SUPREME COURT, STATE OF COLORADO 2 East Fourteenth Avenue Denver, Colorado 80203	
Appeal from the Colorado Court of Appeals Case No. 03CA74 **THE DENVER PUBLISHING COMPANY d/b/a ROCKY MOUNTAIN NEWS, Appellant,** v. **THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, COLORADO; TRACY BAKER, Clerk and Recorder; LEESA SALE, Assistant Deputy Clerk, Appellees**	▲ COURT USE ONLY ▲ **Case Number: 03 SC 783**
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BRIEF OF *AMICUS CURIAE* THE ACLU OF COLORADO

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INTEREST OF *AMICUS CURIAE*

Since its founding in 1952 as the state affiliate of the American Civil Liberties Union, the American Civil Liberties Union of Colorado ("the ACLU") has worked to preserve the civil liberties and civil rights of all persons in Colorado. It is a non-partisan non-profit organization with over 10,000 members. It has often served as *amicus curiae* in the Colorado Court of Appeals, the Colorado Supreme Court, and the Tenth Circuit Court of Appeals, submitting briefs on issues of civil liberties, civil rights, and constitutional law.

The ACLU has worked to advocate for open government, including ensuring that the Colorado Open Records Act is broadly construed to effect its statutory purpose. Likewise, the ACLU has worked to protect the rights of public employees from unnecessary intrusion by their employers. This case presents a conflict between these two important policy objectives. For that reason, the ACLU has a particular interest in the legal standard to be applied in determining when written communications between public employees regarding personal matters is subject to public disclosure under the Colorado Open Records Act.

All of the briefs submitted in this matter to date support reversal of the decision below. All charge that there is no privacy exception to the Open Records Act, and most rely on a sweeping "waiver" theory in which an employer's electronic mail policy may be used to trump all other considerations regarding a worker's expectations of privacy. Accordingly, the Court has *sua sponte* solicited amicus briefs from a number of organizations, including the ACLU. This brief is submitted in accordance with that order, and to address the risks posed by court adoption of the legal standards proposed by the parties.

QUESTIONS PRESENTED FOR REVIEW

Whether constitutional privacy rights may exempt certain written communications between public employees from disclosure?

Whether individual public employees have standing to assert an exemption from disclosure when the records' custodian did not assert a risk of substantial injury to the public interest and the sole persons objecting to disclosure were the public employees who generated the e-mails?

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

In 2002, public attention focused on Tracy Baker ("Baker"), the publicly-elected Arapahoe County Clerk and Recorder, who was accused of a number of improprieties. Among other things, Baker was charged with having an extramarital affair with a subordinate, Leesa Sale ("Sale"). Investigators uncovered several hundred e-mails exchanged between Baker and Sale, a discovery which generated substantial media interest.

On October 25, 2002, the Board of County Commissioners for Arapahoe County ("the County") filed a "Petition for Order Determining Whether Certain Public Records May be Disclosed" with the Arapahoe County District Court, seeking to determine the extent to which the e-mails were subject to public disclosure. Thereafter, the Denver Publishing Company ("the Newspaper") was permitted to intervene. The trial court concluded that all of the communications at issue were public records subject to disclosure under the Colorado Open Records Act, C.R.S. § 24-72-201 *et. seq*. ("CORA"). The trial court certified its written order as a final appealable judgment on January 7, 2003. *Vol. I, p. 323.*

The two public employees whose communications were at issue–Baker and Sale–appealed the trial court's decision to the Colorado Court of Appeals. On July 17, 2003, the Court of Appeals affirmed in part and reversed in part, holding as follows:

- The e-mails were "public records" as defined by CORA;
- certain e-mails related to a sexual harassment complainant were exempt from disclosure as "records of sexual harassment complaints and investigations," pursuant to C.R.S. § 24-72-204(3)(a)(X)(A) (2002);
- Baker and Sale were entitled to assert a constitutional privacy objection to disclosure; and
- Baker and Sale's privacy objection would be analyzed under the three-prong test contained in ***Martinelli v. District Court***, 199 Colo. 163, 612 P.2d 1083 (1980).

The Court of Appeals then remanded the matter to the trial court to determining what disclosure is appropriate in light of ***Martinelli's*** "least intrusive manner" requirement. ***In re Petition of Board of County Comm'rs of Arapahoe County***, 95 P.3d 593 (Colo. App. 2003).

Thereafter, the Newspaper filed a petition for *certiorari* with this Court. The Petition charged that 1) there is no implied privacy exception in CORA; 2) no person but the records custodian has standing to challenge disclosure; and 3) that "public records" attached to a sexual harassment report are nevertheless subject to disclosure. *See generally, Denver Publishing Company's Petition for Certiorari*. This Court granted review as to the following issues:

- Whether the Court of Appeals erred by holding that certain e-mails subject to CORA were nonetheless exempt from disclosure based on employee privacy rights; and

- Whether the Court of Appeals erred by holding that certain e-mails were exempt from disclosure where only the public employees, but not the records custodian, objected to such disclosure.

Order, 7/26/04.

The Newspaper filed its Opening Brief, and its demand for unfettered disclosure of the Baker-Sale e-mails was supported by several *amici*, including the Colorado Press Association, the Colorado Freedom of Information Council, and Colorado Counties, Inc. The Answer Brief submitted by the County supported reversal as well, and Baker and Sale failed to file a Brief. In an effort to obtain a more comprehensive analysis of the issues, the Court then *sua sponte* solicited participation by a number of organizations, including the ACLU, as additional *amicus curiae*. *Order, 2/14/05.*

B. Statement of Facts.

The ACLU's interest is in the legal questions involving the intersection between the privacy rights embodied in the United States and Colorado Constitutions and the public policy objectives underlying CORA. Because ACLU is not taking a position regarding the application of those legal standards to the precise communications at issue in this appeal, many of the facts unearthed below are not relevant to the arguments made here. ACLU therefore generally adopts the Statement of Facts contained in the published decision of the Colorado Court of Appeals, ***In re Board of County Com'rs of County of Arapahoe***, 95 P.3d 593 (Colo. App. 2003). The appeals court recited the essential facts as follows:

In 2002, a chief deputy in the Arapahoe County Clerk and Recorder's Office accused Baker of, among other things, hostile work environment sexual harassment. The County

commenced an investigation. Rick Johnson, an investigator contracted by the County prepared a detailed report and subreport. Included in the Johnson report were some 570 intimate and sexually-explicit exchanged between Baker and Sale, all of which had been drafted and exchanged on the County's computer system. After the County released a redacted version of the Johnson report, various media outlets requested disclosure of the e-mails under CORA. The County's Petition soon followed.

SUMMARY OF ARGUMENT

The maxim that "bad facts make bad law" has been oft-repeated. ACLU respectfully submits that left unopposed, the arguments advanced by the parties do indeed invite this Court to make bad law. This matter poses unique risks: an unpopular now-recalled elected official, salacious intra-office communications, and two parties who–though nominally opponents–are marching in lock step. Real-parties-in-interest Baker and Sale have meanwhile run out of time, energy, or both, and thus no party or *amicus* has advanced any plea for workplace privacy. Both sides seek a new CORA pronouncement providing unfettered disclosure of any and all e-mail communications, no matter how personal to the individual public employee. This "e-mail exception," functionally asks this Court to abandon ***Martinelli*** balancing in cases involving electronic communications.

The ACLU takes no position as to which e-mail communications, if any, should be disclosed as public records in this matter. Rather, the ACLU believes that there is a constitutional privacy exception to CORA and that it, like all other exceptions to statutes regarding open government, should be construed narrowly. Although an employer's e-mail

policy can and should be scrutinized in evaluating an employee's expectation of privacy, it cannot be used to trump all other considerations or avoid complete ***Martinelli*** balancing. Finally, individual public employees possess standing to object to disclosure of their private communications.

ARGUMENT

I. A Privacy Exception Exists to CORA, But It Must be Construed Narrowly.

CORA serves an important public purpose. Like its federal counterpart, CORA is first and foremost a tool for citizens and the media to know what their "government is up to." ***U. S. Dept. of Justice v. Reporters Committee for Freedom of Press,*** 489 U.S. 749, 773 (1989)(regarding the federal Freedom of Information Act). ***See also Freedom Newspapers, Inc. v. Tollefson***, 961 P.2d 1150, 1156 (Colo. App. 1998)(CORA "recognize[s] the compelling public interest in access to information."). Accordingly, any exceptions to CORA's broad reach are narrowly construed. ***Sargent Sch. Dist. RE-33J v. W. Servs., Inc***., 751 P.2d 56, 60 (Colo. 1988). ***See also Denver Post Corp. v. University of Colorado***, 739 P.2d 874, 879 (Colo. App. 1987)("public employees have a narrower right and expectation of privacy than other citizens.").

Nevertheless, the sweeping suggestion that any Colorado statute is exempt from implied and/or recognized state or federal constitutional limitations must be rejected. Likewise, government workers do not check *all* constitutional rights at the door. ***Cf. Nixon v. Administrator of General Services***, 433 U.S. 425, 457 (1977)("We may agree with appellant that, at least when government intervention is at stake, 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.")

CORA's plain language acknowledges that some information in government records is so unconnected to public business that the document is not even subject to the Act. Colo. Rev. Stat. § 24-72-202(6)(a)(II)(B) and (C) exclude from the definition of "public records" correspondence by elected officials which is "[w]ithout a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds" and any communication with constituents that "clearly implies" that the constituent expects confidentiality. Exclusions are likewise in place for a host of personal or highly-sensitive documents, including investigative, testing, and research data. Colo. Rev. Stat. § 24-72-204. Although the court below concluded that the Baker-Sale emails were "public records" because their creation involved an incremental expenditure of public funds,[1] that finding should not end the inquiry.

The Newspaper's position is at odds with this Court's analysis in ***Wick Communications Co. v. Montrose Co. Bd. of Comm'rs***, 81 P.3d 360 (Colo. 2003). In ***Wick***, a local media organization sought disclosure of the county manager's personal diary. This Court held that CORA did not mandate disclosure of the diary. Noting that the inquiry required "[b]alancing open government with the privacy of public officials,"[2] the Court observed that a diary is "highly personal" and its inspection would be "far too intrusive." ***Id***. at 365. Most importantly, the

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[1] This portion of the decision below is apparently not on review here.

[2] 81 P.3d at 364 (subheading 2).

Wick court recognized the likelihood that a "constitutional right to privacy exists, and could possibly be a bar to the access of public records" but held that it did not need to reach that issue. Instead, the Court concluded that a document as private as a diary was simply not a public record. ***Id***., n. 4. ***See also Denver Post Corporation v. Cook***, 104 P.3d 293, 297 (Colo. 2004)(recognizing ***Wick*** as recognizing "that a constitutional right to privacy may likewise limit the disclosure of public records); ***See also Freedom Newspapers, Inc. v. Tollefson***, 961 P.2d at 1150 (recognizing that certain records requests implicate privacy rights of public employees).

Finally, the parties suggest that the Court cannot recognize a privacy exception to CORA, because courts are constrained to honor only those specific exceptions set forth by the legislature. *See, e.g., Petitioner's Opening Brief at pp. 12-13.* This approach is inconsistent with the decision in ***City of Colorado Springs v. White***, 967 P.2d 1042, 1055 (Colo. 1998) in which this Court held that the common law "deliberative process privilege" was implicitly incorporated into CORA. The ***White*** decision was broadly applauded by public entities, who apparently now find it more desirable to be strict constructionists. Although the impact of ***White*** was limited by subsequent revisions to CORA,[3] the decision in ***White*** plainly recognizes that certain extra-statutory sources of law may indeed impact CORA's scope.

II. An Employer's E-Mail Policy Does Not Dictate, Standing Alone, Whether a Communication Between Employees May be Disclosed to the Public.

[3] During the legislative session immediately following the announcement of the ***White*** decision, the General Assembly amended CORA to reverse the "mandatory nondisclosure" portion of the opinion and instead require that courts "weigh, based on the circumstances in a particular case, the public interest in honest and frank discussion and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." Colo. Rev. Stat. 24-72-204(3)(a)(XIII).

The Newspaper and certain *amici* charge that the County's issuance of an e-mail policy, standing alone, dictates that any electronic communication may be disclosed to the public. The Newspaper reasons that an employer's unilateral declaration that "all e-mail messages are the property of the employer and are therefore not private" nullifies any legitimate expectation of nondisclosure, and that without such an expectation, an employee cannot prevail. This reasoning is both too simple and too complex.

The Newspaper's analysis is overly simplistic because it ignores the distinction between an employee's reasonable expectation that his employer may *access* electronic communications and his expectation that sensitive or intimate contents not be *shared* with the public at large. It further ignores that a public records analysis is always content-driven. The Newspaper then adds an unnecessary layer of complexity by seeking to confer a special legal status on electronic communications that differs from handwritten, typewritten, or tape recorded ones. Imposing a standard for electronic messages that is different from that applied to handwritten ones unnecessarily risks in consistent results for otherwise-identical communications. Instead, the existing balancing test in ***Martinelli v. District Court***, 512 P.2d 1083 (Colo. 1980), dictates that electronic communications be analyzed under the same balancing test that would apply to any other request for public disclosure of personal information, and that test includes consideration of the *contents* of the communication.

A. An Important Legal Distinction Exists Between *Access* and *Disclosure*.

The reliance on "expectation of privacy" e-mail cases misses the mark. *See Petitioner's Opening Brief at 18*.[4] The privacy issue implicated here is not whether Baker and Sale had a reasonable expectation of privacy, under ***Katz v. United States***, 389 U.S. 347 (1967), against *inspection* of e-mails by the County. Rather, the question is whether the e-mails, once legitimately in the possession of the government, possess the personal and intimate quality which requires application of the ***Martinelli*** balancing test.

Each of the cases cited by the Newspaper involve only the employer's right to *access* data on its own system. ***United States v. Simons,*** 206 F.3d 392, 398 (4th Cir. 2000) and ***United States v. Angevine*****,** 281 F.3d 1130 (10th Cir. 2002), for example, are both Fourth Amendment decisions on motions to suppress in which the employer discovered child pornography on the worker's computer. ***Smyth v. Pillsbury Co.*****,** 914 F. Supp. 97, 101 (E. D. Pa. 1996) merely rejected an at-will employee's wrongful discharge theory after he was fired for sending inappropriate e-mails. Neither the parties nor *amici* cite any authority for the proposition that an e-mail policy, standing alone, confers an automatic right of public disclosure.

The difference between employer access and public disclosure mirrors the distinction in tort law between two distinct invasion of privacy theories: intrusion upon seclusion and unreasonable publicity given to private facts. ***Compare Doe v. High-Tech Institute***, 972 P.2d

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[4] The parties fail to acknowledge the legal distinction between the Fourth Amendment analysis governing ***access*** by the employer (the "reasonable expectation of privacy" analysis) and ***disclosure*** by the employer. Disclosure of confidential personal information implicates a Fourteenth Amendment liberty interest analysis and requires application of a balancing test. ***Tollefson***, 961 P.2d at1156-57.

1060 (Colo. App. 1998)(intrusion upon seclusion does not involve "the unreasonable dissemination of private information but, instead, rests upon the improper appropriation of that information.") with ***Cohn v. Cox Broadcasting Co.***, 420 U.S. 469, 489 (1975)(describing the tort of unreasonable publicity as one in which "the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities."). In ***Ozer v. Borquez***, 940 P.2d 371, 377 (Colo. 1997), this Court recognized, for example, that "facts related to an individual's sexual relations, or 'unpleasant and disgraceful' illnesses, are considered private in nature and the disclosure of such facts constitutes an invasion of the individual's right of privacy." *See also Restatement (Second) of Torts*, § 652D, comment b, p. 386 (1977).[5] The right to "intrude" does not confer an automatic right to disclose.

A formulaic reliance on an e-mail policy which refuses to take into account the *contents* of the electronic communications at issue, elevates form over substance. In ***Denver Publishing Co. v. University of Colorado***, 812 P.2d 682 (Colo. App. 1991), the Court of Appeals held that a document could not be withheld from disclosure merely because it was placed in a personnel file.[6] Rather, the contents of the documents must be evaluated to determine whether they do, in

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[5] "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, keeps entirely to himself or at most reveals only to his family or to close personal friends. ... When these intimate details of his life are spread before the public gaze in a manner highly offensive to the reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest."

[6] Personnel files are exempt from disclosure by statute. Colo. Rev. Stat. § 24-72-204(3)(a)(II)(A).

fact, implicate a privacy right. ***Id***. at 684. The Newspaper's argument is merely the flip-side of the University's failed arguments in ***Denver Publishing Co. v. University of Colorado***–it seeks to have the outcome dictated exclusively by *where* a document is maintained rather than *what* it has to say.

The Newspaper charges that the compelling state interest in the disclosure of public records automatically "trumps the privacy interests of persons whose personal information may be included in public records." *Petitioner's Opening Brief, p. 2*. Under this analysis, an employee's email exchange with her attorney, a facsimile transmission to her medical doctor, a membership list for her after-work prayer group scrawled on an office notepad, or her book selection history on *Amazon.com* would all be at risk of public disclosure by virtue of this "trump card," without regard to whether such communications were work related or not. That is not a reasonable construction of CORA.

B. The Test In *Martinelli* Adequately Balances the Interests of the Individual and the Public and Should Be Left Unchanged.

Nearly 25 years ago, this Court issued its decision in ***Martinelli v. District Court***, 199 Colo. 163, 612 P.2d 1083 (Colo. 1980). Since that time, the analysis in ***Martinelli*** has guided courts reviewing demands for public records (***City of Colorado Springs v. White***, 967 P.2d 1042 (Colo. 1998)), law enforcement investigations (***City of Loveland v. Loveland Pub. Corp***., 2003 WL 23741694 (Colo. Dist. Ct. June 16, 2003)), personnel files (***Corbetta v. Albertson's***, 975 P.2d 718 (Colo. 1999)) and civil discovery documents (***In re Attorney D***., 57 P.3d 395 (Colo.

2002)). In this case, the Court of Appeals analyzed the e-mails under a ***Martinelli*** framework, concluding that

> 1) although Baker and Sale did not have a reasonable expectation that all of their e-mails would be exempt from disclosure, they had a reasonable expectation under CORA that "there would be more limited disclosure of at least their sexually explicit e-mails;"
>
> 2) disclosure of the e-mails would not serve a compelling state interest except with regard to three specifically listed categories;[7]
>
> 3) the trial court failed to apply the "least intrusive manner" test to the scope of disclosure, thus necessitating a remand.

In re Petition of Bd. of County Comm'rs, 94 P.3d 593. The Newspaper's approach would end the balancing analysis as it currently exists under ***Martinelli*** and allow a lone factor to trump all other considerations.

The ***Martinelli*** decision acknowledges a "right to confidentiality" which encompasses the "power to control what we shall reveal about our intimate selves, to whom, and for what purpose." 612 P.2d at 173-174, ***citing Byron, Harless, Schaffer, Reid & Assoc. v. State ex. rel. Schellenberg***, 360 So. 2d 83, 92 (Fla. App. 1978). Noting that the right is "by no means absolute," this Court then directed judges to apply a case-specific "balancing test" when

[7] Those categories are listed as encompassing "why Baker promoted Sale to her current position, why she received substantial increases in salary as well as overtime pay, and why she ha[d] not be terminated despite allegations that she embezzled money." 95 P.3d at 603.

confronted with a demand for public disclosure of sensitive personal information about public employees.[8] ***Id***. at 1091. It directs a three-pronged analysis as follows:

> When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tri-partite balancing inquiry must be undertaken by the court, as follows:
>
> > (1) does the party seeking to come within the protection of right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
> >
> > (2) is disclosure nonetheless required to serve a compelling state interest?
> >
> > (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?

612 P.2d at 1091.

It is the first prong–the legitimate expectation of non-disclosure–that the parties invoke to play their e-mail "trump card." They charge that the mechanism of transmission (a county-owned computer network) eviscerates any legitimate expectation of non-disclosure.[9] Analysis under the first prong of ***Martinelli*** is not, and cannot be, so single-faceted. The court must consider both the subjective and objective expectations of privacy ***and*** evaluate whether the

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[8] In ***Martinelli***, the petitioners were police officers who sought review of a trial court order compelling disclosure of personal and internal investigative records to plaintiffs in a civil suit against the Denver Police Department. 612 P.2d 1083.

[9] One amicus even chastises the Court of Appeals for considering the e-mail contents in its "first prong" analysis. ***See e.g.***, ***Brief of Amicus Curiae Colorado Press Association*** *at 22*, charging that the "Court of Appeals Erred in Conflating the Inquiry into Whether the Interested Parties Had a Legitimate Expectation of Non-Disclosure of the Emails with the Inquiry Into the Contents of the Emails."

information is "highly personal and sensitive." ***Martinelli***, 612 P.2d 1091. ***See also In re Petition of Bd. of County Comm'rs***, 95 P.3d at 601-602 (under the first prong of the ***Martinelli*** test, "[o]ne factor is the person's expectation of nondisclosure, and the other is the nature of the information sought to be disclosed.") It is axiomatic that such evaluation is done on a case by case basis.

The sound reasoning of this Court's decision in ***Martinelli*** has been adopted by the Tenth Circuit. ***Denver Policemen's Protective Assn. v. Lichtenstein***, 660 F.2d 432, 435 (10th Cir. 1981); ***Flanagan v. Munger***, 890 F.2d 1557, 1570 (10th Cir. 1989). It has further been adopted nearly verbatim by courts in Utah, Alaska, and Arizona.[10] The ***Martinelli*** balancing test has enabled courts to ably navigate the intersection of public and private rights for 25 years, and the court should not tinker with it. Nor has any party articulated a valid basis to abandon it here.

III. Individuals Have Standing to Oppose Disclosure of Public Records.

The Newspaper and the Board suggest that individually-aggrieved public employees lack standing to assert their constitutional privacy rights. Instead, the parties contend that the application of ***Martinelli*** balancing should be entrusted to the unbridled and unreviewable sole discretion of the records custodian. That is not–and cannot be--the law.

CORA confirms that a party denied access to documents may bring an action in district court to challenge that denial. C.R.S. § 24-72-204(5). The statute does not specify a mechanism

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[10] ***Madsen v. United Television, Inc***. 801 P.2d 912, 915 (Utah 1990); ***Alaska Wildlife Alliance v. Rue***, 948 P.2d 976, 980 (Alaska 1997); ***Pima County v. Harte***, 131 Ariz. 68, 638 P.2d 735, 736 (Ariz. App. 1981).

of protection for a party who objects to disclosure. However, in ***CF&I Steel v. Air Pollution Control Division***, 77 P.3d 933 (Colo. App. 2003), the Court of Appeals recognized the right of a Colorado business to file an action in district court seeking a protective order when a state agency threatened to disclose confidential documents. The court further held that an interested union was entitled to intervene in the case as well. 77 P.3d at 939.

Likewise, in ***Bodelson v. Denver Publishing Company***, 5 P.3d 373 (Colo. App. 2000), the Court of Appeals rejected the Newspaper's claim that the parents of Columbine killer Dylan Klebold lacked standing to intervene and appeal a trial court decision regarding release of their son's autopsy photos. 5 P.3d at 380. Of course, the Newspaper may seek to distinguish ***Bodelson*** by noting that in ***Bodelson***, it was the *custodian* in the first instance who sought a court order allowing it to restrict public access to the Columbine autopsies. That is a distinction without a difference. An interested party aggrieved by the actions (or proposed actions) of government is entitled to seek judicial relief whether or not he is marching in lock step with the records custodian. *Compare* Colo. R. Civ. P. 106 (allowing a party to seek a writ of mandamus or prohibition against a public entity); *See also* Colo. Const. Art. II § 6 (regarding right of access to courts).

For its parade of horribles, *amicus curiae* Colorado Counties, Inc. ("CCI") suggests that permitting individual public employees to assert their own privacy rights will open the litigation floodgates and allow damages awards against public entities. Of course, courts already permit "interested persons" to object to the disclosure of government records, and CCI's fears have not borne out. ***See generally***, ***CF&I Steel***, 773 P.2d 933 and ***Bodelson***, 5 P.3d 373. When in

doubt, a custodian may proceed as the County did here–by filing an action seeking judicial guidance. See Colo. Rev. Stat. § 24-72-204(6)(a) (allowing a custodian to file an action where it is unable to determine if disclosure is prohibited or not).

Whether a private cause of action for damages is available for those adversely affected by erroneous disclosure is beyond the scope of this appeal. CORA identifies a large number of records that are exempt from disclosure, including for example medical, mental health, personnel and education records. Colo. Rev. Stat. § 24-72-204(3)(a). Existing case law does not address whether an aggrieved citizen may seek damages for improper disclosure, but not all statutory violations give rise to a claim for damages. ***Compare Gonzaga University v. Doe***, 536 U.S. 273 (2002)(no Section 1983 claim for Family Education Rights and Privacy Act violation).

In any event, a public entity's handling of its responsibilities under CORA should be treated the same as its actions in fulfilling any other ministerial duty. Liability for negligence is barred by the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 *et. seq*. Efforts to craft a federal constitutional claim out of an errant disclosure would trigger all of the defenses available against Section 1983 claims.[11] To the extent that such claims are already actionable, this proceeding neither expands nor limits such suits. ***Compare Sheets v. Salt Lake City***, 45 F.3d 1383 (affirming jury verdict on Section 1983 claim where defendant county and investigator disclosed contents of victim's diary to public).

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[11] For example, individual employees would be entitled to qualified immunity unless their actions violated clearly the plaintiff's established constitutional rights. ***Harlow v. Fitzgerald***, 457 U.S. 800, 813-819 (1982). Public entities would be liable only if a municipal policy or custom was a "moving force" behind a constitutional violation. ***Monell v. New York City Dept. of Social Service***, 436 U.S. 658 (1978).

CONCLUSION

The ACLU declines to take a position regarding the application of the legal principles detailed above to the e-mails exchanged between Baker and Sale. The ACLU remains committed to principles of open government, broad construction of CORA, and public access to public records. However, the parties propose abandoning all balancing of competing interests and adoption of a new legal standard which places personal, sensitive information of public employees at risk of automatic disclosure. The ACLU believes that such a sea change is unwise and inconsistent with established legal principles.

The right to privacy is well established in constitutional jurisprudence, and the right to avoid unreasonable disclosure of one's private affairs is recognized in our state's common law. The content of communications, rather than the mode of transmittal or the mechanism of storage, must drive the Court's analysis, and the well-established balancing test announced 25 years ago in ***Martinelli v. District Court*** is an appropriate standard to be applied upon remand. In contrast, the default disclosure of electronic communications–without proper consideration of ***Martinelli*** factors–is inconsistent with existing law and unsound policy.

Finally, existing precedent confirms that interested persons – whether private citizens or public employees – have had and should continue to possess the right to assert their privacy interests in public records cases. Accordingly, the Court of Appeals appropriately remanded the case with the directive that the trial court apply ***Martinelli***, evaluate the contents of the communications at issue, and consider prospects for a less intrusive method of disclosure.

WHEREFORE, for the foregoing reasons, the ACLU respectfully requests that the Court of Appeals decision be affirmed, with appropriate instructions to the trial court to scrutinize the documents at issue in accordance with ***Martinelli***..

RESPECTFULLY SUBMITTED this ___ day of March, 2005.

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