DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St.
Denver, CO 80202

Plaintiffs: THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado Corporation, and TERRILL JOHNSON, an individual,

v.

Defendants: 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.

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Case Number: **04-CV-700**

Division: **18**

This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:

This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003)

FIRST AMENDED COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE

Plaintiffs, the American Civil Liberties Union of Colorado and Terrill Johnson, for their Complaint against the Defendants, Gerald Whitman, in his official capacity as the Chief of Police for, Denver, Colorado, Alvin LaCabe, in his official capacity as the Manager of Safety for the City and County of Denver, the Denver Police Department, and the City & County of Denver (collectively, the "Defendants"), allege as follows:

INTRODUCTION

Pursuant to the Criminal Justice Records Act, Plaintiffs seek disclosure of records concerning the Denver Police Department's ("DPD") investigation of a citizen complaint filed by Terrill Johnson alleging that police officers engaged in racial profiling, used excessive force, made an unjustified arrest, and engaged in other improper conduct when they held him at gunpoint and arrested him for minor traffic violations and "interference" on April 12, 2002.

The prosecutor dropped all charges against Mr. Johnson, who has no criminal record and had never been arrested before. Thirteen months after Mr. Johnson asked the members of the Internal Affairs Bureau to investigate their fellow officers, he received a brief letter purporting to inform him of the results. Although it advised that charges of excessive force were not sustained, it stated that "other charges were sustained." The letter did not explain which charges were sustained, against which officers, nor did it state whether any officers received any discipline.

When Mr. Johnson and the American Civil Liberties Union of Colorado ("ACLU") subsequently sought additional information about the investigation of Mr. Johnson's complaint, the Defendants asserted that disclosure of the requested records would be "contrary to the public interest." In this action, Plaintiffs vigorously contend that the contrary is true, that disclosure ***promotes*** the strong public interest in monitoring the conduct and performance of public officials in discharging their public duties. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 47 (1984) ("The public in general . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.").

The 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 refuses to disclose records similar to those requested by Mr. Johnson unless and until an action is filed in court. Even after the Denver District Court has rejected the Defendants' legal rationale for withholding documents and has ordered disclosure of the requested records, the Defendants nevertheless have re-asserted the identical arguments as grounds for withholding disclosure when the next request comes along. Consequently, in addition to seeking disclosure of the records requested in this

particular case, Plaintiffs also ask this Court to issue a declaratory judgment holding invalid, as a matter of law, two of Defendants' repeatedly-asserted and repeatedly-rejected grounds for withholding records connected to the DPD's investigation of allegations that police officers have mistreated citizens in the course of discharging their duties.

JURISDICTION AND PARTIES

1. This honorable Court has jurisdiction of the claims herein, pursuant to Section 24-72-305(7) of the Criminal Justice Records Act ("CCJRA"), § 24-72-301, *et seq.*, C.R.S. and § 13-51-105, C.R.S.

2. Plaintiff ACLU is a public interest organization incorporated in Colorado and headquartered in Denver, Colorado.

3. Plaintiff Terrill Johnson, an individual, is a citizen of the State of Colorado, residing in the City and County of Denver.

4. Plaintiffs are both "persons" as defined in the CCJRA, § 24-72-302(9), C.R.S. (2003).

5. Defendant Gerald Whitman is the Chief of Police for 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* § 24-72-302(5) & (8), C.R.S. (2003).

6. Defendant Alvin LaCabe is the Manager of Safety of the City and County of Denver, Colorado. Mr. LaCabe is also a "custodian" of the criminal justice records at issue in this case. *See* § 24-72-302(5), C.R.S. (2003).

7. The Denver Police Department is an agency of the City and County of Denver and is also a "custodian" of the criminal justice records at issue in this case. *See* § 24-72-302(5), C.R.S. (2003).

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. *See* § 24-72-302(5), C.R.S. (2003).

APPLICABLE LAW

9. All records "made, maintained, or kept" by the Denver Police Department are "criminal justice records," as defined by Section 24-72-302(4), C.R.S. Unless specifically exempt, all criminal justice records should be made available for public inspection pursuant to Section 24-72-305, C.R.S. (2003).

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. § 24-72-305(7), C.R.S. (2003).

11. 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.*

12. Upon a finding that the custodian's denial of access was arbitrary or capricious (without any legal support), the Court may order the custodian to pay the applicant's court costs and attorneys' fees in an amount to be determined by the Court. *Id.*

13. This Court is authorized under § 13-51-102, *et seq.*, C.R.S. to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and to clarify and declare what are the rights of the parties with respect to their competing claims.

FACTUAL CONTEXT GIVING RISE TO THE RECORDS REQUESTS

14. Terrill Johnson is, and by physical appearance is identifiable as, African-American.

15. Mr. Johnson is an honorably discharged, decorated Air Force veteran, and he works as an aircraft mechanic for Frontier Airlines.

16. Mr. Johnson has no criminal record. Prior to the evening of April 11, 2002, Mr. Johnson had never been arrested. There were no outstanding warrants for him.

17. On the night of April 11, 2002, Mr. Johnson was driving westbound on I-70, returning home from his work at the Denver airport. According to the complaint that Mr. Johnson submitted to the Internal Affairs Bureau, Officers Troy Ortega and Luis A. Estrada of the DPD gang unit began following extremely closely and then pulled up alongside Mr. Johnson's vehicle and shined a spotlight on Mr. Johnson.

18. Shortly after Mr. Johnson arrived home, the same officers showed up. Mr. Johnson's complaint stated that the officers "demonstrated that they are racist and have little respect for decent hardworking citizens of the inner city community." The officers crashed their car into the car owned by Mr. Johnson's wife.

19. Officers Ortega and Estrada then got out of the squad car and drew their weapons on Mr. Johnson, who was not armed and was posing no threat. They yelled at Mr. Johnson to "drop his weapon," even though he had no weapon. Additional officers arrived

on the scene, and they forcibly subdued and handcuffed Mr. Johnson while slamming him onto the police vehicle and shouting out racial slurs.

20. According to Mr. Johnson's complaint, Officer Ortega attempted to explain his actions by stating that he "once lost a partner to a black man" and that Mr. Johnson's car was a common type of car driven by gang members.

21. Police booked Mr. Johnson for two traffic minor charges and disobeying a lawful order with a police officer. A copy of the Denver Police Department's "arrest record" is attached as Exhibit A.

22. On or about June 17, 2002, Mr. Johnson filed a formal complaint with the Internal Affairs Bureau of the Denver Police Department. Mr. Johnson complained that he was the victim of racial profiling, false arrest, excessive use of force, harassment, and property damage, among other things.

23. As a part of his complaint to the Internal Affairs Bureau of the Denver Police Department, Mr. Johnson submitted his own written statement describing the events of April 11, 2002. In addition, Mr. Johnson submitted a written statement from his common-law wife, Melinda Jarvis, describing the events of April 11, 2002. Mr. Johnson also submitted a written statement by a neighbor who was an eyewitness to the events of April 11, 2002.

24. Two days after he filed his complaint with DPD, on June 19, 2002, all charges filed against Mr. Johnson were dismissed.

25. During the course of the subsequent IAB investigation into Mr. Johnson's complaint, IAB officers interviewed both Mr. Johnson and his wife. On information and belief, they also interviewed Officers Ortega and Estrada, as well as additional officers who arrived at Mr. Johnson's home on April 11, 2002.

26. By letter dated July 8, 2003, Defendant Chief Gerald Whitman wrote to Mr. Johnson and informed him that the complaint he had filed (Case Number C2002C0129) had been investigated by the Internal Affairs Bureau and had also been reviewed by the Denver District Attorney's Office. The letter further stated that although Johnson's allegations of excessive use of force by the arresting officers had not been substantiated, "other charges were sustained." ***The letter does not state which charges were sustained, against which of the officers, nor whether any of the officers were disciplined for having been found to have violated departmental policies.*** A copy of Chief Whitman's July 8, 2003 letter to Mr. Johnson is attached hereto, as Exhibit B, and incorporated herein by reference.

DEFENDANTS' DENIAL OF PLAINTIFFS' REQUESTS FOR ACCESS TO RECORDS

27. On September 19, 2003, the Plaintiffs wrote a letter to Defendants LaCabe and Whitman, requesting to inspect and copy all records made, maintained or kept by the Defendants that relate to the Denver Police Department's contact with Mr. Johnson beginning on the evening of April 11, 2002, and resulting in Mr. Johnson's arrest on April 12, 2002, including the subsequent Internal Affairs Bureau investigation and any resulting disciplinary action. A copy of this letter is attached hereto as Exhibit C and is incorporated herein by reference.

28. When no response was received by the Plaintiffs within three days of the September 19, 2003 letter (as required by law), the Plaintiffs sent a second letter, dated September 25, 2003, to Defendants LaCabe and Whitman again requesting access to the same set of records. A copy of the letter dated September 25, 2003 is attached hereto as Exhibit D and incorporated herein by reference.

29. By letter dated September 29, 2003, the Defendants, through their counsel, Assistant City Attorney Stan M. Sharoff, denied the Plaintiffs' request for access to the criminal justice records at issue herein. The City provided access only to the accident report that is attached hereto as Exhibit E. At a minimum, but without limitation, the Defendants' untimely denial of access included a denial of access to the findings that certain disciplinary charges were sustained, to the records of what discipline, if any, was imposed, and to the records of statements and/or interview notes made by IAB investigators memorializing their interviews with Mr. Johnson, his common law wife Melinda Jarvis, the officers in question, and other third party witnesses. Nor did the defendants produce any criminal justice records concerning the arrest, detention, charging, and dismissal of charges against Mr. Johnson.

30. As the basis for its untimely refusal to provide access to the records requested, the City stated that disclosure of the documents was, in Chief Whitman's estimation, "contrary to the public interest." As support for Chief Whitman's rationale, Mr. Sharoff expressed his own opinion that "a number of these documents are statements made by police officers under a promise of confidentiality and are therefore not subject to disclosure. And, lastly, other documents contain deliberative and evaluative statements protected from disclosure by statute." *See* Ex. E.

31. On Friday October 17, 2003, ACLU Legal Director Mark Silverstein spoke with Defendant LaCabe. Mr. Silverstein asked if Mr. LaCabe would be willing to reconsider the City's decision to deny access to the requested records, and Mr. LaCabe said he would do so. Mr. Silverstein followed up on that conversation by writing to Mr. LaCabe again, in a letter dated October 20, 2003, a copy of which is attached as Exhibit F. Although Mr. Silverstein has received no written response and no written report of the results of the

requested reconsideration, Mr. LaCabe subsequently informed Mr. Silverstein orally that the request for disclosure had been reconsidered and the decision was unchanged.

32. At no time have Defendants or their counsel provided Plaintiffs with an index identifying which documents are being withheld on the basis of a purported deliberative process privilege or an affidavit identifying, under oath, how the disclosure of the withheld documents would stifle honest and frank discussion within the Department. *Cf.* § 24-72-204(3)(a)(XIII), C.R.S.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment – No Reasonable Expectation of Non-Disclosure Under the Garrity Advisement)
§ 13-51-105, C.R.S.

33. The Plaintiffs incorporate by reference as if fully set forth here the preceding paragraphs of this Complaint and Application.

34. The police officers who provided statements to the Internal Affairs Bureau in connection with the investigation triggered by Mr. Johnson's complaint (Case No. C2002C0129) were forewarned, prior to providing their statements, in accordance with the Denver City Charter Section 9.4.18 (and DPD Form 455, also known as "the Garrity Advisement") that their statements were not necessarily confidential. This advisement informs cooperating officers that, under certain circumstances, their "statement or answers may be offered as evidence to a Hearing Officer in an appeal brought by a member challenging any discipline imposed, in whole or in part, because of the content of the statement or answers to the questions."

35. The Denver City Charter provision Section 9.4.18 and DPD Form 455 as they existed at the time of the questioning of officers in this case, were identical in wording to Charter provision Section C5.78 and DPD form 455 as they existed in the summer of 1996.

36. The Denver City Charter provision Section 9.4.18 and DPD Form 455 as they existed at the time of the questioning of officers in this case, were identical in wording to Charter provision Section C5.78 and DPD form 455 as they existed in the spring of 1997.

37. There is presently an actual controversy and disagreement between the parties concerning whether Denver Police Department officers who provide statements or information to the Internal Affairs Bureau pursuant to the Garrity Advisement (DPD Form 455) and City Charter Section 9.4.18 have a reasonable expectation that such statements will not be publicly disclosed.

38. The Defendants herein have previously litigated whether former Denver City Charter provision Section C5.78 and DPD Form 455 ("the Garrity Advisement") provide cooperating police officers with a reasonable expectation of confidentiality—meaning a reasonable expectation that their statements shall never be publicly disclosed—in the case of *Brotha to Brotha v. City and County of Denver*, Denver Dist. Ct. Case No. 96CV6882. A copy of that decision is attached as Exhibit G.

39. The Defendants herein were given a full and fair opportunity to litigate the question of whether cooperating police officers giving statements to Internal Affairs Bureau investigators under DPD Form 455 ("the Garrity Advisement") had a reasonable expectation of confidentiality in their statements, in the case of *Brotha to Brotha v. City and County of Denver,* Denver Dist. Ct. Case No. 96CV6882.

40. In the case of *Brotha to Brotha v. City and County of Denver,* Denver Dist. Ct. Case No. 96CV6882, this Court considered the case of police officers who cooperate with the Internal Affairs Bureau and provide statements after being forewarned of their rights under DPD Form 455 ("the Garrity Advisement"). In a ruling issued on February 4, 1997, Judge Paul Markson ruled that police officers did *not* have a reasonable expectation of confidentiality in such statements. The City and County of Denver did not appeal that adverse ruling.

41. The Defendants herein have previously litigated the identical issue in an additional case. In the case of *The American Civil Liberties Union of Colorado v. City and County of Denver*, Denver Dist. Ct. Case No. 97CV7170, the Defendants herein litigated whether former Denver City Charter provision Section C5.78 and DPD Form 455 ("the Garrity Advisement") provide cooperating police officers with a reasonable expectation of confidentiality – meaning a reasonable expectation that their statements shall never be publicly disclosed. A copy of that decision is attached as Exhibit H.

42. The Defendants herein were given a full and fair opportunity to litigate the question of whether cooperating police officers giving statements to Internal Affairs Bureau investigators under DPD Form 455 ("the Garrity Advisement") had a reasonable expectation of confidentiality in their statements, in the case of *American Civil Liberties Union of Colorado v. City and County of Denver,* Denver Dist. Ct. Case No. 97CV7170.

43. In that case, Judge Herbert L. Stern, III ruled on April 7, 1998, that police officers cooperating with the Internal Affairs Bureau and providing statements after being forewarned of their rights under DPD Form 455 ("the Garrity Advisement") did *not* have a reasonable expectation of confidentiality in such statements. The City and County of Denver did not appeal that adverse ruling.

44. The Plaintiffs are entitled to a declaratory judgment that all Denver Police Department officers who provide statements to Internal Affairs Bureau investigators under DPD Form 455 ("the Garrity Advisement") do not have a reasonable expectation of confidentiality in such statements.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment – No Reasonable Expectation of Privacy in IAB Files Concerning Official Conduct)
§ 13-51-105, C.R.S.

45. The Plaintiffs incorporate by reference as if fully set forth here the preceding paragraphs of this Complaint and Application.

46. The statements provided by police officers and other witnesses contained in the Internal Affairs Bureau investigation file at issue in this case concern the conduct of public officials in discharging their official duties while acting as on-duty police officers in the Denver Police Department.

47. As such, the Denver Police Department officers whose official conduct is the subject of information contained in the criminal justice records at issue herein do not have a reasonable expectation of privacy in such material.

48. Defendants are expected to argue in this case, as they have in previous cases, that Denver police officers enjoy a reasonable expectation of privacy in an Internal Affairs Investigation file that concerns their conduct in discharging their official duties while acting as on-duty police officers. The Plaintiffs disagree.

49. There is presently an actual controversy and disagreement between the parties concerning whether Denver Police Department officers whose official conduct is the subject of information contained in the criminal justice records at issue herein have a reasonable expectation of privacy in such material.

50. The Defendants previously litigated the issue whether police officers in the Denver Police Department have a reasonable expectation of privacy in information contained in an Internal Affairs Bureau file that relates to those officers' discharge of their official duties while acting as police officers, in the case of *Brotha to Brotha v. City and County of Denver*, Denver Dist. Ct. Case No. 96CV6882 (Ex. G).

51. The Defendants herein were given a full and fair opportunity to litigate the question of whether police officers in the Denver Police Department have a reasonable expectation of privacy in information contained in an Internal Affairs Bureau file that relates

to those officers' discharge of their official duties while acting as police officers, in the case of *Brotha to Brotha v. City and County of Denver,* Denver Dist. Ct. Case No. 96CV6882.

52. On February 4, 1997, in the case of *Brotha to Brotha v. City and County of Denver,* Denver Dist. Ct. Case No. 96CV6882, Judge Paul Markson ruled that police officers in the Denver Police Department have no reasonable expectation of privacy in information contained in an Internal Affairs Bureau file that relates to those officers' discharge of their official duties while acting as police officers. The City and County of Denver did not appeal that adverse ruling.

53. The Defendants herein have also previously litigated the same issue – whether police officers in the Denver Police Department have a reasonable expectation of privacy in information contained in an Internal Affairs Bureau file that relates to those officers' discharge of their official duties while acting as police officers – in the case of *The American Civil Liberties Union of Colorado v. City and County of Denver*, Denver Dist. Ct. Case No. 97CV7170.

54. The Defendants herein were given a full and fair opportunity to litigate the question of whether police officers in the Denver Police Department have a reasonable expectation of privacy in information contained in an Internal Affairs Bureau file that relates to those officers' discharge of their official duties while acting as police officers, in the case of *American Civil Liberties Union of Colorado v. City and County of Denver,* Denver Dist. Ct. Case No. 97CV7170.

55. On April 7, 1998, in the case of *American Civil Liberties Union of Colorado v. City and County of Denver,* Denver Dist. Ct. Case No. 97CV7170, Judge Herbert L. Stern ruled that police officers do not enjoy a reasonable expectation of privacy with respect to statements or other information contained in an Internal Affairs Bureau file that pertains to those officers' conduct of their official duties while acting as Denver Police officers. The City and County of Denver did not appeal that adverse ruling (Ex. H).

56. The Plaintiffs are entitled to a declaratory judgment stating that police officers do not enjoy a reasonable expectation of privacy with respect to statements or other information contained in an Internal Affairs Bureau file that pertains to those officers' conduct of their official duties while acting as police officers.

THIRD CLAIM FOR RELIEF
(Order to Show Cause and Award of Reasonable Attorneys Fees)
§ 24-72-305, C.R.S.

57. The Plaintiffs incorporate by reference as if fully set forth here the preceding paragraphs of this Complaint and Application.

58. The information originally requested by the Plaintiffs on September 19, 2003 has been made, maintained, and kept by the Defendants and constitutes criminal justice records under the CCJRA, § 24-72-302(4), C.R.S. (2003).

59. The Defendants have refused to provide access to the criminal justice records pursuant to the Plaintiffs' request.

60. No statutory exemption under the CCJRA warrants the Defendants' decision to deny access to the criminal justice records requested by the Plaintiffs.

61. Providing the Plaintiffs with access to the criminal justice records sought herein, as the Defendants have been ordered to do in the past, would *promote* the public interest and would not, as Defendants contend, be contrary to the public interest.

62. The Defendants' denial of access to the criminal justice records sought by the Plaintiffs herein violates the CCJRA.

63. There is no good faith basis or grounds to support the Defendants' refusal to provide access to the criminal justice records sought by the Plaintiffs herein.

64. The Plaintiffs are entitled to an Order directing the Defendants to show cause "at the earliest practical time" why the Defendants should not permit access to the records which are the subject of this Complaint and Application. *See* § 24-72-305(7), C.R.S.

65. Upon hearing this matter on an Order to Show Cause, the Plaintiffs are entitled to a further order making the order absolute and directing that the Plaintiffs be given access to all of the requested records on the grounds that the Defendants' decision to deny access was not proper. *See* § 24-72-305(7), C.R.S. (2003).

66. The Plaintiffs should also be awarded their reasonable attorneys' fees under § 24-27-305(7), C.R.S. (2003).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Terrill Johnson and the American Civil Liberties Union, pursuant to §§ 24-72-305(7) and 13-51-105, C.R.S., pray that:

(a) The Court enter a declaratory judgment declaring that police officers in the Denver Police Department who provide statements and/or other information to the Internal Affairs Bureau after being advised pursuant to a "Garrity Advisement" that their statement or answer may be disclosed under certain

circumstances do not enjoy a reasonable expectation of confidentiality in such statements and/or information;

(b) The Court enter a declaratory judgment declaring that police officers in the Denver Police Department who are the subject of witness statements and other information contained in an Internal Affairs Bureau file that pertains to those officers' discharge of their official duties while acting as Denver Police Department officers have no reasonable expectation of privacy with respect to such information;

(c) The Court enter an order directing the Defendants to show cause why they should not permit inspection and copying of the requested criminal justice records described above (a proposed order is attached with this Complaint); and

(d) 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

(e) The Court enter an order directing Defendants to pay the Plaintiffs' court costs and reasonable attorneys' fees, as provided by § 24-72-305(7), C.R.S. (2003); and

(f) The Court award any other and further relief that the Court deems just and proper.

Respectfully submitted this _____ day of February, 2004.

FAEGRE & BENSON LLP

Christopher P. Beall
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO and TERRILL JOHNSON

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THIS FIRST AMENDED COMPLAINT AND APPLICATION WAS FILED WITH THE COURT THROUGH THE COURTLINK ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(C), § 1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH FAEGRE & BENSON LLP.

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of February, 2004 a true and correct copy of the foregoing **FIRST AMENDED COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE** was served on the following counsel through the Lexis/Nexis CourtLink electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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