DISTRICT COURT, EL PASO COUNTY, COLORADO

Address: 270 South Tejon
Colorado Springs, CO 80903

Plaintiffs: CITY OF COLORADO SPRINGS, a Home Rule City and Colorado Municipal Corporation

v.

Defendant: THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC.

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Case Number: 06CV2053

Division: 5

DEFENDANT/COUNTERCLAIMANT AMERICAN CIVIL LIBERTIES UNION'S RESPONSE BRIEF

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Defendant/Counter-claimant The American Civil Liberties Union of Colorado, Inc., ("ACLU") through its attorneys at Faegre & Benson LLP, respectfully submits this Response to the Opening Brief submitted by the City of Colorado Springs for the Court's consideration in resolving the issues presented at the Show Cause Hearing set in this action for Thursday, December 7, 2006, at 1:30 p.m.

INTRODUCTION

The issues presented by this case are neither new nor novel. Scores of courts have evaluated the issues presented here, and without exception, all have held that the documents at issue are not "personnel files" under the Colorado Open Records Act ("CORA"). Notwithstanding that uniform authority, the City continues to argue that the records it refuses to disclose are "personnel files." The City also raises new arguments concerning privacy and liberty interests of Officer Hardy, despite the fact that Officer Hardy has not claimed any such interests or intervened in this case to voice any objection to disclosure. Fundamentally, the City of Colorado Springs Police Department seeks special protections for documents that are subject to disclosure under the Colorado Criminal Justice Records Act ("CCJRA"). Neither the statutes nor case law affords police officers this special protection. Indeed, the opposite is true. There is a statutory presumption that these documents should be disclosed and a universally-recognized compelling public interest in learning how citizen complaints of police misconduct are handled. The internal investigation file relating to Officer Hardy's contact with Delvikio Faulkner must be made available for inspection by the ACLU under the CCJRA.

ARGUMENT

I. THE CITY HAS NEITHER PROVIDED LEGAL AUTHORITY FOR ITS "PERSONNEL FILE" ARGUMENT NOR ADDRESSED THE NUMEROUS LEGAL AUTHORITIES DIRECTLY CONTRARY TO THE CITY'S POSITION.

A. THE CITY HAS FAILED TO CITE OR PROVIDE ANY OF THE SO-CALLED "PRIOR PRECEDENTS OF THE EL PASO COUNTY DISTRICT COURT."

For the first time, and without citation of any kind, the City repeatedly claims in its Opening Brief that there are prior cases from this judicial district holding that IAU files[1] are "personnel files" exempt from disclosure under CORA. *See* City Op. Br. at 2, 3, 4, and 8. The City's attempt to characterize the legal issue before the Court as one that is the subject of competing precedents fails because the City has offered no authority for its position. Despite the exchange of half a dozen letters between the parties and their Counsel—many of which concerned authorities that govern ACLU's request—the City never once raised the issue of the "local precedents" it now asserts exist. Similarly, there are no allegations of any such authorities in the City's Complaint. The only case from El Paso County of which the t ACLU is aware of held that, consistent with the ACLU's position, IAU files are criminal justice records subject to the CCJRA. *See Johnson v. Dep't of Corrections*, 972 P.2d 692, 694 (Colo. Ct. App. 1998) (affirming El Paso County trial court ruling that an internal investigation report of Colorado Department of Corrections "constituted 'criminal justice records' governed by the provisions of the Criminal Justice Records Act"). Thus, whatever phantom "local

[1] ACLU's Opening Brief referred to these files as IAB documents or files, while the City refers to these files as IAU files. They are one in the same, but for purposes of consistency, in this brief the ACLU will refer to them as IAU files.

precedents" the City relies on are not consistent with *Johnson*, and certainly are not properly before the Court.

B. PRECEDENT IN MULTIPLE JURISDICTIONS CONTRADICTS THE CITY'S POSITION.

The City goes on to incorrectly state that only the Denver District Courts have addressed the status of IAU files. But, as the ACLU has previously noted to the CSPD, other counties, such as Garfield and Larimer, have also addressed this issue, and consistent with Denver, have held that IAU files do not constitute "personnel files" as the City claims. *See Walter v. Colorado Mountain News Media Co.*, No. 05CV79 (Colo. Dist. Ct. Garfield Cty., Nov. 15, 2005) (holding IAU files relating to allegations of excessive force by police are criminal justice records, not personnel files, and there is a strong public interest disclosing of such documents to evaluate how authorities respond to misconduct allegations) (Exhibit G to ACLU's Opening Brief); *City of Loveland v. Loveland Publ'g Corp.*, No. 03CV513 (Colo. Dist. Ct. Larimer Cty., June 16, 2003) (holding IAU files are criminal justice records and that the public has a legitimate and compelling interest in ensuring that law enforcement adequately polices itself) (Exhibit I to ACLU's Opening Brief).

C. THE CITY'S PRIOR PRACTICE IS IRRELEVANT TO THE QUESTION AT BAR, AND IN ANY EVENT, IS INACCURATELY PORTRAYED.

The City also seems to rely on its own historical practice of treating IAU files as "personnel files" under CORA as authorizing what it claims to be its long-standing practice. Once again, however, there is no legal authority for the City's position. Moreover, the City's true historical practice is not in accord with the positions set forth in its Opening Brief, and in

any event, a government entity's promise to maintain confidentiality of certain information is insufficient to transform a public record into a private one for several reasons.

First, how the City treats documents is relevant only insofar as the documents it seeks to withhold are actually present in an employee's personnel file. *See Denver Post Corp. v. University of Colorado,* 739 P.2d 874, 878 (Colo. Ct. App. 1987) (holding that documents must actually be present in the employee's personnel file to qualify for personnel file exemption under CORA). Here, the City has admitted that the IAU file is kept entirely separate from Officer Hardy's actual personnel file. *See* City Opening Br. at 3 (noting actual personnel file is kept in the City's Human Resources office). Given this admission, the documents are not entitled to be treated as "personnel files" as a matter of law. *See Denver Post*, 739 P.2d at 878. Even if the City had deposited the IAU file at issue into a folder marked "personnel file," however, that would not render the material therein automatically subject to the "personnel file" exemption. *See Denver Post Corp.*, 739 P.2d at 878.

Second, the City has not steadfastly maintained IAU files as confidential and refused to release them. The City has released information about officer reprimands in the past[2] and, in February of 2005, released an entire IAU file concerning Officer Charles Broshous to the Colorado Springs Gazette.[3] Officer Broshous was forced to resign from the CSPD after a

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[2] A former CSPD Police Chief revealed to the media that two officers had been reprimanded and the reason for the reprimand. *See Flanagan v. Colorado Springs*, 890 F.2d 1557, 1570 (10th Cir. 1989).

[3] Officer Broshous's IAU file is hundreds of pages. It is not appended as an exhibit because it is so voluminous. The ACLU will, however, tender it at the Dec. 7, 2006 hearing.

citizen complaint revealed Broshous arrested an under-age male without cause and forced him to pose for semi-nude photos. *See* Gazette article, attached as Exhibit M. Broshous plead guilty to misdemeanor official misconduct. The release of the Broshous IAU file directly contradicts the City's assertions concerning its historical practices and protection of the privacy interests of its former employees. While Broshous was charged with a petty offense, this does not explain why the CSPD released Broshous' IAU file, as opposed to the file maintained by the Major Crimes Unit or some other crime investigation file without the IAU investigation file.

Third, whether the City treats the information as confidential by segregating it or stamping it as such is immaterial. Colorado courts have repeatedly held that a commitment from the government to maintain information as "confidential," by itself, is not a recognized exception to the disclosure requirements of the CORA. *See, e.g., International Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.,* 880 P.2d 160, 167 (Colo. Ct. App. 1994) .. ("it remains insufficient as a matter of law merely to classify the information as confidential" and a "government agency's longstanding promises of confidentiality to insurance companies [are] irrelevant to whether the requested documents [are] public records subject to disclosure"); *Denver Pub. Co. v. University of Colorado*, 812 P.2d 682, 685 (Colo. Ct. App. 1990) (noting that parties to settlement agreement, including the university, had "agreed that information concerning the settlement process would remain confidential, but such agreements alone are insufficient to transform a public record into a private one"); *Freedom Newspapers, Inc. v. Denver & R. G. W. R. Co.,* 731 P.2d 740, 742

(Colo. Ct. App. 1986) (ordering disclosure of coal transportation contracts despite fact that there was "a confidentiality clause in each of the contracts"); *Daniels v. City of Commerce City,* 988 P.2d 648 (Colo. Ct. App. 1999) ("An agreement by a government entity that information in public records will remain confidential is insufficient to transform a public record into a private one.").

D. CORA DOES NOT APPLY, AND IN ANY EVENT, ITS EXPRESS LANGUAGE AND CASES INTERPRETING IT SPECIFICALLY REFUTES THE CITY'S POSITION.

In advancing its "personnel file" position, the City attempts to create a strained statutory construction argument under CORA that the City to support its position. The City's argument fails because: (1) the records at issue are criminal justice records governed by the CCJRA; (2) even under CORA's express language, documents reflecting "performance ratings" are not "personnel files"; and (3) precedents binding on this Court dictate that the IAU files are not exempt "personnel files" under CORA.

1) The IAU files are Criminal Justice Records and Therefore Cannot Fall Under Any Provision of CORA—Including the "Personnel File" Exemption.

A fundamental and recurring flaw in the City's arguments is its willful refusal to acknowledge the CCJRA and the fact that, by definition, the records at issue are "criminal justice records." Records that are criminal justice records are not public records under CORA and therefore cannot be subject to the personnel file exemption of CORA. *See* § 24-72-202(6)(b)(I), C.R.S. (2005) ("'Public records' does not include . . . criminal justice records that are subject to the provisions of part 3 of this article [the CCJRA]."); *see also Harris v. Denver Post Corp.,* 123 P.3d 1166, 1170-71 (Colo. 2005) (differentiating between public

records and criminal justice records and recognizing records can be either but not both). Because the records at issue are created, maintained and kept by the CSPD as a criminal justice agency, in exercising one of its functions authorized by law or administrative rule,[4] the IAU files are criminal justice records. The Court of Appeals specifically held internal investigation files are criminal justice records subject to CCJRA in *Johnson v. Dep't of Corrections*, 972 P.2d 692, 694 (Colo. Ct. App. 1998). CORA and its personnel file exemption therefore simply do not apply. Therefore, the City's claimed fear of facing criminal fines under CORA is wholly without merit.

2) The Express Language Of CORA Refutes The City's Position.

The City asserts the language of CORA's personnel file exemption supports a finding that the IAU files are exempt "personnel files." To adopt the City's position requires that the Court ignore both key language of the definition of a personnel file the City relies on and binding precedent from Colorado's appellate court.

In its Opening Brief, the City asks the Court to examine what "is" a personnel file and what "is not" a personnel file under the language of § 24-72-202 (4.5) C.R.S. . This approach, however, is actually incompatible with the City's position because § 24-72-202 (4.5) C.R.S. list of what "is" a personnel file has been interpreted very narrowly; whereas, the list of what "is not" a personnel file has been interpreted in a much broader fashion. In fact, the list of

[4] *See* C.S.P.D. General Order No. 1620.24 (authorizing internal investigations of officer misconduct).

what "is not" a personnel file specifically enumerates documents such as "performance ratings"—the very type of documents at issue here.

A personnel file "means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship." § 24-72-202 (4.5) C.R.S. (emphasis added). The City relies on the emphasized language in arguing that a "document detailing an employee's work performance" fits the definition of a personnel file. *See* City Op. Br. at p. 6, ¶ 2. This very argument was rejected by *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. Ct. App. 1999). *Daniels* examined the very language the City relies on and held:

> "Maintained because of the employer-employee relationship" is a general phrase following a list of specific types of personal information. "If general words follow the enumeration of particular classes of things, the rule of *ejusdem generis* provides that the general words will be construed as applicable only to things of the same general nature as enumerated things." [citation omitted] Thus, we construe the phrase at issue to mean that the information must be of the same general nature as an employee's home address and telephone number or personal financial information.

Id. (emphasis added). *Daniels* also held that because there is a presumption of access to public records and a broad legislative declaration of open access, the personnel file exemption must be narrowly construed. *See id.* Likewise, this Court is obligated to narrowly construe the definition of "personnel files" under CORA. For this reason, District Judge Rebecca Bromley ordered the release of the complete performance evaluations of El Paso County employees. *See Board of Comm'rs v. The Gazette*, No. 03CV4140 (Dist. Ct. El Paso Cty.

April 28, 2004) (attached as Exhibit N) (holding performance evaluations were not exempt "personnel files" under CORA and awarding attorneys' fees and costs to applicant because custodian did not exercise good faith and reasonable diligence and inquiry based on statues and applicable case law.)

The City also ignores additional language in the statutory definition of personnel file detailing numerous types of documents that are not personnel files—including "performance ratings." *See* § 24-72-202 (4.5) C.R.S. . Under § 24-72-202 (4.5), personnel files "does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, *performance ratings*, final sabbatical reports required under Section 23-5-123, C.R.S., or any compensation, including expense allowances and benefits, paid to employees." *See* § 24-72-202 (4.5) C.R.S. (emphasis added). Thus, the list of what "is not" a personnel file is much broader than the list of what "is" a personnel file. Employment agreements, settlement agreements and termination of employment documents are all arguably maintained as a direct result of the employer-employee relationship, but that does not render them exempt personnel file documents under CORA. Likewise, performance ratings and job performance evaluations such as IAU files are not exempt personnel file documents under CORA. *See* Cases cited at p. 7-8 of ACLU's Opening Brief.

3) Binding Precedents Refute the City's Position

To accept the City's position is to ignore binding authority from the Colorado Court of Appeals. To the ACLU's knowledge, no court has ever agreed with the position asserted by

the City. Rather, Courts examining the definition of "personnel file" under CORA have consistently held only purely private, demographic information qualifies for the personnel file exemption. *Daniels*, 988 P.2d at 652; *ACLU v. Whitman*, No. 04CV700 (Colo. Dist. Ct., Denver Cty., Mar. 30, 2004) (Exhibit H to ACLU Opening Brief at 4) (documents in IAU file that "concern the performance by these officers of their duties" and "concern the activities of the officers on their job" are "not protected . . . as personnel file material") *aff'd* --- P.3d.--- (Colo. Ct. App. Oct. 5, 2006); *ACLU v. City & Cty. of Denver,* No. 97CV7170 (Colo. Dist. Ct. Denver Cty., April 7, 1998) (Exhibit J to ACLU Opening Brief at 2). Furthermore, *Johnson v. Dep't of Corrections*, 972 P.2d 692, 694 (Colo. Ct. App. 1998), a case from this judicial district, holds that IAU files are criminal justice records subject to the CCJRA—not personnel files under CORA.

E. THE CITY'S CHARACTERIZATION OF THE DOCUMENTS IN QUESTION IS NOT ENTITLED TO ANY DEFERENCE.

The City next argues that its own determination that the IAU files are "personnel files" is entitled to "great deference" under *Johnson v. Dep't of Corrections*. *See* City Op. Br. at 6. There are two glaring problems with the City's reliance on *Johnson*. First, there is simply no support for the City's deference argument in *Johnson*. The only deference afforded in *Johnson* was deference to the trial court's findings of fact. Second, the core holding of *Johnson* (by both the El Paso District Court and the Colorado Court of Appeals) is that internal investigation reports of criminal justice agencies are not "personnel files" under CORA. *Johnson* does not even arguably support the City's assertion that the documents in question are exempt personnel files under CORA.

II. THE DOCUMENTS AT ISSUE WERE IMPROPERLY WITHHELD PURSUANT TO A LONG-STANDING BLANKET POLICY—THE CUSTODIAN NEVER ATTEMPTED TO BALANCE ANY PRIVACY OR LIBERTY INTERESTS.

In its final attempt to justify the CSPD's categorical refusal to disclose the subject IAU file, the City attempts to invoke alleged liberty and privacy interests of Officer Hardy, a non-party. In support of its argument, the City offers only hearsay statements to the effect that Officer Hardy does not want the information released and he may take some unspecified action against the CSPD if the information is released. This belated argument lacks merit for several reasons.

First, the Custodian here never invoked or attempted to balance any interest of Officer Hardy in non-disclosure. Instead, the Custodian simply refused access based on a blanket policy of never disclosing IAU files. For this reason, the denial was arbitrary and capricious, entitling ALCU to an award of its reasonable attorneys' fees and costs under § 24-72-305, C.R.S. *See Harris*, 123 P.3d at 1175 (requiring that a records custodian to balance interests of disclosure on a case-by-case basis); and *Nash v. Whitman*, No. 05CV4500 (Colo. Dist. Ct. Denver Cty., Dec. 7, 2005) (withholding criminal justice records under a blanket policy is an abuse of discretion and entitles the party seeking records to attorneys fees and costs) (Exhibit F to ACLU Opening Brief at 7).

Further, to the extent the City now seeks to place the liberty and privacy interest of Officer Hardy in issue, there is no evidentiary basis for their assertions. There is no evidence that Officer Hardy had legitimate expectation of privacy in these records. Even assuming *arguendo* that Officer Hardy is entitled to assert a privacy expectation, he has not done so.

The ACLU requested the records in question some six months ago, and this case has been pending for over five months. Officer Hardy has not sought to intervene or taken any other discernable action to prevent the IAU files from being disclosed to the ACLU. Moreover, the liberty and privacy interests the City now seeks to invoke on Officer Hardy's behalf ring hollow given the City's release of prior IAU files, other officer reprimand information, and documents that disclose and describe Officer Hardy's actions with respect to Delvikio Faulkner. *See* Exhibit L to ACLU's Opening Brief.

A. DISCLOSURE OF RECORDS AS REQUIRED BY THE CCJRA DOES NOT CONSTITUTE A VIOLATION OF OFFICER HARDY'S LIBERTY INTEREST.

The City claims that releasing the IAU files relating to Officer Hardy will tarnish his good name and could give rise to a claim by Officer Hardy against the City. This argument is a red herring. As a threshold matter, the City has already released Officer Andrews' report, which clearly details Officer Hardy's use of excessive force. *See* Exhibit L to ACLU's Opening Brief. Furthermore, as discussed below, unless the City is willing to concede that its personnel made false statements about Officer Hardy impugning his honesty or morality and such statements have not already been published (*i.e.* seen by others within the City or its departments), the release of the IAU files to the ACLU has no bearing on whether the City may be subject to a claim by Officer Hardy.

The City cites *Hartman v. Middleton*, 974 P.2d 1007 (Colo. Ct. App. 1998), in raising the issue of potential claims by Officer Hardy if the IAU files are released. *Hartman* is inapposite. *Hartman* involved unfounded charges of dishonesty or immorality by a former public employee and a resulting § 1983 claim by the employee when she could not get re-

hired. Hartman holds that in § 1983 actions, when a "decision not to re-hire is accompanied by special circumstances, such as the dissemination of stigmatizing statements about the employee," a liberty interest may be implicated. *See id.* at 1011. Here, there is no issue of re-hiring Officer Hardy and there is certainly no allegation that unfounded charges of dishonesty or immorality have been made by anyone. The issue is the use of excessive force in the discharge of Officer Hardy's "public function"[5] in the discharge of his duties as a law enforcement officer. Further, the Tenth Circuit has held that there is no § 1983 liability for the mere reporting of allegations of police misconduct as such. *See Melton v. Oklahoma City*, 928 F.2d 920, 928 (10th Cir. 1991) (public statement concerning allegations of perjury being investigated by the F.B.I. in Oklahoma City Police Department was true because the investigation was in fact underway, and there was "nothing contained in [the defendant's] publication which suggests . . . defendant either accepted the accusation as true or embraced it as his own").

Indeed, if releasing the IAU file containing unproven allegations gives rise to a § 1983 claim, which it does not, then Officer Hardy already has such a claim against the City premised on its release of Officer Andrews's report that records his observation of Officer

[5] In footnote 3 of its Brief, the City seems to question whether the subject of the documents in question relates to a public function, citing *Denver Publ'g Co. v. Bd. of County Comm'rs.*, 121 P.2d 190 (Colo. 2005) (involving romantic e-mails between two public employees). The City wisely does not compare the private exchange of romantic e-mails to a peace officer's on-duty interaction with members of the public which unquestionably relates to an important public function—namely law enforcement. It was Officer Hardy's job to interact with members of the public, and his contact with Mr. Faulkner was not a private one, it was in the course of his public function.

Hardy's arrest of Mr. Faulkner. *See* Exhibit L to ACLU's Opening Brief. The City's release of Officer Andrews's report, but not Officer Hardy's IAU file on the basis that there is a liberty interest at stake in protecting Officer Hardy's good name is irreconcilable.

B. ANY PRIVACY INTEREST OFFICER HARDY MAY HAVE IS GREATLY OUTWEIGHED BY THE PUBLIC INTEREST IN DISCLOSURE.

The City attempts to invoke Officer Hardy's privacy interests as a justification for its refusal to disclose the IAU files. There is no evidence that the City withheld the IAU files on the basis of any privacy concerns, nor is there evidence that Officer Hardy had any legitimate expectation of privacy in these records.

1) The IAU files Were Not Withheld Out of Concern for Officer Hardy's Privacy Interests.

While a custodian of criminal justice records is entitled to balance the interests of public disclosure against issues such as the privacy of individuals who may be impacted by disclosure, no such balancing occurred here. *See, e.g., Harris v. Denver Post Corp.,* 123 P.3d 1166 (Colo. 2005) (remanding to custodian of criminal justice records to justify why disclosure should not occur). The City made clear that it had a blanket policy of never disclosing IAU records and it would not release the IAU files to the ACLU pursuant to that blanket policy. *See* Exhibit B to ACLU's Op. Br. Neither the Complaint nor the two letters sent by the City prior to this litigation ever invoked or raised the now alleged privacy concerns about Officer Hardy. *See* Exhibit C and Exhibit E to ACLU's Op. Br. In addition, Officer Hardy has not asserted any right of privacy in these records. Accordingly, the City is not entitled to now rely on issues of privacy as a justification for denying access to these

records when those interests played no actual role in the decision to deny the ACLU access to the IAU file of Officer Hardy.

2) The City Cannot Demonstrate Officer Hardy Had a Legitimate Expectation of Privacy in the IAU files or That Any Such Interest Outweighs the Compelling Interest of Public Disclosure.

Even if the City had timely invoked the privacy concerns it has now belatedly raises, it cannot meet its burden of showing that Officer Hardy had a legitimate expectation of privacy in the IAU files, nor that any such interest outweighs the compelling interest in public disclosure.

Under *Martinelli v. District Court of Denver,* 612 P.2d 1083 (Colo. 1980) and *ACLU v. Whitman*, --- P.3d --- (Colo. Ct. App. Oct. 5, 2006),[6] a custodian faced with a claim of privacy interests in public documents must first determine whether there is a legitimate expectation of privacy and if so, engage in a balancing test. The City cannot meet its burden here because Officer Hardy has not asserted any right of privacy, nor can one be established in records such as IAU files since they relate exclusively to Officer Hardy's discharge of a public function.

In *Martinelli*, Colorado's Supreme Court addressed whether police officers have a constitutional right of privacy – also denominated as the "right to confidentiality" – in the information contained in the file of an internal investigation of alleged misconduct.

[6] *ACLU v. Whitman* is a case in which the trial court held that IAU files were not personnel files. On appeal, the Court of Appeals upheld the trial court's decision that the ACLU could not obtain a declaratory judgment that no police officer in the City and County of Denver has a legitimate expectation of privacy in IAU files because this is an individualized inquiry. A petition for certiorari is pending.

Martinelli, did not, as the City contends, implicitly hold that such records are "personnel files" under CORA. Rather, *Martinelli* arose in the context of a dispute over discovery of records in a civil lawsuit.[7] To resolve the discovery dispute, the Colorado Supreme Court adopted a test set forth by the Florida Court of Appeals in *Byron, Harless, Schaffer, Reid & Assocs. v. State, 360 So. 2d 83, 92 (Fla. 1st DCA 1978)* [hereinafter "*Schellenberg*"], and held that a person may have a constitutional right to prevent the government's disclosure of "personal materials or information" in the government's possession if the person can overcome a "tri-partite balancing inquiry":

> (1) [D]oes the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
>
> (2) [I]s disclosure nonetheless required to serve a compelling state interest?
>
> (3) [I]f so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?

Martinelli, 612 P.2d at 1091. Only if the proponent of non-disclosure can satisfy the first, "threshold prong," *id.* at 1092, demonstrating that he possesses a "legitimate expectation of

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[7] The City relies heavily on an assertion that while the IAU files may be discoverable in civil litigation, they are not available for inspection under CORA (or the CCJRA apparently). The City confuses the standards for civil discovery and disclosure under open records laws. *Martinelli* holds that CORA exemptions are not a bar to civil discovery requests. However, the converse is also true because, while discovery rules applicable in civil litigation impose relevancy requirements, CORA and CCJRA do not. Thus, a document may not be discoverable in civil litigation if it is not relevant, but available through CORA (or CCJRA), because the party seeking disclosure need not demonstrate relevance. *See People v. Interest of A.A.T*, 759 P.2d 853 (Colo. Ct. App. 1988).

non-disclosure," does the court need consider whether disclosure is nonetheless warranted. If this first prong is not satisfied, there is no constitutional impediment to disclosure.

In order to satisfy *Martinelli*'s threshold requirement – that the party have a "legitimate expectation" of non-disclosure – the proponent of non-disclosure must establish that he had "an actual or subjective expectation that the information would not be disclosed; and second, that his expectation was one that society recognizes as 'legitimate' or reasonable." *Schellenberg*, 360 So. 2d at 94 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also People v. Haley*, 41 P.3d 666, 677 (Colo. 2001). This standard, borrowed from Fourth Amendment jurisprudence, contains both a subjective and objective component. In order for a claimant's expectation to be legitimate, it must not only be subjectively held, but it must be one that, as an objective matter, society deems reasonable. *See Vernonia Sch. Dist. 47j v. Acton,* 515 U.S. 646, 653 (U.S. 1995) (observing that the Fourth Amendment "does not protect all *subjective* expectations of privacy, but only those that society recognizes as 'legitimate'"); *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998); *Martinelli*, 612 P.2d at 1091. Thus, to establish *Martinelli*'s threshold requirement of a legitimate expectation of privacy, the proponent must satisfy three discrete sub-requirements. First, he must show "'an actual or subjective expectation that the information . . . not be disclosed.'" 612 P.2d at 1091. Second, the proponent of non-disclosure must show that the requested material is "highly personal and sensitive." 612 P.2d at 1091. Third, the proponent of non-disclosure must establish that disclosure would be "offensive and objectionable to a reasonable person of

ordinary sensibilities." *Martinelli*, 612 P.2d at 1091 (quoting *Schellenberg*, 360 So. 2d at 94-95).

Colorado's appellate courts have previously held that only after *all three* of preconditions to satisfy *Martinelli's* first prong are met does the information at issue then become subject to a constitutionally based right of confidentiality or privacy, against which other rights may then be balanced. *Martinelli,* 612 P.2d at 1092 (describing the first prong as a "threshold"); *Freedom Newspapers v. Tollefson,* 961 P.2d 1150, 1156 (Colo. Ct. App. 1998) (only information "so intimate, personal or sensitive that disclosure of such information would be offensive and objectionable to a reasonable person," is subject to a legitimate expectation of right of privacy); *ACLU of Colo. v. Grove*, Case No. 98CA981, at 3-4 (Colo. App. Oct. 21, 1999) (not selected for publication) (attached as Exhibit P) (where information at issue is not shown to be "highly personal and sensitive," the court need not engage in balancing of competing interests).

Other courts, applying the *Martinelli* test, have similarly held (several in cases involving police internal affairs files) that unless the information at issue is of a "highly personal and sensitive" nature, such that its public disclosure "would be offensive and objectionable to a reasonable person," the disclosure of such information cannot, as a matter of law, constitute a violation of a person's constitutional right to privacy. Furthermore, the Court need not, under such circumstances, proceed to balance the individual's rights against those of the party requesting access. *See, e.g., Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) ("The plaintiffs' right to privacy claim can be disposed of under the first

prong of the *Martinelli* test . . . . Only highly personal information is protected," and, therefore, information in "documents related simply to the officers' work as police officers" is not entitled to any such protection, so no balancing needed); *Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (applying *Martinelli* tripartite test, and concluding "we need not address the second and third factors if the first is not met"; because the files at issue concerned allegations that "castigate [a police officer's] on-the-job performance" there was no need to go beyond the first, unsatisfied, prong of *Martinelli*).

The City cannot meet its burden of proving any of the three sub-requirements to satisfy the first prong of *Martinelli*. First, there is no evidence that Officer Hardy believed any document generated by the internal investigation would remain confidential. Second, there is no evidence to support an assertion that the internal investigation contains the requisite highly personal and sensitive information that merits a subjective expectation of privacy. Third, there is no evidence that the material in the IAU files is "offensive and highly objectionable to a reasonable person of ordinary sensibilities.

Indeed, another court has already examined the question of whether the City of Colorado Springs Police Department's internal investigation files—specifically reprimands to police officers—are documents in which the police officers have a legitimate expectation of privacy. *See Flanagan v. Munger*, 890 F.2d 1557, 1570-71 (10th Cir. 1989). *Flanagan* held that Colorado Springs police officers had no legitimate expectation of privacy in records that reprimanded them for off-duty conduct because the facts about the conduct were publicly known. *See id.* Here, the conduct is publicly known to an even greater degree than in

Flanagan because it involved on-duty conduct in front of many witnesses, and the underlying facts about Officer Hardy's conduct are already known through the release of Officer Andrews's report. *See* Exhibit L to ACLU Opening Brief. Unless information in the government's hands is non-public and of a "highly personal and sensitive" nature, such that its public disclosure "would be offensive and objectionable to a reasonable person," the disclosure of such information cannot, as a matter of law, violate an individual's right to privacy. *See Flanagan*, 890 F.2d at 1570 (applying the first prong of *Martinelli* to internal affairs file and concluding that "data in files 'which is not of a highly personal or sensitive nature may not fall within the zone of confidentiality"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (rejecting a claim of privacy in case involving an internal affairs investigation file where City of Denver had given same assurance of confidentiality to officers as it does in all Department of Safety investigations: "The legitimacy of an individual's expectations [of privacy] depends . . . upon the intimate or otherwise personal nature of the material which the state possesses"); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (same with respect to police officer's suspension and reprimand: the "disclosed matters were not of a highly personal and sensitive nature sufficient to be accorded constitutional protection . . .. Accordingly, the court concludes, as a matter of law, Worden did not have a legitimate expectation of privacy that rose to the level of constitutional protection").

Indeed, courts in Colorado and elsewhere have repeatedly found that information regarding only the official conduct of a police officer, acting while on duty, is not "highly

personal and sensitive," and thus is not protected from disclosure under the first prong of the *Martinelli* test. *See, e.g., Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) ("[P]olice internal investigation files [are] not protected by the right to privacy when the 'documents relate[] simply to the officers' work as police officers")[8] (emphasis added); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (a police officer who was subject to suspension and reprimand for on-duty conduct did not have a "legitimate expectation of privacy" because the disclosed information was "not of a highly personal and sensitive nature"); *Cowles Pub. Co. v. State Patrol,* 748 P.2d 597, 605 (Wash. 1988) ("[I]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life"); *State Org. of Police Officers v. Society of Professional Journalists-University of Haw.* Chapter, 927 P.2d 386 (Haw. 1996) ("[I]nformation regarding charges of misconduct by police officers in their capacities as such . . . is not 'highly personal and intimate information'").[9]

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[8] *Stidham* cites two earlier Tenth Circuit decisions which held that police officers do not have a legitimate expectation of privacy in documents "related simply to the officers' work as police officers." *See Flanagan*, 890 F.2d at 1570; *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981).

[9] Another reason why police officers do not enjoy a legitimate expectation of privacy in such records is because their conduct, in public, does not give rise to such expectation. *See, e.g.*, C.J.I.-Civ. 4th 28:8; *see also Cassidy v. American Broad. Cos., Inc.*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978) ("The conduct of a policeman on-duty is legitimately and necessarily an area upon which public interest may and should be focused . . . the very status of the policeman as a public official, as above pointed out, is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his public duties."); *cf. Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2294 (2005) (police officer has no legitimate expectation of privacy in his conduct "while he was on duty performing an official function in a public place"); *Hornberger v.*

Moreover, in Colorado, as elsewhere, police officers are "public officials," *see Willis v. Perry*, 677 P.2d 961 (Colo. App. 1983), and "a public official . . . has no right of privacy as to the manner in which he conducts himself in office. . . . Hence, a truthful account of charges of misconduct in office cannot form the basis for an action for invasion of privacy." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (emphasis added); *Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) (same). *See also* RESTATEMENT (SECOND) TORTS § 652D cmt. e (1977) ("a public officer has no cause of action [for invasion of privacy] when his . . . activities in that capacity are recorded, pictured, or commented on in the press"); 37A AM. JUR. 2D *Freedom of Information Act* § 254 at 262-63 (1994 & Supp. 2005) (explaining that "disclosure of materials relating to investigations of alleged misconduct . . . of public officials is frequently not considered to be an unreasonable invasion of the official's privacy because investigation into official misconduct is a legitimate public concern, and incidents relating to public employment are frequently found not to be private").

The wellspring of the body of case law – in both federal and Colorado state courts – concerning a government official's right to privacy in records that are in government's hands, is the United States Supreme Court's landmark case *Nixon v. Administrator of Gen'l Servs.*,

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American Broad. Cos., 799 A.2d 566, 594 (N.J. Ct. App. 2002) (police officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties); *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) ("Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny . . . Performance of police duties and investigations of their performance is a matter of great public importance."); RESTATEMENT (SECOND) TORTS § 652D at 386 (1977) ("nor is [a person's] privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public").

433 U.S. 425 (1977). In that case, former President Richard Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act, which provided for the historical archiving of and public access to recordings and materials made by the President during his tenure in public office. In addressing Nixon's claim that providing public access to his White House recordings and papers would violate his right to privacy, the Court recognized and reaffirmed that "one element of privacy had been characterized as the 'individual interest in avoiding disclosure of personal matters. . . ." *Nixon*, 433 U.S. at 457 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). The Court continued, recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Nixon*, 433 U.S. at 457 (emphasis added). The Court concluded that the "tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency," and that "the overwhelming bulk of the [records at issue] pertain, not to appellant's private communications, but to the official conduct of the Presidency." *Nixon*, 433 U.S. at 459. Therefore, the Court concluded "only a minute portion of the materials implicates appellant's privacy interests," precisely because "of his lack of any expectation of privacy in the overwhelming majority of the materials" – those that reflected on his official conduct. *Nixon*, 433 U.S. at 461-64. Tellingly, *Nixon* was cited with approval by Colorado's Supreme Court, and served as the very foundation for its holding, in *Martinelli*. *See Martinelli*, 612 P.2d at 1091.

Although the Court need not reach this balancing issue because the first prong of *Martinelli* is not satisfied, even if it did, the compelling interest in public disclosure would warrant disclosure. The numerous authorities so holding are set forth in ACLU's Opening Brief at pages 15-16.

CONCLUSION

The City and the CSPD have willfully refused to honor their statutory obligations under the CCJRA, even in the face of overwhelming authority that clearly demonstrated what those obligations were. Based on these clear obligations, numerous Colorado law enforcement agencies and public entities are routinely releasing the information the ACLU seeks, including those in LaPlata County, Garfield County, the City of Aspen, and the City and County of Denver. Despite being made aware of these authorities, the City of Colorado Springs refused to alter its blanket policy and to follow the law and the unambiguous, binding cases that have interpreted that law. The ACLU should be given access to the IAU files, and the Court should award the ACLU its reasonable attorneys' fees and costs incurred in bringing its counter-claim.

Respectfully submitted this 28th day of November, 2006.

/s/ Brandee L. Caswell

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A duly signed physical copy of this document is on file at the office of Faegre & Benson, LLP pursuant to CRCP Rule 121, Section 1-26(9)