHIEF OF POLICE

Sergeant Ronald J. Lopez, #1004
Civil Liability Bureau
1331 Cherokee Street
Denver, CO 80204-4507

# BENEZRA & CULVER, L.L.C.

Attorneys at Law

**John A. Culver, Esq.**

141 Union Boulevard, #260
Lakewood, CO 80228
(303) 716-0254
(303) 716-0327 (fax)
e-mail – jaculver@bc-law.com
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Broadway Suites
Boulder, CO 80302
(no mail accepted)
(303) 716-0254

June 7, 2005

**VIA FACSIMILE AND U.S. MAIL**
Mr. Gerald R. Whitman
Chief of Police
Denver Police Department
1331 Cherokee St., Room 402
Denver, CO 80204

Re: Nash, et al., v. Whitman, et al.

Dear Chief Whitman:

My firm represents Stephen Nash, Vickie Nash, and the American Civil Liberties Union in connection with their April 14, 2004, request under the Colorado Criminal Justice Records Act, C.R.S. § 24-72-101, et seq. (attached). My clients intend to file a Complaint and Order to Show Cause on June 13, 2005, regarding your previous refusal to produce the documents requested. Because we believe that the denial of inspection and copying was "arbitrary and capricious," we intend to seek an award of attorney fees and costs and a statutory penalty pursuant to C.R.S. § 24-72-305(7). However, if, by the close of business on June 10, 2005, we receive a commitment from your office to produce the requested documents, we will agree not to file the Complaint and Application for Order to Show Cause.

I look forward to your response. If you or your counsel wish to discuss this matter further, please contact me directly Thank you very much.

Sincerely,

BENEZRA & CULVER, L.L.C.

John A. Culver

JAC:ss
Enclosure
cc: Mark Silverstein, Esq.

* * * Transmission Result Report(MemoryTX) ( Jun. 7. 2005 9:54AM ) * * *

1) Benezra & Culver, LLC
2)

Date/Time: Jun. 7. 2005 9:52AM

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Reason for error
E.1) Hang up or line fail
E 2) Busy
E 3) No answer
E 4) No facsimile connection

BENEZRA & CULVER, L.L.C.
141 Union Blvd., #260
Lakewood, CO 80228
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303/716-0327 - FAX
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# Fax

| TO: | FAX: |
|---|---|
| Chief Gerald Whitman | (720) 913-7029 |
| **FROM:** | **DATE:** |
| John Culver, Esq. | June 7, 2005 |
| **PAGES:** | **RE:** |
| 8 | Nash et al., v Whitman et al. |

COMMENTS:

Letter and attachment from John A. Culver, Esq. dated June 7, 2005

2-4

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 96CV6882, Courtroom 9

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ORDER

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BROTHA 2 BROTHA, et al.,
Plaintiffs,

v.

CITY AND COUNTY OF DENVER, et al.,
Defendants.



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This matter is before the Court on Plaintiffs' Complaint and Application for Order to Show Cause Pursuant to the Colorado Open Records Act (the "Act"), filed December 23, 1996. The Court issued an Order to Show Cause to Defendants on January 3, 1997, and a hearing was held on January 17, 1997. The parties submitted hearing briefs and stipulated that the affidavits and other materials attached to the briefs could be admitted in lieu of live testimony. Defendants also submitted the disputed records for the Court's *in camera* inspection. Following arguments, the Court took the matter under advisement.

On September 4, 1996, the Denver Police Department issued a press release concerning its internal investigation into allegations of police misconduct following a dance at Thomas Jefferson High School on May 4, 1996. The release indicated that an investigative team of 13 experienced senior sergeants under the direction of the command staff of the Internal Affairs Bureau (the "IAB") had interviewed more than eighty students, parents and teachers and seventy-four police officers and had compiled a final investigative file consisting of a sixty-three page summary and a total case file of nine hundred fifty-one pages. The release also indicated that as a result of the investigation a recommendation had been made that two police supervisors and a patrol officer should be disciplined and that certain policy considerations should be implemented. On September 18, 1996, Plaintiffs, who had sponsored the dance, made a written request of the Denver Police Department pursuant to the Act to review the IAB investigative file. Defendants responded to the request by letter of September 23, 1996

denying disclosure of the file on the basis that the records constituted personnel files under C.R.S. 24-72-204(3)(a)(II), were privileged under C.R.S. 24-72-204(3)(a)(IV), and that disclosure would be contrary to the public interest under C.R.S. 24-72-305(5) and 24-72-204(2)(a)(I).

The incident at Thomas Jefferson High School was one of three major confrontations between young people and Denver police officers in the late Spring and early Summer of last year. These three incidents, in conjunction with a police shooting earlier in the year, generated considerable public interest and media attention about the conduct of the Denver Police Department and its officers. Plaintiffs requested inspection of the IAB file, stating:

> It appears that 74 police officers responded to a call on the night of the dance based on a single incident of two young people having a fight in the school parking lot. Obviously, the department's actions impacted far more individuals than those involved in the fight. The public is entitled to know whether this overwhelming show of force directed at law abiding young people was warranted, particularly given the fact that a number of individuals were maced and struck with batons, and that there have been numerous allegations of the use of racial slurs by the officers.

Plaintiffs' Exhibit 1. In late May, Denver's Public Safety Review Commission (the "Commission") appointed a task force to review police procedures and response to emergencies involving large crowds. *See* Plaintiffs' Exhibit 6.

Subsequent to the Plaintiffs' request for inspection, but before the filing of this action, Judge Larry L. Bohning released approximately seven hundred pages of the IAB file without restrictions in conjunction with a criminal prosecution resulting from the incident. *See* Plaintiffs' Exhibit 5. *Westword*, a weekly newspaper distributed throughout the Denver metropolitan area, currently claims to have nearly eight hundred pages of the file. *See* Plaintiffs' Exhibit 6. At the hearing, the parties agreed that the Commission has a copy of the entire file.

The IAB file is divided into four sections. Section A contains administrative reports, and Sections B, C and D contain statements from witnesses and police officers and supporting documents. In addition, there is a video tape taken on the night of the incident. The parties agree that the file is a public record under the Act.

The purpose of the Act is to ensure that the workings of government are not unduly shielded from the public eye, and the Act provides a presumption in favor of disclosure. Accordingly, the party denying access to public records bears the burden of proving an exception to disclosure. *International Brotherhood of Elec. Workers v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165 and 168 (Colo.App.1994). Defendants rely on three exceptions: the personnel file exception, the privileged material exception, and public interest exception.

## I. PERSONNEL FILE EXCEPTION

Defendants assert an exception to disclosure claiming that the IAB file is a personnel file as defined in C.R.S. 24-72-202(4.5). The definition relied upon is as follows:

> 'Personnel files' means and includes home addresses, telephone numbers, financial information, and any other information maintained because of the employer-employee relationship....

The definition also includes a very specific list of employment-related records excepted from the definition of personnel files. Defendants argue that if records are maintained because of the employer-employee relationship, and do not fall within the list of matters expressly excluded from the "personnel file" definition, then they constitute personnel files and cannot be disclosed in response to a request under the Act. C.R.S.. 24-72-204(3)(a)(II)(A).

Defendants contend that the IAB investigated the allegations of police misconduct on the night in question in order to determine whether officer conduct warranted imposition of discipline against any police officer(s). *See* Defendants' Exhibit C. As such, Defendants argue that supervisory (employer) personnel investigated staff (employee) personnel and that the file reflecting the investigation was generated "because of the employer-employee relationship".

Defendants' construction of the personnel file exception is overly broad. It is true that personnel action resulted from the investigation. At the inception of the investigation, however, official clearance of officers unjustly accused of wrongful conduct was at least an equal likelihood. Indeed, only three of the many officers investigated received disciplinary measures. Likewise, the IAB file is maintained separate and apart from the personnel files of those investigated. In order for the personnel file exception to apply, the records sought to be disclosed must

be maintained in a personnel file. *Denver Post Corp. v. University of Colo.*, 739 P.2d 874, 878 (Colo.App. 1987). An exception to disclosure under the Act must be construed narrowly; and where, as here, it is not obvious that an internal investigation is a personnel record, the personnel record exception does not apply. *See Federated Publications, Inc. v Boise City,* 915 P.2d 21 (Idaho 1996).

## II. THE PRIVILEGED MATERIAL EXCEPTION

Records custodians are directed by statute to deny the right of inspection under the Act for "privileged information". C.R.S. 24-72-204(3)(a)(IV). Defendants maintain that Section A of the IAB file is privileged. Section A is a sixty-three page summary of the eight hundred eighty-eight page SIB investigation compiled by an SIB lieutenant and submitted to his superior, the IAB commander. Section A identifies officers for whom discipline might be considered, the specific policies and procedures that might have been violated, and synopsizes the officer and witness statements and other evidence contained in the remaining three sections of the file.

The Act does not define that information for which a privilege exists, but Colorado courts have relied on the Act's federal counterpart, the Freedom of Information Act ("FOIA"), 5 U.S.C. sec. 552(1970), in crafting exceptions to disclosure. *See Martinelli v. Dist. Court,* 612 P.2d 1083 (Colo.1980). Like the Act, FOIA was enacted to promote full disclosure of information in the government's possession. *Van Aire Skyport v. Federal Aviation Administration,* 733 F.Supp. 316 (D.Colo.1990). Also like the Act, FOIA recognizes an exception for privileged material. Sec. 552(b)(5). Colorado and the federal courts acknowledge the existence of the attorney-client privilege as an exception to disclosure, *Denver Post, supra.* and *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct.1504, 44 L.Ed.2d 29 (1975). Another privilege recognized in the federal courts is the deliberative process exception. *Environmental Protection Agency v. Mink,* 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). Defendants urge the adoption of the deliberative process exception by this Court.

The deliberative process exception was conceived to protect the deliberative or policy-making processes of government, because it was felt that, if internal agency discussions and memoranda were publicized, government would be forced to operate in a fishbowl, thus inevitably inhibiting the frank discussion essential to the development of carefully formulated, coherent agency policy.

*Environmental Protection Agency*, 410 U.S. at 86, 93 S. Ct. at 835. Originally, if intra-agency communications consisted of only factual material or if factual recitations were easily severable from deliberative portions, the courts required disclosure of the factual data. *Id.*, 410 U.S. at 87-88, 93 S.Ct. at 836. The factual versus deliberative distinction, however, was found to be inadequate when determining whether factual summaries contained in intra-agency communications should by disclosed. *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C.Cir. 1974).

In *Montrose*, Environmental Protection Agency (the "EPA") staff members summarized over nine thousand pages of hearing testimony to assist the EPA Administrator in making an agency ruling. The Administrator reviewed the prepared summaries and issued a fifty page ruling. The summaries were based wholly on evidence in the public record of the hearings. Montrose, as the Plaintiffs do here, maintained that the summaries were factual and should be disclosed. The EPA argued, as do the Defendants here, that the summaries were a part of the agency's internal deliberative process and should not be disclosed. The *Montrose* court summarized the issues as follows:

> Can Montrose use the FOIA to discover what factual information the Administrator's aides cited, disregarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision? Or would such discovery be an improper probing of the mental processes behind a decision of the agency?

*Montrose*, at 68.

Recognizing that the staff's judgmental evaluation and condensation of the record facts constituted agency deliberation, the *Montrose* court held that, "To probe the summaries of record evidence would be the same as probing the decision-making process itself." *Id*, at 68. The court concluded that the deliberative process exception was intended to protect not simply deliberative material, but also the deliberative process of agencies and denied disclosure of the summaries.

The Federal District Court of Colorado cites *Montrose* with approval and suggests four factors to consider in determining whether a document is protected by the deliberative process privilege:

> (a) whether the document is "predecisional" (i.e., whether it was generated before the adoption of an agency policy); (b) whether the document is 'deliberative' (i.e., whether it reflects the give-and-take of consultative process); (c) whether the document

is so candid and personal in nature that public disclosure would stifle honest and frank communication in the future; (d) whether the document is recommendatory in nature or whether it is a draft of a final document.

*Van Aire Skyport Corporation v. Federal Aviation Administration,* 733 F.Supp. 316, 320 (D.Colo.1990). The Court has reviewed Section A and concludes that it is predecisional; deliberative (i.e., clearly a summary of the evidence based upon the staff member's interpretation of what is important and what is not and his characterization of it); that public disclosure would subject the summary to second-guessing, thereby stifling frank communication in the future; and that it is not a draft of a final decision.

Plaintiffs attempt to distinguish the *Montrose* case from the instant case, contrasting the extensive fifty page ruling of the EPA Administrator and the one page news release issued following the completion of the IAB's investigation. The Court acknowledges the distinction, but finds it to be one without a difference. The Administrator was acting in a quasi-judicial capacity and was required by law to render findings and conclusions. The Denver Police Chief was not required by any law to be so expansive. In addition, the Commission has been investigating this incident since May and has the entire file in its possession, including Section A. The Commission's review of the file and its own investigation provide the type of safety-net that the *Montrose* court found in the Administrator's ruling.

Plaintiffs also argue that the Police Chief waived any privilege he might have had in Section A by referencing Section A and the remainder of the investigative file in his press release. *Montrose,* at 70. Here, as in *Montrose,* the Police Chief did not adopt Section A as the rationale for his decision by mere reference to its existence. The SIB summary did not become so intertwined with the Chief's decision that it became incorporated into it. *See Washington Post Co. v. U.S. Department of Air Force,* 733 F.Supp. 316 (D.Colo. 1990).

The Court has ruled in Section I, above, that the personnel file exception does not apply to the IAB file and will rule in Section III, below, that the public interest exception does not apply to Sections B, C, and D of the file. Accordingly, all of the facts summarized in Section A will become available for public inspection. Section A, the IAB summary of the now public record, however, should "most

emphatically not" become a part of that public record. *Montrose*, at 70.

In addition to Section A, the Court finds that portions of Section D are also subject to the deliberative process exception. Pages D60 through D76 are letters to police officers advising them that they are preliminary subjects of the IAB investigation. Pages D77-D82 are letters to some of these officers advising them that they are no longer subjects of the investigation. These letters reflect the subjective thought processes of the investigators and constitute a part of the deliberative process.

Likewise, page D1 is the case filing form presented to a Chief Deputy District Attorney along with the IAB file for consideration of the filing of criminal charges. It includes the deputy's reason for concluding that criminal charges should not be filed. The form reflects the subjective thought process of the District Attorney's Office and is subject to the deliberative process exception.

Finally, at the end of notebook binder 3, the Court found five pages which are duplicates of the documents maintained in Section A at page A1. As a part of Section A, these documents are excepted from disclosure and should not be disclosed simply because they appear to be misplaced in the Court's copy of the IAB file. To the extent that these documents also appear at the end of the original IAB file, the custodian may deny access to them.

## III. THE PUBLIC INTEREST EXCEPTION

Because the IAB file is not maintained as a part of the personnel files of the officers who were investigated, Defendants bear the burden of proving, under C.R.S. 24-72-204(6) that "disclosure [of the IAB file] would do substantial injury to the public interest by invading the constitutional right of privacy of the individuals involved." *Denver Post, supra* at 878. Section A of the file contains otherwise privileged material as discussed in Section II, above, but the Defendants assert that disclosure of Sections B, C, and D would be substantially injurious to the public interest. The Court disagrees.

The vast majority of the eight hundred eighty-eight pages which comprise Sections B, C, and D are currently in the public domain. They include statements from witnesses and police officers at the scene and other supporting documents, including a video tape shot by one of the lay

witnesses. The officer statements were taken pursuant to Charter Section C5.78, and each officer was promised that his or her statement would be held in confidence by the police department. One who claims the right of privacy in records must, however, have a legitimate expectation of confidentiality. *Martinelli, supra* at 1091. The passage of the City Charter provision upon which the officers rely in asserting confidentiality reflecets the public's view that confidentiality is important to the success of internal investigations. On the other hand, the officers definitely knew when they gave their statements that under certain circumstances their statements would be disclosed as discovery in resulting civil and/or criminal litigation. They did not have a reasonable expectation in total confidentiality.

In addition, the Court's review of the officer statements reflects that, in the scheme of the "descending order of sensitivity and constitutional interest" described in *Martinelli, supra,* the statements do not contain information so intimate, personal or sensitive as to rank near the top of that order. *See Denver Post, supra,* at 879. The officer statements only contain descriptions of the officers' conduct and observations while deployed at Thomas Jefferson and most of the statements are already in the public domain. As such, their privacy interests must be considered to be somewhat diminished. Weighing the privacy interests of the officers, the confidentiality interest in Charter Section C5.78, and the Act's general presumption in favor of public access, the Court finds a balance in favor of disclosure. Defendants have failed to demonstrate that allowing access to Sections B, C, and D would do a substantial injury to the public interest.

## ORDER

**DEFENDANTS' MAY DENY PUBLIC ACCESS TO SECTION A, PAGE D1, PAGES 60 THROUGH 82, AND THE FIVE PAGES WHICH DUPLICATE THE PAGES CONTAINED AT PAGE A1.**

**DEFENDANTS SHALL MAKE THE REMAINING PORTIONS OF SECTIONS B, C, AND D AVAILABLE FOR THE PUBLIC'S INSPECTION AT REASONABLE TIMES AND UNDER REASONABLE CONDITIONS CONSISTENT WITH C.R.S. 24-72-203(1).**

**THE COURT DENIES PLAINTIFFS' REQUEST FOR ATTORNEY FEES.**

THE COURT SHALL SEAL AND RETAIN THE COPY OF THE IAB FILE DEFENDANTS SUBMITTED FOR ITS *IN CAMERA* INSPECTION.

THE COURT STAYS THIS ORDER FOR THIRTY DAYS TO ALLOW THE PARTIES THE OPPORTUNITY TO PERFECT APPEAL/CROSS APPEALS.

BY THE COURT

Paul A. Markson, Jr.

2-4-97

cc: all counsel

Apr-7 '98 CTRM 19

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 97 CV 7170, Courtroom 19

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COURT'S ORDER RE: COMPLAINT FOR RECORDS DISCLOSURE

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THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,

Plaintiff,

vs.

CITY AND COUNTY OF DENVER, COLORADO; FIDEL MONTOYA, Manager of Public Safety for City and County of Denver, and DAVID MICHAUD, Chief of Police for the Denver Police Department,

Defendants,

and

NICHOLAS GROVE and PHIL STANFORD, Denver Police Officers,

Intervenors.

---

THIS MATTER comes before the Court pursuant to Plaintiff's Complaint filed December 2, 1997. Plaintiff seeks disclosure of the Denver Police Department's internal investigation records arising out of events that occurred on March 26, 1997, when Denver police arrested Gil F. Webb II for auto theft and vehicular homicide. This incident was widely covered in the media. The Court, having reviewed the file, the pleadings and being fully advised, FINDS AND ORDERS as follows:

## I. INTRODUCTION

1. Plaintiff brought this action under the Colorado Open Records Act, C.R.S. § 24-72-201, et seq. (hereinafter referred to as "CORA") and the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301, et seq. (hereinafter referred to as "CCJRA"). Plaintiff is seeking complete disclosure of the Denver Police Department's Internal Affairs Bureau file (hereinafter referred to as the "IAB File") relating to the investigation of Denver Police Officers Stanford and Grove in order to understand the basis for the Police Department's disciplinary action against them. Jurisdiction is not contested and the standing of the parties is not an issue.

2. On the evening of March 26, 1997, an automobile collision occurred in Denver involving a stolen Ford Mustang and a Denver police cruiser. Rookie Denver Police Officer Ronald DeHerrera was killed in the collision. Gil F. Webb II, a seventeen year old

African American, was arrested and subsequently convicted of causing the death of Officer DeHerrera. A KWGN TV (Channel 2) reporter videotaped events shortly after the crash. This videotape and other media reports raised concerns about the treatment of Mr. Webb by the Denver Police Department and paramedics.

3. A Special Prosecutor, Jefferson County District Attorney Dave Thomas, was appointed to investigate whether criminal charges should be brought against anyone involved in the arrest or care of Mr. Webb. Internal investigations were undertaken by the Denver Police Department and the Denver Health Medical Center. On or about May 27, 1997, the Special Prosecutor decided not to bring criminal charges. Notwithstanding this decision, two Denver Police Department disciplinary hearings were held and upon their conclusion in late July 1997, disciplinary action was taken against Denver Police Officer Phillip Stanford and Denver Police Officer Nicholas Grove. In early August 1997, the Manager of Public Safety, Fidel Montoya, accepted the recommendation of Police Chief Michaud and ordered five-day suspensions of the two officers. Officer Stanford accepted the discipline. Officer Grove has appealed to the Civil Service Commission. A hearing is set for April. Any matters disclosed in the hearing will become public.

4. Plaintiff asserts that since the present system allows the police to investigate themselves, disclosure of the requested information serves the public interest by establishing the credibility (or lack thereof) of the Police Department's investigation of its members. Defendants contend that disclosure of such information compromises the effectiveness of their self-investigation because confidentiality is promised to police officers in an effort to encourage them to come forward with information. Without such assurances, Defendants assert that their self-investigatory process would be undermined and that the public's confidence in the Police Department would be undermined as well. Intervenors contend that they have a right to confidentiality concerning the files.

## II. CORA/CCJRA

5. Under CORA, the IAB file is not by definition a "public record." See, C.R.S. § 24-72-202 (6)(a) defining "public records" and exempting "criminal justice records" per § 24-72-202(6)(b). It is a "criminal justice record" as defined in the CCJRA at 24-72-302(4). It is therefore exempt from any CORA disclosure.[1] In making this finding, the Court notes that both the Plaintiff and the Defendant argued principally under the CORA and not the CCJRA. The Court also notes the awkward interrelationship between the CORA and the CCJRA as demonstrated by C.R.S. 24-72-204(2)(a)(I) and 24-72-305(5).

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1. City urges that "portions" of the IAB file are "personnel files" per 24-72-202(4.5) of CORA and are exempt from disclosure per 24-72-204(3). While "portions" of the IAB file relate to discipline, this argument is unpersuasive. The fact that a document may be filed in more than one place and that one such place may be protected from disclosure does not necessarily justify suppression of the document. This is particularly so here, where any IAB file document that may find its way into a "personnel file" was first generated elsewhere. In addition, the Court finds CORA inapplicable to its analysis and so the "personnel file" exception is not relevant.

6. The IAB file may be disclosed under the CCJRA unless Defendant establishes that such disclosure would be "contrary to the public interest." C.R.S. 24-72-305. The Court finds that the Defendant has failed to meet this burden. Indeed, as to this case, disclosure promotes the public interest in maintaining confidence in the honesty, integrity and good faith of Denver's Internal Affairs Bureau. The public has viewed the event leading to disciplinary action and is aware of the result. The only thing it does not know is how or why the disciplinary decision was made.

## III. INTERVENOR'S PRIVACY RIGHTS

7. Intervenors allege that disclosure would violate their right to privacy or confidentiality. Under Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), a tripartite balancing inquiry must be undertaken by the Court. Consideration must be given to whether:

1) The party asserting confidentiality has a legitimate expectation of same;

2) disclosure would serve a compelling state interest; and

3) disclosure can occur in the least intrusive way.

In evaluating these factors, the Court notes that the Intervenors only have a limited expectation of privacy. Denver City Charter § C5.78-1 and the IAB "Advisement Pursuant to Internal Investigation" allow for disclosure in any appeal. Officer Grove is appealing his discipline. Officer Stanford is not. Intervenors note that C.R.S. 24-72-204(2)(a) and C.R.S. 13-90-107(e) create an expectation of privacy. However, these statutes allow for discretionary disclosure after review by the record's custodian and/or the Court. Moreover, 24-72-204(2)(a) is under CORA and so is inapplicable given the Court's earlier analysis. Also, the information sought to be protected is not "highly personal and sensitive" and its disclosure would not be offensive and objectionable to a reasonable person. Martinelli, *supra* at 1091. In short, Intervenor's confidentiality argument is unpersuasive in this case.

## IV. OFFICIAL INFORMATION PRIVILEGE

8. The City argues that portions of the IAB file contain information that falls under the common law "official information" privilege which was recognized in Martinelli, *supra* at 1088. Such a privilege is separate and distinct from the statutory and confidentiality claims discussed above. Martinelli requires a multifaceted balancing test in evaluating documents claimed to be subject to the "official information" privilege. The documents in issue here are mainly the summary and recommendation parts of the IAB file. Without making specific findings as to each enumerated Martinelli factor (but after considering them), the Court concludes that disclosure of these portions of the IAB file (i.e., the

summaries and recommendations) is warranted in this case. The public knows what started the IAB investigation and it knows the results thereof. It is entitled to know what happened in between these two events. Indeed, such disclosure may serve the public interest by showing a conscientious and thorough effort by the IAB.

## V. ITEMS REVIEWED

9. The files and documents reviewed by the Court consisted of the following:

(1) Unedited Channel 2 VHS Videotape;

(2) Channel 9 VHS Enhanced Videotape;

(3) Cassette Audiotape of Police Radio Transmissions;

(4) Cassette Audiotape of Civilian Witness Kevin Miller;

(5) Cassette Audiotape of Telephone Interview Between IAB Investigator Lt. Murphy and Denver Police Officer J. Dennis;

IAB FILE

(1) Cover Sheet

(2) Disciplinary Badge No. 95030 (Stanford);

(3) Additional Statements Badge No. 95030 (Stanford);

(4) Disciplinary Badge No. 91042 (Grove);

(5) Administrative Reports;

(6) Civilian Statements;

(7) Police Officer Statements;

(8) Miscellaneous Supporting Documents.

In addition, the Police Department has a BETA version of the Channel 2 Video in its file. This tape has not been reviewed as the Court does not have the technical ability to view tape in this format.

## VI. CONCLUSION

VIDEOTAPES

The Court orders the release of all videotapes that exist in connection with this matter. This information has already been broadcast to the public and there is no reasonable justification for withholding any videotapes from the Plaintiff.

CASSETTE AUDIOTAPES

All cassette audiotapes shall be released. There are no persuasive legal reasons why these items should not be disclosed.

THE IAB FILE

The IAB file shall be released in its entirety. There are no persuasive legal reasons why, in this case, these items should not be disclosed.

To the extent the Court is in the possession of original items to be disclosed, Defendants are instructed to promptly contact the Court and arrange their return (unless they need to be maintained in the file pending appeal).

DONE this 7th day of April, 1998.

BY THE COURT:

Herbert L. Stern III

Herbert L. Stern, III
District Court Judge

cc: Thomas B. Kelley, Esq.
Daniel B. Slattery, Esq.
David J. Bruno, Esq.

TBK
SDZ
CPB

| DISTRICT COURT<br><br>CITY AND COUNTY OF DENVER, COLORADO | |
|---|---|
| Plaintiffs:<br><br>**THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO**, a Colorado corporation; and **TERRILL JOHNSON**, an individual<br><br>Defendants:<br><br>**GERALD WHITMAN**, in his official capacity as the Chief of Police for the City and County of Denver; **ALVIN LaCABE**, in his official capacity as the Manager of Safety of the City and County of Denver; **THE DENVER POLICE DEPARTMENT**; and **THE CITY AND COUNTY OF DENVER** | ▲ COURT USE ONLY ▲<br><br>Case Number:<br><br>**04 CV 700**<br><br>**Courtroom 18** |

**RULING ON ORDER TO SHOW CAUSE**

Plaintiff Terrill Johnson was contacted and arrested by officers of the Denver Police Department on April 11, 2002. He was charged with a minor traffic violation and interference, and the charges were soon dropped by the prosecutor. Mr. Johnson made a complaint to the Denver Police Department that the arresting officers had engaged in racial profiling, used excessive force, made an unjustified arrest and engaged in other improper conduct. In December of 2002, Mr. Johnson was advised that the charges of excessive force were not sustained as a result of the investigation by the Internal Affairs Bureau ("IAB"). Later, he was told that "other charges were sustained."

On September 19, 2003, Mr. Johnson and the American Civil Liberties Union of Colorado ("ACLU") made a request under the Colorado Open Records Act and the Colorado Criminal Justice Records Act for all documents relating to his contact with the Denver Police Department on April 11-12, 2002 (Exhibit C to First Amended Complaint). The request included all documents relating to the internal affairs investigation and action taken as a result of the investigation; personnel files of the involved officers were not requested.

Through the City Attorney, the police department responded that all of the documents requested by plaintiffs were criminal justice records whose disclosure would be contrary to the

PLAINTIFF'S EXHIBIT 1

public interest, excepting only the traffic accident report arising from the incident, which was disclosed (Exhibit E to First Amended Complaint). This lawsuit ensued.

By their first amended complaint, plaintiffs seek two declaratory judgments concerning the expectation of privacy of police officers in IAB files. Those claims are not addressed in this order. Plaintiffs' third claim seeks an order to show cause under the Colorado Criminal Justice Records Act, C.R.S. §24-72-305. I issued the order to show cause, and a hearing was held on February 27, 2004. At the hearing, the officers who were involved in the incident with Mr. Johnson were allowed to intervene as defendants. Testimony was taken and exhibits were received. I now make the following findings and conclusions on the order to show cause.

All parties agree that the requested records are "criminal justice records" as defined in C.R.S §24-72-302(4). Therefore, the records request must be evaluated under the Colorado Criminal Justice Records Act ("CJRA") rather than the more general Colorado Open Records Act. C.R.S. §24-72-202(6)(b)(I) ("Public records" does not include criminal justice records).

The CJRA contains a declaration by the General Assembly that it is the public policy of Colorado that records of official actions of criminal justice agencies shall be open to inspection by any person and that other criminal justice records may be open for inspection as provided in the statute or other laws. C.R.S. §24-72-301(2). The Colorado Court of Appeals has held that this section of the statute "implements the public policy that criminal justice records are open to public review." The Denver Post Corporation v. Cook, 2004 WL 169754 (Court of Appeals, January 29, 2004). The CJRA contains exceptions to the presumption of disclosure, but those exceptions must be narrowly construed. Bodelson v. Denver Publishing Company, 5 P.3d 373, 377 (Colo. App. 2000). The exceptions to disclosure are stated in C.R.S. §24-72-305. The relevant exception here provides that the custodian may deny access to "records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose" if disclosure would be contrary to the public interest.

The City's response to plaintiffs' records request identified only the public interest exception, the promise of confidentiality given to police officers giving statements in IAB investigations, and the deliberative process privilege. At the hearing, the City also claimed that some of the requested documents are protected as personnel files. The intervenors assert that police officers have a constitutional right of confidentiality in the entire contents of the IAB files.

At the hearing, the City submitted for *in camera* inspection a notebook of documents represented to contain everything the police department had concerning this incident, including the IAB files (that notebook was marked as Exhibit A). The City did not produce any personnel files because none was requested.

The City also tendered a second notebook, marked as Exhibit B, which was represented to contain a subset of the documents in Exhibit A which the City claims are protected against disclosure. That notebook includes documents behind five divider tabs entitled:

1. Deliberative Process Privilege
2. Personnel Documents: Privacy Interests Implicated
3. "Garrity" Statements: Officers statements made after promises of confidentiality
4. CCJRA
5. DA Attorney Work Product

The City stated that it had no objection to producing those documents from Exhibit A which were not also included in Exhibit B, and I ordered that subset of documents produced immediately. Plaintiffs' request for attorney fees concerning the delayed production of those documents was reserved for later ruling. I have done an *in camera* review of the documents in Exhibit B. I will now address each category of documents in Exhibit B which the City claims should not be open to inspection.

Deliberative Process Privilege

The Colorado Supreme Court has recognized the deliberative process privilege and has held that materials falling within its ambit are not subject to disclosure in response to requests for public records under the Colorado open records laws, C.R.S. §§24-72-201 to -309. City of Colorado Springs v. White, 967 P.2d 1042, 1045 (Colo. 1998). Although White did not concern criminal justice records, the Supreme Court's citation to open records laws includes the CJRA.

The deliberative process privilege is a qualified privilege, the primary purpose of which is "to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future." Id. at 1051. "In light of the purposes of the privilege, it protects only material that is both pre-decisional (i.e. generated before the adoption of an agency policy or decision) and deliberative (i.e. reflective of the give and take of the consultative process)." Id. Pre-decisional material normally retains its protection even after the decision is made, and purely factual investigative material is not protected. Id. at 1052. The privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency. Id. at 1053.

The government entity asserting the deliberative process privilege has the burden of establishing that it applies; this burden is not met by conclusory and generalized allegations of privilege. Id. The requirements for assertion of the privilege are technical. Specifically, the agency must produce a "Vaughn index" which provides specific information concerning each document claimed to be privileged (author, recipient, subject matter and explanation of why the privilege applies to that document). The "Vaughn index" is required as an aid to reviewing courts. Id. at 1053-1054.

Here, the City has not produced anything close to a Vaughn index. The City's response to the records request by plaintiffs included a one-line reference to the deliberative process privilege, and the City's assertion of the privilege at the hearing consisted of placing 37 pages of

documents behind a tab in Exhibit B marked "Deliberative Process Privilege." Therefore, the City has failed to meet its burden of proving that the deliberative process privilege applies, and I decline to perform an *in camera* inspection of those documents or weigh the factors relevant to the balancing test prescribed by White. Those documents must be made available for plaintiffs' inspection.

Personnel Documents

Personnel files are excepted from the definition of public records in the Colorado Open Records Act, C.R.S. §24-72-202(4.5); that exception has not been carried through to the CJRA, but personnel files would not appear to fall within the definition of "criminal justice records." C.R.S. §24-72-302(4). Plaintiff's records request did not include personnel files, and Commander John Lamb of the IAB testified at the hearing that IAB files do not include personnel files. The City nevertheless asserts that 19 pages of documents concerning this incident should be protected from disclosure as "personnel documents."

Behind the "Personnel Documents" tab in Exhibit B, the City has placed the summary of the disposition of Mr. Johnson's complaints and the oral or written reprimands issued to two officers. Those documents concern the performance by these officers of their duties and do not fall within the definition of personnel files in C.R.S. §24-72-202 (4.5). In order for the personnel file exception to apply, the records sought to be disclosed must be maintained in a personnel file. Denver Post Corp. v. University of Colorado, 739 P.2d 874, 878 (Colo. App. 1987). The City has offered no evidence that these documents are maintained in the personnel files of the officers. The City also apparently claims protection for IAB complaint summaries for the four subject officers which show the history of all complaints and the disposition of those complaints for each officer. Likewise, those documents concern the activities of the officers on the job and are not protected against public inspection as personnel file material. Finally, there is a one-page driving history for one officer that is likewise not protected. Therefore, the City's assertion that some of the documents are protected as personnel files is rejected, and those documents must be produced.

Garrity Statements

Behind this tab, the City has placed the statements by the involved officers following the incident with Mr. Johnson. Although no Garrity advisements are included, some of the statements are entitled "Internal Affairs Bureau Statement," and I infer from the context that all of the statements were obtained as part of the IAB investigation.

The City and the intervenor officers assert that all officers have a reasonable expectation of confidentiality in all statements given in connection with an IAB investigation. This expectation flows from the advisement each officer is asked to sign before speaking to IAB investigators (DPD Form 455, attached to intervenor's brief as Exhibit A). That advisement tells the officer that the statement will be confidential and not disclosed to anyone, with three

exceptions, and states that the police department will resist every effort to produce "this statement or answers" in any civil or criminal case. The Denver City Charter, at §9.4.18, also provides that statements given as part of an internal investigation shall be confidential, again with certain enumerated exceptions.

The officers and the City assert that this promise of confidentiality amounts to a constitutional right of privacy which may only be breached after applying the three-part balancing test prescribed in Martinelli v. District Court, 612 P.2d 1083, 1091 (Colo. 1980). Martinelli holds that the person claiming a constitutional right to privacy must first show that he or she has an actual or subjective expectation that the information will not be disclosed, as, for example, by showing that he or she "divulged the information to the state pursuant to an understanding that it would be held in confidence or that the state would disclose the information for stated purposes only." Id. This formulation would appear to fit officer statements given to IAB pursuant to a Garrity advisement.

I reject plaintiff's contention that the officers fail to meet the Martinelli threshold here because they have failed to show that these files contain material that is "highly personal and sensitive" and that its disclosure would be "offensive and objectionable to a reasonable person of ordinary sensibilities." Id. Martinelli can be read that way, but that case itself, which concerned IAB files, as well as later cases applying it, do not support that construction. Rather, I read Martinelli to hold that materials of a highly personal and sensitive nature are at the top ranking of a descending order of sensitivity and constitutional interest. Materials in the "lower tiers" of this ranking are entitled to decreasing degrees of protection. Applying this construction of Martinelli to the facts here, I conclude that the officers have a reasonable expectation of limited confidentiality, based on the Charter provision and the Garrity advisement. However, my review of the IAB file shows that it does not contain highly personal and sensitive information such as family or medical data; rather, the officer statements relate "simply to the officers' work as police officers." Denver Policemen's Protective Assoc. v. Lichtenstein, 600 F. 2d 432, 435 (10th Cir. 1981). Thus, this material is in the lower tiers of information to be protected under Martinelli.

The Martinelli balancing test is fact-specific and must be done on a case-by-case basis. Intervenors suggest that there are ten factors to be considered in performing this balancing test (Intervenors' Brief at pp. 23-24), but those factors are prescribed by Martinelli for weighing the deliberative process (or official information) privilege, and have nothing to do with balancing a claim of a constitutional right to privacy against a compelling state interest.

The second step of Martinelli requires an assessment of whether a "compelling state interest" requires disclosure notwithstanding a legitimate expectation of privacy. Martinelli at 1092. In any case brought under the open records laws, an expectation of privacy collides with the compelling state interest, expressed in both statute and case law, in permitting public access to records of governmental activities. See, Denver Post Corporation v. University of Colorado, 739 P. 2d 874, 879 (Colo. App. 1987). More specifically, in the context of this case, I agree with plaintiffs that there is a compelling interest of the public in knowing how allegations of police misconduct are being investigated and the outcome of those investigations. Even though the incident involving Mr. Johnson may not have attracted wide media attention, there is certainly

public interest in the topic of racial profiling and whether it is occurring within the Denver Police Department. Commander Lamb testified that the Department is keenly interested in allegations of racial profiling and that it serves the public interest to dispel concerns that racial profiling is occurring. He also acknowledged that maintaining the standing, respect and integrity of the police department is in the public interest. In this case, there is a compelling state interest in allowing the public to see how the police department is policing itself and that its internal investigations are performed in a thorough and unbiased manner. I find that this interest outweighs the limited expectation of confidentiality the officers have in their statements to IAB.

The third prong of Martinelli calls for any disclosure to be done by the least intrusive means available. Here, the limited privacy interests of the officers have been protected by the *in camera* review performed by the Court. No further restriction on disclosure is necessary or appropriate in the context of an open records request.

CCJRA

Apparently, the documents behind the tab marked "CCJRA" in Exhibit B are sought to be protected under the public interest exception. Those documents consist primarily of portions of the IAB file other than Garrity statements obtained from officers. There is no personal or highly sensitive information and nothing that would otherwise appear to deserve confidential treatment. Commander Lamb testified that photographs of officers are ordinarily not released to the public, and this section does include photo arrays apparently shown to witnesses during the IAB investigation. However, no names or other data are associated with those photos, and most of the witnesses were unable to make an identification from the arrays. Therefore, I conclude that the City has failed to show that the public interest would be harmed by release of these portions of the IAB files in this case.

DA Attorney Work Product

The only documents behind this tab are two DA case filing forms which indicate the deputy district attorney's refusal to file criminal charges against officers arising from this incident. Those documents are attorney work product and need not be disclosed.

Attorney Fees

The CJRA provides that the court may order the City to pay plaintiffs' court costs and attorney fees "upon a finding that the denial was arbitrary or capricious." C.R.S. §24-72-305(7). I find that the City's refusal to produce promptly the portions of Exhibit A for which the City claims no protection against disclosure was arbitrary and capricious. The City offers no explanation as to why those portions of the file were not produced immediately in response to the request, as the statute contemplates. I also find that the City's failure to produce those documents it denominated as "personnel documents" was arbitrary and capricious. No personnel

files were even requested, and the so-called "personnel documents" did not come from a personnel file.

With regard to the remainder of the files, I find that the City had good faith arguments that they should not be produced and therefore do not find its refusal arbitrary and capricious. Therefore, it is reasonable that the City pay a portion of the costs and reasonable attorney fees incurred by plaintiffs in obtaining the order to show cause and this order. The attorney fees will not include any portion of those incurred in connection with plaintiffs' first and second claims for relief or the res judicata/collateral estoppel argument which has not been addressed in this order.

Plaintiffs are directed to submit their affidavit of costs and attorney fees within 15 days from the date of this order, and they should include their proposed method of allocating the fees. The amount to be awarded will be determined according to the procedures in C.R.C.P. 121, §1-22.

For the foregoing reasons, the City is ordered to produce for plaintiffs' inspection and copying the originals of the documents described in this order that are not exempt from inspection. The opportunity to inspect and copy must be made available no later than fifteen days from the date of this order. The order to show cause is made absolute as to those documents. Copies of the documents not required to be produced will be retained in the Court file in a sealed envelope.

SO ORDERED.

Dated this 30th day of March, 2004.

BY THE COURT:

Joseph E. Meyer III
District Court Judge

cc: Steven D. Zansberg, Attorney for Plaintiffs
Stan M. Sharoff, Attorney for Defendants
Michael T. Lowe, Attorney for Intervenors

| | |
|---|---|
| Denver District Court<br>1437 Bannock Street, #256<br>Denver, CO 80202 | |
| **STEPHEN NASH, an individual,<br>VICKIE NASH, an individual, and<br>AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**GERALD WHITMAN, in his official capacity as the Chief of Police of the City and County of Denver, and THE CITY AND COUNTY OF DENVER,**<br><br>**Defendants.** | **This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:**<br><br>**This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).** |
| John A. Culver, Esq., #21811<br>Dean H. Harris, Esq., #35017<br>Benezra & Culver, L.L.C.<br>141 Union Blvd., #260<br>Lakewood, CO 80228<br>(303) 716-0254<br>(303) 716-0327 facsimile<br>jaculver@bc-law.com<br><br>Mark Silverstein, Esq., #26979<br>ACLU of Colorado<br>400 Corona Street<br>Denver, CO 80218<br>(303) 777-2490<br>msilver2@att.net<br>*Attorneys for Plaintiffs* | **Case Number:**<br><br>**Div.: Ctrm:** |
| **[Proposed] ORDER TO SHOW CAUSE** | |

THIS MATTER comes before the Court upon the Application for Order to Show Cause, lodged by Plaintiffs Stephen Nash, Vickie Nash and the American Civil Liberties

Union of Colorado in conjunction with their Complaint in this civil action, and being fully advised in the premises and having found good cause therefor,

The Court HEREBY ORDERS:

(1) Defendants Gerald Whitman, Alvin J. LaCabe, Jr., the Denver Police Department and the City and County of Denver shall appear before this Court at a hearing to be held on the _____ day of _____, 2005, at _____ o'clock ___.m.

(2) At the Show Cause Hearing set above, the Defendants shall show cause why they should not be directed to make available to Plaintiffs and the public for public inspection and copying the records requested in Plaintiffs' April 14, 2004, correspondence and identified in paragraph 20 of Plaintiffs' Complaint and Application for Order to Show Cause.

DATED this _____ day of _____, 2005.

**BY THE COURT:**

_____
District Judge