

Denver District Court
1437 Bannock Street, #256
Denver, CO 80202

**STEPHEN NASH, an individual,
VICKIE NASH, an individual, and
AMERICAN CIVIL LIBERTIES UNION OF COLORADO,
a Colorado corporation,**

Plaintiffs,

v.

**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,**

Defendants.

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**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).**

Case Number:

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 Affairs 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.

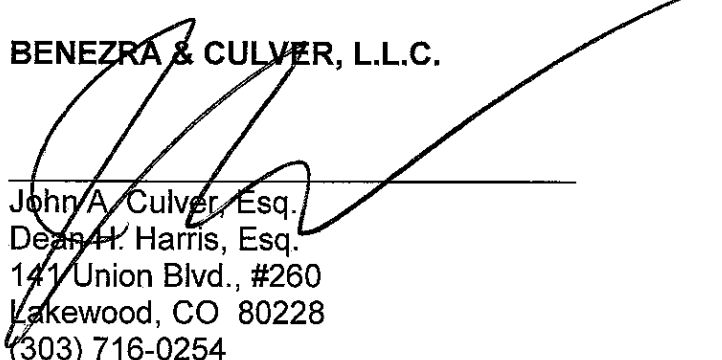
33. There is no good faith basis or grounds to support Defendants' refusal to provide access to the CJRA records sought by Plaintiffs herein, thereby entitling them to an award of attorney fees and costs.

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.

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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.