AMERICAN CIVIL LIBERTIES UNION of COLORADO
ACLU FOUNDATION

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

August 27, 2008

Mr. William Lovingier
Director of Corrections and Undersheriff
Denver Sheriff Department
1437 Bannock Street, Room 405
Denver, CO 80202
VIA EMAIL to Alvin.lacabe@denvergov.org

David Fine
Office of the City Attorney
1437 Bannock St., Room 353
Denver, CO 80202
VIA EMAIL to david.fine@denvergov.org

Re: Problems resulting from mass arrests

Dear Director Lovingier and Mr. Fine:

In the aftermath of the mass arrests made by the City and County of Denver on August 25th, 2008, I write to address issues arising from those arrests and connected to the City's refusal to permit attorney from the People's Law Project and the American Civil Liberties Union of Colorado access to arrestees held at the Temporary Arrestee Processing Site (TAPS).

As you know, prior to the DNC the ACLU of Colorado expressed concerns about the conditions of confinement at TAPS. Some of these concerns were communicated in an August 6, 2008 letter sent to Director Lovingier and Manager of Safety Al LaCabe, and copied to Mr. Fine[1], and included ensuring confidential visits with attorneys at any place of custody pursuant to C.R.S. §§ 16-3-403 & 404, providing access to adequate food and water, prompt processing, and the health and safety of the detainees.

The City assured the ACLU that it had considered and addressed many of the ACLU's other concerns. The City ultimately refused, however, to permit attorney access at TAPS.

Unfortunately, when these assurances were tested by the mass influx of arrestees to TAPS during of Monday evening, August 25th, and Tuesday morning, August 26th, several problems quickly emerged.

[1] http://www.aclu-co.org/dnc/Lovingier.LaCabe.ACLU.detentionfacility.08-06-08.pdf

Although we are still gathering information and interviewing persons detained at TAPS, the initial information we have gathered raises serious questions regarding whether there were systemic and pervasive violations of the constitutional and statutory rights of those detainees, and their rights under international law. The combination of the conditions at TAPS and the lack of any confidential consultation with attorneys may have put undue pressure on those arrested on the evening of August 25th to plead guilty to charges simply to escape confinement.

I write now to address these concerns and request that the City remedy these problems to correct any problems before any future mass arrests occur.

1. Mass Arrests on the Evening of August 25th, 2008

Although the legality of the mass arrests of persons on the evening of August 25, 2008 is not the subject of this letter, the health and safety of the persons held in custody by Denver at TAPS cannot be fully addressed without understanding the events that lead to their confinement.

We are still investigating the events that lead to the corralling of hundreds of citizens on 15th Street between Court and Cleveland. What we do know is that at after some interactions between law enforcement and civilians in and around Civic Center park, a large group of persons walked down Colfax Avenue and onto 15th Street, where any further progress was stopped by an array of law enforcement officers blockading 15th Street at Court.

The group that proceeded to 15th Street appear to include 1) protestors who had been standing in the public streets around Bannock, 2) protestors who were obeying all laws by standing only on the sidewalks, 3) interested onlookers and bystanders from Civic Center Park, the 16th Street Mall and the downtown area who followed the crowd to see what was occurring or otherwise found themselves blocked in with the crowd, 4) members of the media, and 5) Legal Observers from the People's Law Project ("PLP") of the National Lawyers Guild.

As this group came down 15th Street and saw that any further progress was impeded, another group of law enforcement officers closed off 15th Street from the southeast side on Cleveland, completely blocking several hundred people in that small section of 15th Street between Cleveland and Court, and not permitting anyone to leave the area.

It is not clear whether any order to disperse was ever given. No Legal Observer, witness or arrestee on the scene we've debriefed heard any order to disperse. If one was given, it was not audible to many of the persons trapped inside of 15th Street between Cleveland and Court, nor was it audible to me at the corner of 15th and Court or to our Legal Observers inside the cordon.

Even if an order to disperse was given and could have been heard, however, it may have made little difference as officers who had cordoned off 15th Street were initially refusing to allow anyone to leave. Numerous persons, including attorneys serving as Legal Observers, asked to be able to leave the blockaded area and were refused. At some point, additional lines of law enforcement officers began to subdivide the area between the street and the sidewalks, forcing more persons off the sidewalk and onto the street. During the time that people were trapped on 15th Street, law enforcement officers deployed chemical agents, including pepperball rounds, and used other physical force on the persons trapped inside of the cordon.

Eventually, law enforcement officers began releasing some persons and making full custodial arrests of others. It is not yet clear what the methodology or criteria were for determining whether a person would be released or arrested.

2. Time in custody at the arrest site

By approximately 7:00 p.m., if not earlier, it was clear that persons trapped inside the police cordon on 15th Street were not free to leave and were being held in the custody of the City's law enforcement officers. The persons who were ultimately arrested that night spent the next several hours in the custody of the City while officers determined who they were going to arrest. For those arrested, after hours in custody waiting sitting on the road or sidewalk, they then spent more time during a videotaped probable cause statement and other arrest processing at the site. Eventually, they were placed on a bus and transported to TAPS. Thus, by the time they had reached TAPS, arrestees had already been detained and in the custody of the City for hours.

3. Denial of attorney access at TAPS

After the arrests, attorneys from the People's Law Project and the ACLU arrived at TAPS to conduct confidential attorney-client consultations with persons in custody detained there, as guaranteed by Colorado law. The PLP and ALCU attorneys had specific names of clients who wished to meet with them. Although these persons had now been in the custody of the City for hours, the City refused to provide any access to allow these persons to meet with attorneys.

4. Time in Custody at TAPS

The City had assured the ACLU and the public that processing times would be as fast as 60 persons per hour.[2] Early reports indicated that 84 arrestees were sent to TAPS within a short time frame on the night of August 25th. Later reports we received from court personnel indicated that this number may have been as high as 139.

[2] No Razor Wire At Denver's Convention Holding Cells, P. Solomon Banda, CBS 4 News (available at http://cbs4denver.com/local/denver.convention.holding.2.799498.html).

Arrestees spent hours in custody at TAPS. The last group of arrestees was still arriving at the City and County building late into the morning of August 26th, after spending hours at TAPS. It is unclear whether this delay was because the processing times at TAPS were far longer than the City had publicly estimated (139 arrestees arriving *en masse* would have taken about 2 ½ hours to process by the City's estimates; if they arrived in groups that never exceeded 60, presumably they all should have been processed within one hour), or because the persons were processed in one hour as anticipated but then had to wait for space at the City and County building before transport. In any event, however, it is clear that TAPS was and is a detention facility, as some arrestees who did not make their own bond spent 6, 7, 8 or more hours waiting at TAPS before being transferred to court.

5. Conditions of confinement at TAPS

Reports of the conditions of confinement at TAPS are disturbing. The allegations reported by arrestees held at TAPS includes, but is not limited to:

- Numerous arrestees report being denied the right to make any phone call at TAPS despite requests to do so;

- A larger number of arrestees was permitted to make a short phone call, but only *after* they had been forced to make a decision regarding whether or not to post their own bond;[3]

- Arrestees who were exposed directly or indirectly to pepper spray report not being decontaminated at the arrest site nor at TAPS;

- Arrestees who were vegetarian or vegan, which was a large portion of the arrestees, were not given any food at all, not even non-animal portions of the standard brown bag meals;

- Universally, arrestees report that TAPS was kept incredibly cold. Many arrestees, who were arrested outside on a hot and sunny August day, were dressed in tank tops and shorts, or other light clothing. Some were shirtless when arrested. Arrestees who reported requesting blankets were not given any. Many arrestees were kept in holding pens where tubes running from the air conditioning trucks outside were venting directly and forcefully into their cells from across an open floor;

- Arrestees were kept barefoot at TAPS. I personally saw one such arrestee later at the City and County Building. I saw her marched from the

[3] Had the phone call been permitted earlier, arrestees could have been counseled on their bond options, and the positive and negative consequences of posting their own bond.

elevator to the courtroom in bare feet and leg shackles. I saw her appear in front of the judge in bare feet. At least one other arrestee I personally saw in court was missing one shoe and was sock-footed.

6. Misinformation provided to arrestees at TAPS

During an August 14th, 2008, meeting between myself, Manager LaCabe, Director Lovingier, Mr. Fine and ACLU of Colorado Legal Director Mark Silverstein, we discussed the ACLU's position that attorney access had to be provided at TAPS. Manager LaCabe questioned the purpose of such attorney access. The night of August 25th and 26th drew into sharp relief just how critical that access would have been, and how the City's decision to deny arrestees that access fundamentally prejudiced their most basic rights.

The City provided arrestees with pre-printed forms, or "trip tickets," that purported to contain all the charges that were being lodged against the arrestee. The forms almost universally contained charges such as obstructing streets and interference with police authority. In addition, however, the forms included additional other charges that included begging, loitering, and throwing stones and missiles. Arrestees looking at the forms thought that they were facing 6, 7 or 8 different charges.

It was not until later that an assistant city attorney explained, for the first time, that the charges for arrestees were "pre-printed" on the forms, and that the protocol was supposed to have been to "cross-out" the charges that arrestees were not facing, with the remaining charges being the ones actually brought against arrestees. The assistant attorney explained that that it had been an error that the charges were not "crossed-out."

In addition, the summons and complaint form filled out by officers reflected precisely the same error—on the face of the summons there were typed charges that made it erroneously appear that the arrestee was facing numerous charges which, according to the City's questionable protocol, should have been "crossed out." In addition, on some summons forms officers had mistakenly written-in or checked off charges by hand in addition to the pre-printed charges. Thus, one arrestee's summons and complaint form that I reviewed appeared to have 6 charges, but upon further inspection it revealed that 2 pairs of the charges were duplicates—the arrestee was actually only charged with 2 ordinance violations, not 6.

In addition, it was evident that the arrestees were laboring under a myriad of misunderstandings and misinformation that was predictably highly coercive in convincing an arrestee to plead guilty, and could have been remedied if they were provided a confidential visit with legal counsel, including, but not limited to:

- If they plead not guilty they could not post bond;

- If they plead not guilty would result in a "double-sentence" if they were convicted;

- If they plead "not guilty" they could not later change their plea;

- They were facing "years" in jail for a conviction of a single particular charge;[4]

- That third parties could not post their bond;

- A number of other basic and common misunderstandings about the complicated criminal justice process including, but not limited to, lack of information for out-of-town arrestees about the possibility of moving or continuing future court dates.

7. Conditions of confinement at the City and County Building

After being moved from TAPS, arrestees were brought to the fourth floor of the City and County building. Nearly all were flexi-cuffed on the right wrist to another person on the right wrist, which was a painful and uncomfortable position especially when seated in rows of seats in the jury box, as one person had to constantly have his or her arm draped over her body at all times. The arrestees were also put in leg shackles. Arrestees remained flexi-cuffed to other arrestees even when they were inside the holding cells. Even more shocking, however, was that deputies refused to release persons from flexi-cuffs for the purpose of using the bathroom. Thus, arrestees that had to use the restroom were forced to do so while be flexi-cuffed to another person.[5]

8. Attorney-client visits denied at City and County Building

It was our understanding from Director Lovingier that although the City refused to allow attorneys access to TAPS, arrestees would be permitted to have confidential meetings in private rooms with attorneys at the City and County Building. During the night of August 25th and 26th, however, we learned for the first time that no confidential meetings with arrestees would be provided at all.

Attorneys from the PLP and ACLU were not permitted a single confidential attorney visit with any arrestee at the City and County building. The only meetings that the sheriff's department permitted prior to court appearance was to allow PLP and ACLU attorneys to speak to arrestees in the holding cells, or "cages," on the fourth floor of the City and County Building, in the presence of

[4] In fact, all the charges were municipal court violations that do not carry such penalties.
[5] In addition, although deputies clipped the middle of the flexi-cuffs apart upon release from jail, they sometimes left the actual cuffs on like bracelets. One arrestee came to the PLP office and had to use wire cutters to remove his flexi-cuffs.

sheriff's deputies and other arrestees, and only for a few minutes. ACLU and PLP attorneys were never permitted to meet one-on-one with a single client at the City and County Building. Later, the sheriff's office changed course and prohibited even these limited non-confidential visits on the 4th floor.

Even when arrestees were brought down to court, ACLU and PLP attorneys and arrestees were not provided with any opportunity for a confidential visit. The only access we were given to these clients was to whisper with them while the clients were in the jury gallery, in open court in front of the judge, court staff, assistant city attorneys, a reporter from the Rocky Mountain News in the gallery, and sheriff deputies. In addition, because of the fact that each arrestee was flexi-cuffed to another arrestee in the same awkward fashion, it was not even possible to whisper to a client without another arrestees' ear being literally inches away from the conversation. Even these limited, non-confidential conversations were incredibly brief, as they could be conducted only in open court while the court was waiting for pleas to be entered.

9. <u>The City did not tell ACLU and PLP attorneys about arrestees at PADF</u>

We had long understood that every person arrested during the DNC on municipal charges would be processed at the TAPS and brought to the City and County building for a hearing. We also understood that because things would be moving relatively quickly, it would be nearly impossible for the sheriff or the court to inform attorneys in advance of who would be appearing in court. Thus, the only way an attorney could make sure he or she was present to appear with his client in court would be to "camp out" in the courtrooms and wait for the client to appear. In fact, several private attorneys were in the courtroom doing just that, along with PLP and ACLU attorneys, in the wee morning hours of August 26, 2008.

The City was well aware that PLP and ACLU attorneys were ready, willing and able to meet with any person arrested during the DNC, and more specifically, that PLP and ACLU attorneys were at the court from 11 p.m. on the night of August 25th, 2008 and were staying until each and every arrestee came to the City and County Building. I personally spoke with DSD sergeants each time I was permitted into the cages, and requested and received updates on when the next buses were coming from TAPS and how many arrestees were left at TAPS.

In the early morning of August 26, 2008, we were told that that there were only approximately 50 arrestees left at TAPS who were coming shortly in two buses, a bus of 22 and a bus of 30. Later that morning, however, after only seeing perhaps an additional two-dozen arrestees, ACLU and PLP attorneys were abruptly told that all the arrestees had been brought over, although clearly 50 additional arrestees had not come through court by that time.

It wasn't until later that the ACLU and PLP learned from the friends and relatives of other arrestees that a significant number of arrestees had been taken to Denver's Pre-Arraignment Detention Facility ("PADF"), not the City and County building. Although City officials knew that ACLU and PLP attorneys were ready and able to meet with arrestees, we were lead to believe that all the arrestees had come from TAPS and had their court hearings. In fact, a substantial number of arrestees were transported to the PADF, contrary to the process that was communicated to us prior to the DNC. Had we been informed that people were being detained at PADF, we would have had confidential visits with those arrestees.[6]

Arrestees at PADF reported that they believed they were separated from other arrestees because the City had identified them as "organizers" or "ringleaders," although it is unclear what criteria or evidence the City could have relied upon to make any such alleged designation. We look forward to getting more information from the City on why this last group of arrestees was sent to PADF instead of through the announced protocol, and why ACLU and PLP attorneys were not notified that arrestees were at custody in PADF, but rather lead to believe that all arrestees had come to court.

10. Arrestees may have entered unknowing and involuntary guilty pleas

It cannot be underestimated how gravely and seriously the misinformation provided by the City, the denial of telephone access, the denial of confidential attorney visits at TAPS, the denial of confidential attorney visits at the City and County building, and the conditions of confinement and general fatigue prejudiced the rights of these arrestees and their ability to rationally and knowingly make informed decisions about the charges brought against them.

Most critically, of course, arrestees at TAPS never had the chance to be counseled by attorneys who could have asked them questions about the facts of the events of that evening, and discussed whether there were serious questions regarding the existence of probable cause for their arrest and whether the government would be able to prove the elements of the crime beyond a reasonable doubt. Of course, a citizen's access to information about the nature of the charges, the elements the government must prove to convince a jury to convict them of those charges, and possible defenses is a fundamental part of legal counsel in our criminal justice system.

In addition, the other circumstances described in this letter, individually and in their totality, call into question whether any guilty plea could have possibly been knowing or voluntary. After spending hours sitting on the road, arrestees were transported to TAPS were they sat in ice-cold pens for hours without blankets, unable to sleep, unable to use the bathroom except with another person, some unable to make any phone calls. Arrestees had a number of misunderstandings

[6] Unlike TAPS, the City does allow confidential attorney visits at PADF.

about their rights and the criminal process, not the least of which was misinformation provided by the City to many arrestees that falsely showed the arrestees facing a half dozen or more criminal charges when they were only actually facing 1, 2 or 3 charges. It is not surprising that when arrestees heard that a plea deal included pleading guilty to only one charge, this misinformation was highly coercive in convincing some to take the plea. Out-of-town arrestees mistakenly believed that they had no ability to work with the court system to set court dates around already scheduled flights, and often times believed they were facing much stiffer jail penalties that the ordinances actually permitted. For the entire time in TAPS, not a single arrestee was permitted to speak confidentially with a PLP or ACLU, or any other, attorney.

Not only did arrestees not have the opportunity to discuss with legal counsel the charges, or their possible defenses, or their rights and the procedures of the criminal process, they were also denied any confidential attorney client visits at the City and County Building. Some arrestees got limited access to PLP and ACLU attorneys who were permitted for to talk to them in groups through thick wire screens for a few minutes (until the City subsequently revoked that access). The only other counsel they received was in rushed, whispered conversations in the jury gallery box surrounded by other arrestees, the judge and court staff, and sheriff deputies.

When arrestees were forced to make a decision that could possibly result in a conviction that would forever remain on their record, many had already made up their minds after hours of detention, able to rely only upon misinformation and rumor, and completely isolated from any legal advice. Even those attempting to come to a rational decision were having to do so at 4, 5 or 6 a.m. in the morning, after hours of confinement, without being fed, without sleep, bound uncomfortably by flexi-cuffs to another arrestee, trying to understand complex legal terms and concepts and accurately and rationally relate the facts of their arrest to an attorney in a non-confidential setting in front of a court eager to move through the docket. Certainly, many would agree that such conditions did not permit a knowing and voluntarily plea.

11. <u>The City must correct these problems immediately</u>

With two days remaining in the convention, the City must permit attorney access at TAPS. We know at one time that the City was considering housing a functioning county court at TAPS. Surely if the facility had the physical capacity to house a court, several pairs of chairs and office cubicle dividers could be accommodated against a wall for confidential attorney client visits.

In addition, the City should remedy other problems including, but not limited to, informing detainees that even if they are vegetarian there are items in the lunches they can eat, providing blankets at TAPS, providing shoes or slippers to arrestees without footwear, allowing phone calls and allowing the calls

immediately upon entering TAPS if the arrestee so wishes, permitting confidential attorney consultation on the 4th floor of the City and County building, and flexi-cuffing arrestees individually, and permitting them to use the restroom individually and in private.[7]

I look forward to hearing from you at your earliest convenience. When you respond, please also copy Legal Director Mark Silverstein.

Sincerely,

Taylor Pendergrass
Staff Attorney, ACLU of Colorado

cc. Manager of Safety Al LaCabe (sent via email).

[7] All videotape or digital footage from TAPS should be preserved.