

<p>Denver District Court 1437 Bannock Street, #256 Denver, CO 80202</p> <hr/> <p>STEPHEN NASH, an individual, VICKIE NASH, an individual, and AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,</p> <p>Plaintiffs,</p> <p>v.</p> <p>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,</p> <p>Defendants.</p>	<p>This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:</p> <p>This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).</p>
<hr/> <p>John A. Culver, Esq., #21811 Dean H. Harris, Esq., #35017 Benezra & Culver, L.L.C. 141 Union Blvd., #260 Lakewood, CO 80228 (303) 716-0254 jaculver@bc-law.com</p> <p>Mark Silverstein, Esq., #26979 ACLU of Colorado 400 Corona Street Denver, CO 80218 (303) 777-2490 msilver2@att.net <i>Attorneys for Plaintiffs</i></p>	<hr/> <p>Case Number:</p> <p>05-CV-4500</p> <p>Div.: Ctrm:</p>
<p align="center">AFFIDAVIT OF MARK SILVERSTEIN, ESQ.</p>	

INTRODUCTION

1. I am the Legal Director of the American Civil Liberties Union of Colorado, and I have worked in this position since 1996. I direct the ACLU's litigation efforts in Colorado. I am

one of the attorneys of record in almost all of the ACLU's Colorado cases, and I also serve as a spokesperson for the organization outside the court to articulate the ACLU's positions on civil liberties issues.

2. In the early part of 2002, the ACLU of Colorado came into possession of several documents that originated from the criminal intelligence files maintained by the Intelligence Unit of the Denver Police Department (DPD). The documents indicated that the DPD had been systematically monitoring and recording the peaceful protest activities of Denver-area residents and keeping files on the expressive activities of law-abiding advocacy organizations, in some cases falsely labeling them in the files as "criminal extremist" groups. The ACLU also learned that the DPD had disseminated these files, complete with the erroneous "criminal extremist" label, to at least some third parties.

3. On March 11, 2002, I wrote a letter about these files and their ominous implications for civil liberties, to Wellington Webb, who was then the Mayor of Denver. On behalf of the ACLU, I asked Mayor Webb to take immediate action to stop the political surveillance of peaceful protesters; to investigate the police department's actions; and to provide the public with a full accounting.

4. At a well attended news conference that same day, the ACLU revealed the existence of these files, which the press immediately began calling the "Spy Files." The ACLU released individual files on Stephen Nash and Vickie Nash and another file on the Chiapas Coalition, a Denver-based organization that supports the rights of indigenous persons in Mexico's poorest state. Copies of the documents released by the ACLU that day are attached as Exhibit 1.

5. Mayor Webb called a news conference two days later and said he shared the ACLU's concerns. He said that the DPD's Intelligence Unit currently maintained a database with files on 208 organizations and approximately 3200 individuals. He said that the DPD had maintained much more extensive records but had purged 90% of them when it moved from paper files to the database several years earlier. He acknowledged that the database inappropriately included files on persons who posed no threat, and he said that a review of the files would be conducted and inappropriately maintained files would be purged.

6. On March 28, 2002, ACLU attorneys filed a class action in Denver District Court to challenge the Denver police practice of monitoring and keeping files on political expression and political association. The suit, seeking declaratory and injunctive relief only, alleged that the practices of the Denver Police Department interfered with, chilled, and infringed the right of the plaintiffs to exercise fully and freely their rights to freedom of speech, freedom of the press, freedom of assembly, freedom of association, and freedom to petition their government for redress of grievances, as well as their freedom to travel, their rights to privacy, due process, and the equal protection of the laws. Shortly after the suit was filed, Denver removed the case to federal court, where the case was captioned as American Friends Service Committee v. City and County of Denver, No. 02-N-0740 (CBS). I served as co-counsel in the case, which was resolved with a negotiated settlement agreement in May, 2003. As part of that settlement agreement, Denver adopted a written intelligence policy that prohibits collecting information

about First Amendment activities of persons or organizations unless 1) the information is directly relevant to criminal activity; and 2) there are specific facts amounting to reasonable suspicion that the person or organization is involved in that criminal activity.

7. As a result of my work on the litigation and my involvement in the controversy both inside and outside the courtroom, I have personal knowledge of the facts in this Affidavit, which are relevant to this Court's evaluation of the request for public records in this case.

The strong public interest in the Spy Files controversy

8. The Spy Files controversy was a subject of strong public interest. Mayor Webb appointed a panel of three former judges to review the Denver Police Department's Intelligence Files and make recommendations. The Public Safety Review Commission conducted an investigation, held public hearings, and issued a preliminary report. When the Denver Police Department decided to permit the subjects of the files to obtain copies, hundreds showed up on the first day to request their files at the Police Department. The Spy Files became an issue in the Denver municipal elections in the Spring of 2003, and candidates for mayor and city council fielded questions about the Spy Files and the Intelligence Unit. The City and County of Denver has agreed that the Spy Files will be archived and preserved as part of the Western History Collection at the Denver Public Library. After the files are archived, individuals will be permitted to find out if their names are in the files and will be able to obtain copies any such files (with the names of others redacted).

9. The Denver news media covered the Spy Files controversy frequently and extensively. A search of the Lexis news database reveals 309 articles in the Denver Post or the Rocky Mountain News that contain the words "Spy Files." Indeed, the local media's interest was underscored by the decision of The Denver Post to intervene in the Spy Files lawsuit for the purpose of challenging the City's designation of most of the discovery documents as "confidential," which prohibited the plaintiffs from disclosing them to the public. The national news media also devoted considerable attention to the controversy. I am aware of coverage in the Los Angeles Times, the Chicago Tribune, the New York Times, the Washington Post, ABC News, MSNBC, NPR, CNN, Harper's, The News Hour With Jim Lehr, and 60 Minutes.

The internal investigations

10. The Denver Police Department opens internal investigations of alleged misconduct either as a result of a citizen complaint or on the Department's own initiative. When I submitted a written request for the public records at issue in this case, my letter referred to three internal investigations that are related to the Spy Files controversy. It appears from the City's Vaughan index, which was not produced until after this litigation was filed, that the DPD regards these as only two investigations. One was initiated as a result of a citizen complaint filed by Stephen and Vickie Nash. The other, opened on the Department's own initiative, includes an internal inquiry launched in March, 2002, and also includes an investigation launched as a result of developments in September, 2002.

11. In July, 2002, Stephen and Vickie Nash filed a citizen complaint with the Denver Public Safety Review Commission (PSRC). The Nashes complained about political surveillance by the Denver Police Department, including the monitoring evidenced by the sample Spy Files on the Nashes that had been previously disclosed. The PSRC did not have jurisdiction to investigate or consider citizen complaints at that time unless and until the Denver Police Department had completed an internal investigation of the complaint. Pursuant to the standard procedure in effect at the time, the PSRC referred the Nashes' complaint to the DPD's Internal Affairs Bureau. On March 16, 2004, Chief Whitman wrote to the Nashes and said that the investigation had been completed. A copy of Chief Whitman's letter is attached to the Complaint in this case as Exhibit B. The investigation of the Nashes' complaint is one of the internal investigations related to the Spy Files controversy to which the ACLU's request for public records refers.

12. In the course of litigating the Spy Files case, I became aware that the Denver Police Department had initiated what it referred to as an "internal investigation" into the activities of the DPD Intelligence Unit shortly after the ACLU's news conference in March, 2002. I understood that one purpose of this investigation was to determine whether DPD policies were violated by the kind of political monitoring and surveillance unconnected to suspected criminal activity that was evidenced by the documents the ACLU of Colorado released to the public in March, 2002. Indeed, one question was whether the DPD's Intelligence Unit even had a written policy that had actually been distributed to Unit's detectives. (At a news conference on March 13, 2002, Mayor Webb distributed copies of what he said was the DPD's Intelligence Policy, but information that emerged later indicated that it had never been distributed to the detectives.) It was also my understanding that this investigation was launched on the Department's own initiative. This internal investigation is another of the internal investigations related to the Spy Files controversy to which the ACLU's request for public records refers.

13. The ACLU's request for public records refers to a third internal investigation that was launched in September, 2002. The following paragraphs are intended to provide the Court with background and context.

14. For the first several months of the Spy Files litigation, Denver officials maintained that all of the DPD's intelligence files were contained in a computer database using software purchased from Orion Scientific Systems. It was this Orion database that Mayor Webb referred to when he said, in March, 2002, that the intelligence unit had files on approximately 3200 individuals and 208 organizations. The City maintained that all of its hard-copy intelligence files had been purged and destroyed when it switched to the Orion database in 1999 or 2000. When discovery in the litigation began in the summer of 2002, the City made available a CD-ROM containing the data from the Orion database, and it insisted that this CD contained the totality of the DPD's criminal intelligence files. The City maintained this position, which turned out to be factually wrong, in responses to formal discovery requests.

15. The City's position changed in September, 2002, however, when the City "discovered" six filing cabinets in the office of the DPD's Intelligence Unit. The file cabinets contained numerous hard-copy intelligence files that had not been purged and that were responsive to the plaintiffs' outstanding discovery requests in the Spy Files litigation.

16. Over the next few months, the attorneys in the Spy Files lawsuit worked on ironing out disputes concerning the plaintiffs' access to the newly "discovered" materials. During that time, I was told that the Denver Police Department had taken steps to ensure that the detectives of the Intelligence Bureau no longer had access to the materials in the six file cabinets. In addition, I learned that the desks of each detective in the Intelligence Unit had been combed to ensure that there were no additional intelligence files or portions of them unaccounted for. Finally, I learned that the Denver Police Department had made copies of all the computer files on the hard drives of the Intelligence Unit detectives. I eventually received an inventory of the materials found in the six file cabinets and in the desks of the Intelligence Unit detectives. Included in that inventory were two CD's that contained the computer files copied from the hard drives of the detectives assigned to the Intelligence Unit.

17. It appeared that command staff of the DPD was embarrassed to learn that it had been wrong when it had repeatedly represented that no hard-copy intelligence files existed. I was told that the DPD had launched an internal investigation to determine, in part, whether discipline of any Intelligence Unit detectives was warranted for failing to respond completely and accurately to requests for materials that would be responsive to plaintiffs' discovery requests in the pending lawsuit. The scope of this investigation also included inappropriate emails and email attachments (described in paragraphs 23-30 below) that were discovered on the hard drives of several of the Intelligence Unit detectives. In the ACLU's request for public records dated April 14, 2004, I referred to this internal investigation as a third investigation related to the Spy Files controversy. From a review of the City's Vaughan index, it appears that the City does not regard this internal investigation as distinct from the other Department-initiated investigation described above.

Orders issued in American Friends Service Committee v. City and County of Denver

18. In its Vaughan index, the City asserts that numerous documents cannot be disclosed because, according to the City, disclosure is "precluded by a court order entered in American Friends Service Committee v. City & County of Denver," the lawsuit over the Denver Spy Files. See, e.g., Vaughan Index at ¶¶ 55, 90, 91, 92, 108, 110-124, 128. The City does not provide the date of the court order on which it relies. In order to assist the Court in evaluating Denver's argument, I will provide background about the only two court orders in the Spy Files case that even arguably apply to the City's disclosure of information. As will be seen, neither of those orders purports to forbid the City from disclosing the public records requested in this case.

The Protective Order

19. When discovery began in the Spy Files case, the parties negotiated the terms of a protective order that was signed and entered by the court on July 12, 2002. I will refer to this

order as the Protective Order. A copy is attached to this Affidavit as Exhibit 2. The order facilitated discovery by permitting a party to designate information as “confidential” when turning it over to the opposing party. A party receiving information designated as “confidential” was forbidden to disclose that information outside the litigation. The designating party, however, remained free to disclose any information that it had designated as confidential. When such disclosure occurred, the information was no longer covered by the Protective Order. When the parties needed to attach information designated as “confidential” to documents filed with the court, the Protective Order required the filing party to invoke the procedure for filing documents under seal. Accordingly, a number of documents were filed under seal during the course of the litigation.

20. The Protective Order also provided a procedure whereby a party could challenge the designation of particular information as “confidential.” The Plaintiffs filed several motions challenging the designation of particular discovery documents, or portions of those documents, as “confidential.” As a result of those motions, the “confidential” designation was removed from a number of documents that the City produced in discovery, in some cases after redacting names or information deemed personal. These documents therefore became disclosable to the public.

21. There is only one class of documents that the Protective Order arguably prohibits the City from releasing: documents that the plaintiffs produced and designated as “confidential” pursuant to the Protective Order. None of the documents described in the City’s Vaughan index falls into this category.

The unsealing order

22. The court order to which the City most likely refers was issued on February 19, 2004. This order, which I will refer to as the “Unsealing Order,” resolved a motion filed by The Denver Post, which intervened in the Spy Files lawsuit to ask the court to unseal the documents that had been filed in the case under seal. The Unsealing Order is available at 2004 U.S. Dist. LEXIS 18474.

23. Pursuant to the Unsealing Order, the publicly-accessible court file now contains some limited information about a series of racist, sexist, and otherwise inappropriate emails and email attachments that circulated among certain detectives of the Intelligence Unit and other law enforcement officers. These emails were found on the two CDs that contain the copies of the files on the hard drives of the Intelligence Unit detectives that the Denver Police Department made in September, 2002. (See *supra*, ¶ 16.) These highly inappropriate emails were among the issues included in the internal investigations related to the Spy Files controversy. They are referenced in the City’s Vaughan index. See, e.g., Vaughan Index, ¶ 121 (“lists emails which the Department determined were ‘questionable’”); ¶ 122 (“identifies questionable audio and video attachments”).

24. To assist the court in assessing the City’s claim of confidentiality, I will recount the factual background regarding these emails and what has become public so far.

25. In early December, 2002, I spent two days at the Denver Police Department reviewing the materials in the six file cabinets that were “discovered” in September, 2002. Although I was free to review the paper files and designate documents for copying, I was not able to review or copy the two CD’s containing the computer files. After intervention by the court, a special procedure was arranged for reviewing and obtaining copies of files on the CD’s. Pursuant to that procedure, I was permitted to review the CD’s in the office of the City’s attorneys. I was then required to designate any specific files that I wanted to copy for use in the litigation. The attorneys for the City then had the opportunity to review those files and determine if they would be produced or whether the City would object to their production.

26. Counsel for the plaintiffs eventually asked the city to reproduce a number of emails and email attachments found on the CDs. The City objected and filed a sealed motion for a protective order. In portions of that motion that now are unsealed, the City characterized the requested emails as “R-rated and X-rated photos and audio files describing excretory functions” and as “images and audio files apparently obtained from the internet or e-mailed to certain employees.” The City noted that the files contained “photos of nude women” and asserted that disclosure would “embarrass the officers on whose drives these e-mails were found, or who forwarded the e-mails to others.” The City contended that the materials were not relevant in the Spy Files litigation.

27. Attached to the City’s motion was correspondence between the parties, exchanged just before the motion was filed, discussing the requested emails. A letter from plaintiffs’ counsel (now unsealed) states that the requested emails are evidence of “the senders’ bias and/or prejudice against certain racial groups and/or persons who hold certain political beliefs.” The plaintiffs contended that the emails “shed additional light as to the motivation of members of the Intelligence Unit in singling out certain individuals and groups for surveillance and/or inclusion in the Spy Files.”

28. The letter from plaintiffs’ counsel further asserts that the emails are relevant to the Denver Police Department’s ability to enforce its policies and to supervise and control the officers of the Intelligence Unit. “Presumably, the City has a policy against use of taxpayer-funded email systems to circulate pornography and sexist and racist images and messages,” the letter said. The letter contends that the emails are evidence of the City’s failure to enforce that presumed policy, and it notes that “the supervisors who should have been enforcing such policy themselves violated it by sending and republishing offensive emails.” The letter further states that the emails support the inference that the Denver Police Department is not capable of solving the problems with, or changing the culture of the Intelligence Unit.

29. Plaintiffs’ counsel filed a response to the City’s motion for a protective order. Although much of the discussion of the emails remains sealed, the court unsealed the following description:

As for the e-mails themselves, the City is correct that several of them contain R and X rated photos of the most despicable and profane nature. But the City has only set forth part of the story, and it has argued the wrong standard in seeking to

prevent their disclosure. The X rated e-mails contain photographs . . . that attempt to dehumanize women, while the R rated e-mails contain racial and political messages that demonstrate clear prejudice and bias against certain ethnic and national origin groups.

The plaintiffs explained that they and some members of the class had been targeted for surveillance because of their public stands against racism; against the former South African apartheid regime; in support of Palestinian self-determination, and because of criticism of U.S. policies in Afghanistan and Iraq. The plaintiffs attached exhibits from the Spy Files documenting the Intelligence Unit's monitoring of groups espousing those causes. In asserting the relevance of the emails, the plaintiffs said that these particular causes "have a relationship to the subtitles used to describe the photographs contained in the May 29, 2002 email." The plaintiffs further stated that "the emails betray a vicious contempt for certain political positions that appear to prompt inclusion in the Spy Files, a bias that may play a role in the intelligence officers' views about which groups and which activities merit the surveillance and monitoring that is challenged in this lawsuit." A footnote described additional emails as "containing pornographic photographs and e-mails containing recorded phone messages of a racially biased and despicable nature."

The plaintiffs argued that the e-mails "support Plaintiffs' argument that the creation and retention of the 'Spy Files' on certain individuals and organizations was the result of political and racial biases." Plaintiffs further argued that the emails demonstrate that "the highest ranking police officers in the Department" routinely violate internal policies.

30. Magistrate Judge Shaffer ruled that the emails were not relevant to the litigation and that the City did not have to produce them. He relied on the parties' arguments and the descriptions of the emails in the parties' pleadings. The emails were never submitted for the court's inspection, and they were never part of the court's file.

31. On May 30, 2003, the court granted the Denver Post's motion to intervene in the Spy Files case, which had been pending since December 26, 2002. The Post initially moved to intervene for the purpose of challenging the "confidential" designations on documents that the City had produced in discovery. The Post subsequently narrowed the scope of its intervention to challenge only the continued maintenance of litigation-related documents filed with the court under seal. *See American Friends Service Committee v. City and County of Denver*, 2004 U.S. Dist. LEXIS 18474, *3 - *10 (D. Colo. 2/19/04).

32. The court's Unsealing Order does not prohibit Denver from disclosing any of the documents requested in this case. The Unsealing Order is not directed to any documents in the custody of the City; it is directed only to documents filed under seal with the court, and it directs that certain documents, or portions of them, be unsealed.

33. On February 22, 2004, after the court issued its Unsealing Order, the Denver Post published an article based on the now-public portions of the court file that discuss the emails.

See Kirk Mitchell, “‘Spy-files’ cops sent ‘X-rated,’ abusive e-mails,” The Denver Post, Feb. 22, 2004. A copy of that article is attached as Exhibit 3.

Drafts of policies for the Intelligence Unit

34. In some cases, the City has stated that a document cannot be disclosed because it is a draft of an Intelligence Policy. During the Spy Files controversy, however, numerous drafts of possible intelligence policies were readily disclosed to the public. For example, the document attached as Exhibit 4, which is marked as a draft dated March 21, 2002, was produced during the Spy Files litigation, and the City did not mark it as “confidential. Another draft disclosed in the same manner is attached as Exhibit 5. When the three former judges appointed by Mayor Webb to review the Intelligence Files began their work, they publicized a draft intelligence policy and invited public comment. That draft, dated April 16, 2002, is attached as Exhibit 6. The former judges revised that draft and released yet another draft of a proposed intelligence policy when they issued their report in July, 2002. A copy of that July, 2002, draft is attached as Exhibit 7.

Information about undercover operations

35. The City’s Vaughan index states that certain documents are exempt from disclosure because they reference undercover operations. See, e.g., Vaughan Index, ¶ 51, 84-88. On the contrary, internal police department documents discussing or documenting the Intelligence Unit’s use of undercover officers to infiltrate peaceful political groups have already become public. During the Spy Files litigation, the City produced several such documents, which are attached as Exhibit 8. These documents were originally marked as “confidential” but were subsequently released from the Protective Order and made available to the public.

Signed August 16, 2005.

Mark Silverstein, Esq.

State of Colorado)
)ss.
County of _____)

Subscribed and sworn to before me this _____ day of _____, 2005 by Mark Silverstein, Esq.

WITNESS my hand and official seal.

My Commission expires:_____.

Notary Public