El Paso County, CO _X_District___County Court address: **20 East Vermijo Ave.** **Colorado Springs, CO 80903** Phone Number: **(719) 448-7650**	
Plaintiff: CITY OF COLORADO SPRINGS Vs Defendant: AMERICAN CIVIL LIBERTIES UNION	**Court Use Only**
	Case Number: 06 CV 2053 Division 5 Courtroom 501
ORDER re: RULING ON ORDER TO SHOW CAUSE	

The Defendant/Counterclaimant ACLU made a request of the City of Colorado Springs (City) for inspection of the record of an Internal Affairs investigation of Officer K.D. Hardy's physical altercation with one Delvikio Faulkner, which occurred on June 2, 2005. The City refused that request, taking the position that the record was a personnel record, and thus exempt from disclosure under the Colorado Open Records Act (CORA). After trading correspondence, the City filed this request for declaratory relief, seeking an order that the records of the Internal Affairs Investigation (IAI) are personnel files under CORA and not subject to disclosure. The City asserts that the action is filed under CRS 24-72-204(6). The ACLU filed a counterclaim, seeking a declaration that the records are Criminal Justice records and are subject to disclosure.

The ACLU also filed a motion for an order to show cause why the IAI files should not be subject to inspection by the ACLU and the public, in general. The matter was set for hearing on January 24, 2007. No testimony was presented but the parties stipulated to admission of a number of exhibits, including the correspondence between the City and the ACLU as well as copies of legal opinions rendered by other district courts.

Following the hearing, the City tendered to the Court the IAI file in question so the Court could decide 1) whether the Court is prohibited by case law, as argued by the ACLU, from performing a *Martinelli* analysis before the decision to release or not is made and 2) if there is a requirement for a *Martinelli* hearing, then conducting that examination.

Reviewing all the information produced and the arguments of counsel, the Court finds and concludes as follows:

NATURE OF RECORD:

The City argues that these are personnel records, because they pertain to the employer/employee relationship. They further argue that CORA prohibits their release. The ACLU argues to the contrary that these are criminal justice records. Case law clearly supports the ACLU's position. In Johnson v. DOC, 972 P.2d 692 (Colo. App. 1998) the same issue was addressed, in the context of a DOC internal affairs investigation. The Court of Appeals affirmed the trial judge's determination that DOC was a "criminal justice agency", that the results of the internal affairs investigation were thus "criminal justice records" and therefore that they could not be '"public records" under CRS 24-72-302(3).

Applying the Court of Appeal's logic to this case, I conclude that Colorado Springs Police Department is a "criminal justice agency" as that term is used in the CJRA. An internal affairs investigation conducted by that agency are of necessity records "which are made, maintained, or kept by any criminal justice agency in the state in the exercise of functions required or authorized by law or administrative rule." Section 24-72-302(4). Therefore, in accord with the Johnson case IAI investigative records are "criminal justice records" and subject to examination under the Criminal Justice Records Act, not CORA.

MARTINELLI ANALYSIS:

Section 24-72-305 provides that a custodian of records may allow access to the records unless such inspection would be contrary to the public interest. The correspondence of the parties indicates that access was denied as a policy matter because the City considered these to be personnel records. At the show cause hearing, the City also argued that release of the IAI report was contrary to public interest for the two reasons that Mr. Hardy objected to release and secondly, because release could potentially "chill" the investigative process by giving witnesses incentive to refuse to cooperate with the investigation. The City argues that witnesses will be less likely to testify if they know their testimony could become known to the public. The City finally argued that since no punishment was imposed on Mr. Hardy that there can be no relevance to the records.

As to the analysis to be conducted this case, I conclude that the standards enumerated in *Martinelli* apply to this case. I reject the arguments advanced by the ACLU that only the custodian of records is required to perform the *Martinelli* analysis or that the result of an IA investigation are presumed to be public. I also reject the ACLU's argument that these records were not the type that justify a *Martinelli* analysis or that the Court should not perform that analysis because Mr. Hardy failed to intervene in the suit. On the contrary, the Court of Appeals in ACLU v. Whitman, 2006 WL 2828851 (Colo. App2006) concluded that "as to all claims of privacy, trial courts will conduct their inquiry on an "ad hoc basis,"

applying the mandated balancing inquiry to the facts before them"___P.3d at p.5, reciting from *Martinelli.*

The first question to resolve under *Martinelli* is whether Mr. Hardy has asserted a claim that he expected the records to be held in confidence. Contrary to the ACLU's argument, I do not conclude that Mr. Hardy failed to assert his expectation of privacy in this case. On the contrary, he wrote a letter to the Court indicating that he had been compelled by a *Garrity* advisement and Chief Velez to make a statement, presumably against his will. He further asserts that he expected the record to be kept confidential and that release would cause him further humiliation. While he did not intervene in this action, I conclude that his letter is sufficient to assert his expectation of nondisclosure.

The second portion of the "nondisclosure claimant's" burden under *Martinelli* is to show that the material or information which he or she seeks to protect against disclosure is "highly personal or sensitive". Martinelli v. District Court, 612 P.2d 1083, 1091 (Colo. 1980). As to this prong, neither the City nor Mr. Hardy has shown that the information in the IA file is highly personal or sensitive. On the contrary, the IA investigation is of Mr. Hardy's conduct performed while on duty, in public and in the presence of witnesses. In that respect, any information, other than his statement to investigators was public in the first instance. The police reports generated regarding the arrest of Mr. Faulkner dealt with Mr. Hardy's conduct.

Mr. Hardy asserts that his statement should not be disclosed because it was compelled. I am not persuaded by that argument. Before he provided a statement, he was given a so-called "Garrity advisement". The advisement is contained in the IA file. That advisement informs someone that he maintains all Constitutional privileges against self incrimination and that nothing he says could be used against him in a criminal case. It further indicates that if he refuses to cooperate, that refusal could be the basis for disciplinary action. It does not guarantee nondisclosure or that his statement could not be used in a subsequent civil action. It merely places some pressure on him to provide a statement that an attorney might otherwise discourage him from making.

Moreover, I don't find that the general contents of the file, with one exception that will be dealt with below, are personal and sensitive and would cause a reasonable person to be offended or find the contents objectionable. Mr. Hardy was a public law enforcement officer, acting within the scope of his authority when the incident occurred. A reasonable officer should expect his actions to be subject to public scrutiny. What he did or did not do in public, in front of witnesses, is not personal and sensitive such that there is a significant public policy in not making them available to the public.

Even if one considered these records personal and sensitive, I find that there is a strong public policy in releasing them. The public has an interest in knowing how its public law enforcement officers behave in their jobs and what constraints are in place to prevent inappropriate conduct. The ACLU in this case argues that their interest is in how the IA investigation was conducted and its results. Those are legitimate public concerns which require release. I am not convinced that the release will in any way "chill" future investigations or potential witnesses. No evidence was offered by the City to support that proposition but merely argument that releasing such results will inhibit the process. I find that argument unconvincing and not the "objectively reasonable" basis to find that the information should remain confidential.

The last *Martinelli* prong is whether release of the IA report can be done in the least intrusive manner. I find that it can. The City can redact or "white out" any information about Mr. Hardy that is truly personal, such as address, private phone number, social security number, etc. The City should also remove from the IA file, any reference to Mr. Hardy's daughter or daughters contained in section 9, or elsewhere, as well as the July 5, 2005 reference to an alleged incident that had nothing to do with the Faulkner incident, found on page 1 of section 8, or elsewhere. I find both of those matters to be personal and sensitive with no compelling state interest supporting their release.

CONCLUSION:

With the exception of those items mentioned in the foregoing paragraph, I find that the ACLU has established a public policy reason to release Mr. Hardy's IA file. I find under *Martinelli* that Mr. Hardy has failed to establish that this is type of personal and sensitive record that should not be disclosed, with exception of the two incidents mentioned above. This is a "criminal justice record" that should be released, under the CCRJA, after proper redaction of those matters that I have found have nothing to do with the Faulkner incident. I hereby deny the ACLU's request for a broader finding that IA files should be automatically divulged or that the Court is not obligated to perform a *Martinelli* analysis in each instance where such a record is sought.

The City is hereby ordered to make available to the ACLU for inspection the entire IA file on this incident, after redaction of Mr. Hardy's personal information, and any reference to the two incidents mentioned above.

Attorney Fees:

The ACLU argues that they should be entitled to an award of attorney fees under CRS 24-72-305(7). That allows such an award in the event that the City's

refusal to release is found "arbitrary and capricious". I conclude that the City's refusal was not arbitrary and capricious. No matter how many District Courts have ruled on this issue, to the extent that an officer asserts a claim of privacy in his own IAI records and forces the Court to perform a *Martinelli* analysis, the City's refusal to release cannot be deemed arbitrary and capricious. Granted, the City takes a bit of a risk if it hereafter continues to rely on the "personnel records" argument for nondisclosure. But to the extent that cases such as Whitman continue to require a Martinelli analysis on an "ad hoc" basis for each case, it appears to me that the City's refusal to disclose until after that analysis can not be considered arbitrary and capricious.

The motion for attorney fees is DENIED.

Done this 5 day of Feb, 2007

LARRY E. SCHWARTZ
District Court Judge

cc:

Gregory Garland
Steven Zansberg
Mark Silverstein