

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Petitioner: AMERICAN CIVIL LIBERTIES UNION OF COLORADO, Inc. v. Respondents: CITY AND COUNTY OF DENVER; CHIEF OF POLICE, GERRY WHITMAN	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case Number: Div.: Ctrm.:
Attorney or Party Without Attorney: Name: A. Bruce Jones Address: HOLLAND & HART LLP 555 Seventeenth Street, Suite 3200 Post Office Box 8749 Denver, CO 80201-8749 Phone Number: (303) 295-8232 Fax Number: (303) 975-5385 E-mail: bjones@hollandhart.com Atty.Reg.#: 11370	
PETITIONER’S MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND APPLICATION FOR ORDER TO SHOW CAUSE	

Petitioner ACLU of Colorado submits this Memorandum of Law in support of its Petition seeking public access to the document setting out the terms of the Denver Police Department’s participation in the FBI’s Joint Terrorist Task Force (“JTTF”).

The Colorado Open Records Act (“CORA”) declares it to be the “public policy of this state that all public records shall be open for inspection” C.R.S. § 24-72-201. There is a presumption in favor of public access, and exceptions to CORA must be narrowly construed. *See, e.g., Daniels v. City of Commerce City*, 988 P.2d 648, 650-51 (Colo. App. 1999).

“Public records” are distinguished from “criminal justice records”, which are governed by Part III of Article 72. *See* § 24-72-202(6)(A)(I) and (B)(I). As a general proposition, the custodian of criminal justice records has broader discretion or authority

to withhold information from public inspection than does the custodian of public records. *Compare* §§ 24-72-304(1) and 305(1) *with* §§ 24-72-203(1) and 204(1). Here, it is apparent that the City has attempted to classify the JTTF Memorandum of Understanding as a criminal justice record in an effort to justify the denial of access. Based on the information available to Petitioner, however, the Memorandum is an agreement or contract between the City and the federal government, and therefore should be classified as a public record and be made available for inspection. Indeed, the Memorandum should have been executed by the Mayor and approved and authorized by the City Council, rather than merely being maintained by Chief Whitman or some other official of the Police Department.

The Denver City Charter, § 2.2.4, requires the Mayor to execute all contracts on behalf of the City, with attestation by the City Clerk. Additionally, if a contract or agreement involves the transfer of funds to the City from the federal government, then § 20-52 of the City Code requires that the contract be submitted to the City Council for approval and authorization.

Based on the memoranda of understanding for the cities of Portland, Oregon and San Francisco, California, the agreements between local police departments and federal law enforcement provide for the transfer of funds. *See* Exh. 1 at 5 (FBI will fund overtime worked by local law enforcement); Exh. 2 at 5 (same). The Memorandum for Portland was approved by its City Council. (Exh. 3.) Assuming that the Denver Memorandum is similar to the ones executed in Portland and San Francisco, the Denver City Council should have approved and authorized it, and it should have been signed by the Mayor. The Portland and San Francisco agreements delineate an inter-governmental relationship, rather than describing the specific manner in which crimes are investigated or the law enforced. To classify such a document as a criminal justice record is inconsistent with the Criminal Justice Record Act (“CJRA”), which defines criminal justice records as materials “made, maintained, or kept by any criminal justice agency . . . for use in the exercise of functions required or authorized by law” § 24-72-302(4). The City cannot transform a public contract or agreement into a criminal justice record simply by giving it to the Police Department. *See, e.g., Denver Publishing Co. v. Univ. of Colorado*, 812 P.2d 682, 684 (Colo. App. 1990) (placing settlement agreement in personnel file did not render it beyond reach of CORA). Instead, the Memorandum is a public record of the City and County of Denver and should have been made available for inspection, just as was the Portland memorandum under Oregon law.

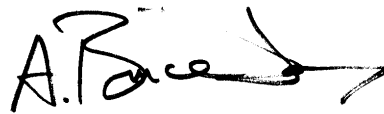
Even if properly classified as a criminal justice record, the Memorandum should be disclosed. First, Respondents have failed to comply with the CJRA by informing Petitioner of “the general nature of the public interest to be protected by the denial [of access].” § 24-72-305(6). Respondents must do more than merely recite “contrary to the public interest” as if it were a magic incantation. Further, if the Denver Memorandum is similar to Portland’s and San Francisco’s, it is hard to imagine why

Respondents are trying to shield it from the public, or why disclosure could be considered contrary to the public interest.

Second, the public interest is not harmed by permitting inspection. Indeed, the contrary is true. The City recently settled the so-called "spy files" case, and agreed to modify its surveillance practices toward citizens engaged in first amendment activities. *See* Petition at ¶ 2. As noted in the ACLU's Petition, City officials have made conflicting statements concerning whether the settlement agreement or the Memorandum of Understanding applies to Denver law enforcement personnel engaged in surveillance as part of the Joint Terrorist Task Force. The Memorandum is likely to shed light on this issue. Given the substantial public concern regarding the Department's surveillance activities, there is a strong public interest in having access to the Memorandum of Understanding. In fact, this interest is reflected in similar events in Portland. *See* Exh. 4 (letter from ACLU of Oregon to Portland city council concerning state law restrictions on Task Force activities).

Dated October 15, 2003

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. Bruce Jones", with a stylized flourish at the end.

A. Bruce Jones, #11370
HOLLAND & HART LLP
Attorneys for Petitioner