DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 20 E. Vermijo Colorado Springs, CO 80903 **Plaintiffs:** CITY OF COLORADO SPRINGS, a municipal corporation, and COLORADO SPRINGS POLICE OFFICER JEFFREY L. HUDDLESTON **Defendant:** COLORADO SPRINGS INDEPENDENT NEWSPAPER GROUP, INC. **Attorneys for Defendant:** Steven D. Zansberg, #26634 FAEGRE & BENSON LLP 370 Seventeenth Street, Suite 2500 Denver, Colorado 80202 Telephone: (303) 607-3500 Facsimile No. (303) 607-3600 E-mail: szansberg@faegre.com	▲ **COURT USE ONLY** ▲ Case Number: 02-CV-3613 Division 7

DEFENDANT'S RESPONSE IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The defendant the Colorado Springs Independent Newspaper Group, Inc. ("*The Independent*"), by and through its undersigned counsel, respectfully files this response in opposition the plaintiffs' Motion for a Preliminary Injunction, pursuant to § 1-15 of Rule 121, C.R.C.P.

INTRODUCTION

As the evidence that will be adduced at the hearing set on the plaintiffs' motion will demonstrate, John Dicker and Cara DeGette, acting as reporter and editor of *The Independent*, arrived at the offices of the City of Colorado Springs Human Resources Department on October 29, 2002, and identified themselves as members of the news media, representing *The Colorado Springs Independent* weekly newspaper. Ms. DeGette provided Catrina Carrington, the clerk on duty at that time, with a business card indicating her position as editor of *The Colorado Springs Independent*. Ms. Carrington clearly understood that Dicker and DeGette were there as members of the news media and had asked to see the file for Officer Jeffrey Huddleston that was accessible to members of the news media. Ms. Carrington said something to the effect, "Sure, you just need to fill out this form." When

Dicker and DeGette completed the form they'd been provided, they again clearly indicated their affiliation with *The Colorado Springs Independent*. Ms. Carrington then made available to Dicker and DeGette Officer Huddleston's file, including the assessments of his professional performance and a description of disciplinary proceedings against Officer Huddleston that were prompted by a citizen complaint concerning Huddleston's discharge of his official duties as a peace officer.

ARGUMENT

For the reasons set forth below, the plaintiffs have not and cannot satisfy their burden for issuance of a preliminary injunction, which in this case constitutes a prior restraint on publication of truthful information, lawfully obtained, on a matter of public concern. Under well-established precedents in Colorado and from the United States Supreme Court, a court order prohibiting *The Colorado Springs Independent* from publishing this newsworthy information is a flagrant violation of the First Amendment's prohibition against prior restraints on free speech.

1. PRIOR RESTRAINTS ARE PRESUMPTIVELY UNCONSTITUTIONAL

As a direct order to the news media not to publish certain information, the preliminary injunction sought by the plaintiffs would constitute a classic "prior restraint" and is presumptively unconstitutional under the First Amendment. *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 2771 (1993); *People v. Denver Publ'g Co.*, 597 P.2d 1038 (Colo. 1979).

As the Supreme Court has stated emphatically, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Therefore, a prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *People ex rel. McKevitt v. Harvey*, 176 Colo. 447, 491 P.2d 563 (1971). This is so because a prior restraint barring the publication of news information "is the very essence of censorship." *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir.), *modified*, 820 F.2d 1354 (1st Cir. 1986). The Supreme Court is even reluctant to approve a prior restraint in the name of national security or to protect a competing constitutional right:

> Even where questions of allegedly urgent national security [citation omitted] or competing constitutional interests [citation omitted] are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n*, 96 S. Ct. at 2804) (alteration in original); *see also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (prior restraint, "under all but the most exceptional circumstances, violates the Constitution"). Indeed, the presumption against enjoining publication of news information is so strong that **the Supreme Court has not *ever* affirmed the imposition of such a prior restraint**.

A preliminary injunction prohibiting the publication of information in the possession of *The Independent* would violate not only the First Amendment to the United States Constitution but also Article II Section 10 of the Colorado Constitution, which provides, without qualification, that "every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty." The Colorado Supreme Court has repeatedly held that this provision affords greater protection for individuals' free speech rights than does the First Amendment to the United States Constitution. *See, e.g., Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002); *Bock v. Westminster Mall*, 819 P.2d 55, 59-60 (Colo. 1991) (collecting cases). The Colorado Supreme Court has recognized "the basic proposition that statutes or court decisions which tend to prohibit or suppress the publication of truthful and lawfully obtained information can seldom satisfy constitutional standards." *Denver Publ'g Co.*, 597 P.2d at 1039-40. Moreover, the Court has cautioned that Colorado's constitutional provision "expressly prohibits [prior] restraints" and contemplates other less restrictive remedies for the abuse of the freedom of speech. *See In re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465, 470 (1956

Under the standards enunciated by both the United States Supreme Court under the First Amendment and by the Colorado Supreme Court under Article II Section 10, an order prohibiting the publication of information lawfully obtained by *The Independent* cannot stand.

2. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Under *Rathke v. McFarlane*, 648 P.2d 648 (Colo. 1982), a party seeking to preliminarily enjoin another party must demonstrate:

1. A reasonable probability of success on the merits;

2. A danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;

3. That plaintiffs have no plain, speedy, and adequate remedy at law;

4. That the granting of a preliminary injunction will not disserve the public interest;

5. That the balance of equities favors the injunction; and

6. The injunction will preserve the status quo pending a trial on the merits.

A plaintiff who cannot satisfy all six of the *Rathke* factors is not entitled to the issuance of a preliminary injunction.

(a) PLAINTIFFS CANNOT DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

In their Complaint, the City and Officer Huddleston plead a single claim for relief, asking the Court to enjoin preliminarily and permanently the defendants from publishing information they obtained when a duly authorized employee of the City of Colorado Springs Human Resources Department provided Officer Huddleston's file to them for review. Notably, the Complaint does not set forth any claim that by publishing the information in its possession the defendants would be violating any of Mr. Huddleston's rights, such as a statutory right to privacy or common law claims for intrusion upon seclusion or publication of private facts. *See* C.J.I.-Civ. 4th 28:1 28:5 (2001).[1] Instead, the plaintiffs rely, both in their Complaint and in their Motion, exclusively upon a provision of the Colorado Open Records Act ("CORA"), § 24-72-204(3), which declares that a custodian of public records shall not grant public access under the CORA to "personnel files." Of course, even if the information disclosed by the City to the defendant were improperly disclosed by the City and contrary to the provisions of CORA (which is refuted above), the fact that the City itself may have violated CORA in no way justifies the imposition of any sanctions – much less a prior restraint – upon the news media who lawfully obtained that information on a matter of public concern. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (holding that the First Amendment prohibits the imposition of civil damages upon a newspaper for publishing private and sensitive information – the name of a rape victim – that the police department had inadvertently disclosed to a reporter-trainee; "where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. . . . Much of the risk from disclosure of sensitive information . . . can be eliminated through careful internal procedures to protect the confidentiality of [governmental] proceedings.") (internal citations omitted).

[1] The City does claim that publication of information obtained by *The Independent* "will result in an unconstitutional deprivation of the right of privacy of the officer." Mot. at 4. Officer Huddleston's *constitutional* right of privacy can only be violated by a governmental ("state") actor, who is subject to *constitutional* restrictions. *The Colorado Springs Independent* is not a state actor.

Moreover, under settled Colorado authorities, the information that City officials made available to the defendant – including information concerning a public official's discharge of his official duties and the police department's investigation and resulting discipline imposed – does not constitute the type of "highly personal and sensitive" information that gives rise to a "legitimate expectation of non-disclosure [by the City]." *Martinelli v. District Ct.*, 612 P.2d 1083, 1091-92 (Colo. 1980). Indeed, other courts have held that an internal affairs file investigating allegations of official misconduct by police officers is not a "personnel file" and is subject to disclosure under Colorado's open records laws. *See A.C.L.U. of Colorado v. City & Cty. of Denver*, Denver Dist. Ct. No. 97-CV-7170; Colo. Ct. of Appeals No. 98-CA-981 (ordering disclosure of entire police internal investigation file, finding that "disclosure promotes the public interest in maintaining confidence in the honesty, integrity, and good faith of Denver's Internal Affairs Bureau") (copies of the trial court's and the Court of Appeal's rulings in this case are attached hereto at TAB A). Colorado's appellate courts have repeatedly found that the mere placement of documents in a folder labeled "personnel file" of a public employee does not render such information automatically subject to non-disclosure. *See Denver Publ'g Co. v. University of Colo.*, 812 P.2d 682, 684 (Colo. App. 1991); *Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) ("A public entity may not restrict access to information by merely placing a record in a personnel file; a legitimate expectation of privacy must exist."). In *Daniels*, the Court of Appeals restricted information that properly may be deemed part of a "personnel file" to information "of the same general nature as an employee's home address and telephone number or personal financial information . . . the type of personal, demographic information listed in the statute." *Id.* Clearly, information concerning how a public official conducts his *public* duties does not satisfy CORA's definition of "personnel file" materials as interpreted by Colorado's Court of Appeals.

Numerous courts have recognized that there can be no invasion of privacy claim premised upon speech concerning official acts of public officers. *See DiManna v. Kearney*, Denver Dist. Ct., Case No. 00-CV-1858, Order of Aug. 28, 2000 at 3 (dismissing invasion of privacy claim brought by Denver police officers based on publication concerning discharge of their official duties) (a copy of the Court's ruling is attached as TAB B); *see also Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 789 (Ariz. 1989) (affirming dismissal of police officers' invasion of privacy claim premised upon publications that related to their performance of their public duties); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435-36 (10th Cir. 1981) (finding police have no right to privacy in documents that relate "simply to the officers' work as police officers"); *Worden v. Provo City*, 806 F. Supp 1512, 1516 (D. Utah 1992) (finding that a police officer "does not have a legitimate expectation of privacy" over information about his conduct while on-duty); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 603 F. Supp. 377, 390 (E.D. Pa. 1985) ("A police officer's on-the-job activities are matters of legitimate public interest, not private facts."), *aff'd*, 780 F.2d 340 (3d Cir. 1985); *State of Hawaii Org. of Police Officers v. Society of*

Prof'l Journalists, 927 P.2d 386, 407 (Haw. 1996) ("[I]nformation regarding charges of misconduct by police officers, in their capacities as such, . . . is not 'highly personal and intimate information.'"); *Cowles Publ'g Co. v . State Patrol*, 748 P.2d 597, 605 (Wash. 1988) ("Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life . . . . They are matters with which the public has a right to concern itself.").

Thus, the plaintiffs have not demonstrated a reasonable probability of success on the merits of the single claim set forth in their Complaint.

(b) PLAINTIFFS HAVE A PLAIN, SPEEDY, AND ADEQUATE REMEDY AT LAW

Plaintiffs assert that an injunction/prior restraint is necessary to protect Office Huddleston's privacy interests. Mot. at 6. As demonstrated above, it is unclear whether the information obtained by *The Independent*, if published in the newspaper, would constitute any actionable invasion of Mr. Huddleston's privacy interests (the City, of course, has no privacy interests). In any case, even assuming *arguendo* that some of the materials that might be published by *The Independent* could, theoretically, constitute an actionable invasion of Mr. Huddleston's privacy, Mr. Huddleston has a "plain, speedy, and adequate remedy at law." Colorado's jury instructions recognize a claim for "publicity given to private facts," that is fully compensable with a court judgment of civil damages. *See* C.J.I.-Civ. 4th 28:5 & 28:16 (2001).

In *Degroen v. Mark Toyota-Volvo, Inc.*, 811 P.2d 443 (Colo. App. 1991), the court reversed the trial court's entry of a preliminary injunction against the picketing of the plaintiff's car dealership by a disgruntled consumer that had been entered to prohibit damage to the plaintiff's reputation. The Court of Appeals held, unequivocally, that the interest in protecting one's reputation from injury, irreparable or otherwise, is insufficient to justify a prior restraint in the form of an injunction. The court recognized that for almost sixty years, "the United States Supreme Court has consistently held that speech cannot be subject to prior restraint merely because it is alleged to be defamatory," citing *Near v. Minnesota*, 283 U.S. 697, 715 (1931), which held that in such cases "for whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws."

The jury instructions for the damages recoverable for a claim for tortious invasion of privacy by publication of private facts are similar to the damages recoverable for defamatory publications. *See* C.J.I.-Civ. 4th 22:13 & 28:16 (2001). There is no logical basis to treat a claim for invasion of privacy differently from a claim for defamation – both involve damages to the reputation and emotional well being of the plaintiff that are claimed to be "irreparable" but for which the law affords an adequate legal remedy of civil damages. Numerous courts

have refused to enjoin publications that were alleged to constitute an invasion of an individual's right to privacy. *See, e.g., In re Providence Journal Co.*, 820 F.2d 1342, 1353 (1st Cir.) (prior restraint not justified where "[t]he only potential danger posed by the restrained speech was to an individual's privacy right. That right can be adequately protected by a subsequent damages action."), *modified*, 820 F.2d 1354 (1st Cir. 1986); *see also O'Leary v. Police Dep't*, 409 N.Y.S.2d 676 (Sup. Ct. 1978) (refusing to enjoin publication that labeled certain police officers as being less qualified than other officers in class).

(c) PLAINTIFFS HAVE NOT DEMONSTRATED AND CANNOT DEMONSTRATE A DANGER OF REAL, IMMEDIATE, AND IRREPARABLE INJURY WHICH MAY BE PREVENTED BY INJUNCTIVE RELIEF

As indicated above, the defendants' publication of truthful information about a public official's discharge of his public duties does not pose the danger of any real, immediate or irreparable injury. This is unquestionably true of information that is properly subject to public disclosure under Colorado's open records laws. Moreover, any injury that Officer Huddleston might suffer from the defendants' publication of such information, if actionable, is fully compensable in a legal claim for civil damages; thus, the injury cannot be said to be "irreparable."

(d) THE GRANTING OF A PRELIMINARY INJUNCTION WILL DISSERVE THE PUBLIC INTEREST

Once again, prior restraints are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. In staying the lower court's injunction in that case, Justice Blackmun stated, "where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. . . . To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n v. Stewart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers). "Enforcement of the First Amendment to the United States Constitution promotes every citizen's fundamental right[s]." *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1409 (D. Colo. 1998); *see also Milliron v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 867 F. Supp. 559, 565 (D. Ky. 1994) ("Clearly the public has a strong interest in protecting [citizens'] freedom of speech.").

Accordingly, the plaintiffs have not demonstrated, and cannot demonstrate, that the granting of a preliminary injunction will not disserve the public interest.

(e) THE BALANCE OF EQUITIES FAVORS THE INJUNCTION

As demonstrated above, and as will be made clear at the hearing on the plaintiffs' Motion, the balance of equities in this case does not favor the granting of an injunction. When they introduced themselves to the city clerk, John Dicker and Cara DeGette fully disclosed their identities as members of the news media interested in obtaining access to whatever records they were entitled to see. To the extent that the information came into the defendants' hands inadvertently or because of the City's negligence, the defendant is not responsible for the City's failure to abide by its own policies. *See Florida Star v. B.J.F.*, 491 U.S. at 534 ("To the extent [that] sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release."); *id.* at 536 ("The fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the department apparently failed to [abide by its own policies prohibiting disclosure] . . . make the newspaper's ensuing receipt of this information unlawful.").

Accordingly, the plaintiffs have not demonstrated and cannot demonstrate that the balance of equities favor the issuance of the injunction.

(f) THE INJUNCTION WILL NOT PRESERVE THE *STATUS QUO* PENDING A TRIAL ON THE MERITS

The *status quo* in this case is that the press is free to report information in its possession, absent a showing of the type of extraordinary and unique circumstances, akin to "imperiling the safety of a transport [of U.S. troops] already at sea," *New York Times v. United States*, 403 U.S. 713, 726 (1975) (Brennan, J., concurring), that would constitutionally justify the issuance of a prior restraint on publication. Absent such a showing,[2] there is no constitutional basis for the court to disturb that *status quo*.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion for a preliminary injunction should be denied.

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[2] *See In re Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir.) (stating that "An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude" as direct, immediate, and certain threats to human life), *modified*, 820 F.2d 1354 (1st Cir. 1986).