DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St.
Denver, CO 80202

Plaintiffs: ASHFORD WORTHAM, an individual; and CORNELIUS CAMPBELL, an individual

v.

Defendants: MARY DULACKI; in her official capacity as Records Coordinator for the Department of Safety

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Case Number: **2010-CV-3032**

Division: **2**

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HEARING BRIEF OF PLAINTIFFS

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Plaintiffs Ashford Wortham and Cornelius Campbell, by their attorneys at Levine Sullivan Koch & Schulz, L.L.P., as cooperating attorneys with the American Civil Liberties Union Foundation of Colorado, respectfully submit this Hearing Brief for the Court's consideration in resolving the issues to be presented at the Show Cause Hearing set in this action for Friday, June 4, 2010, at 10:00 a.m.

INTRODUCTION

As set forth in the Complaint, and as conceded in Ms. Dulacki's Answer, this case calls upon the Court to determine whether Ms. Dulacki's denial of access to each and every page, paragraph and sentence of the IAB file in this case constitutes an abuse of her discretion. As will be shown at the hearing, Ms. Dulacki cannot meet her burden of proving that the blanket denial of access to *all* information in the file, on the sole asserted basis for her decision (the "articulation of . . .her determination"[1]) -- that because the plaintiffs' complaints against the officers were "not sustained" by the IAB, the officers' privacy rights outweigh the public interest in accessing this file-- was not an abuse of discretion.

Quite plainly, there are *portions* of this file in which none of the three police officers can claim the slightest expectation of privacy whatsoever , *i.e.*, the recorded statements of the two complainants (plaintiffs herein), or the summons ("record of official action") that was served on Mr. Wortham. Yet Ms. Dulacki withheld those records asserting officer privacy. Moreover, numerous courts throughout the state, (including this one on several occasions), have held that police officers enjoy no reasonable expectation of privacy, under the first prong of the *Martinelli*

[1] *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008).

standard[2], with respect to portions of IAB files that reflect and discuss their discharge of official duties while acting on the job as peace officers and in interacting with members of the public. This holds true whether or not an internal affairs investigation results in a finding of departmental violation. In contrast, both this court and others throughout the state have recognized a compelling public interest in being able to assess the conduct of police officers accused of misconduct in interacting with members of the public, and of the police department's internal affairs bureau ("IAB") in investigating such allegations of professional, not private, misconduct. *See, e.g. Freedom Colo. Info.*, 196 P.3d at 901 ("The purpose of a criminal justice agency's internal affairs investigation . . . is *to assess the performance of law enforcement officers in carrying out their duties, **a matter of the public interest***.") (emphasis added); see also Complaint ¶¶ 8, 37 (quoting from and citing several judicial opinions).

Thus, the sole grounds which Ms. Dulacki asserted was the basis for her decision to withhold the entirety of this IAB file is contrary to well established legal precedents, and is therefore an abuse of discretion.

Moreover, because Ms. Dulacki, as custodian of records, failed to exercise her authority and discretion to provide redacted records, and thereby to disclose "as much information as possible,[3]" or to articulate any reason for not doing so, her withholding of the entirety of the IAB file (thereby necessitating this lawsuit) was an arbitrary and capricious denial of access,

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[2] Despite the intervenors' invocation of it, the *Martinelli* balancing test no longer applies in proceedings such as the case at bar brought pursuant to the CCJRA. *See Freedom Colo. Info.*, 196 P.3d at 901 (finding that the trial court had mistakenly applied "the inapplicable *Martinelli* analysis."). *See infra* n. 6.

[3] See *Freedom Colo. Info.*, 196 P.3d. at 900 n.3

which entitles the plaintiffs to an award of their reasonable attorneys' fees. *See* 24-72-305, C.R.S.

FACTUAL BACKGROUND

Because the defendant has filed her Answer, there are no significant facts in dispute. Ms. Dulacki has admitted that Judge Ortiz-White, following a full evidentiary hearing, expressly found that the three police officers' conduct in relation to the two plaintiffs on the evening of February 13, 2009 was "extreme, profane, and racially motivated," while Ms. Dulacki, respectfully "disagrees with those statements," *see* Answer ¶ 23. The intervenors (though not intervening as Defendants, nor could they) have filed an "Answer" in which, remarkably, they ask the Court to "strike" the findings set forth in a Minute Order entered by the County Court following a full evidentiary bench trial, because they disagree with it and, as far as they're concerned, "it is just [County Judge Marilyn Ortiz-White's] opinion." Intervenors' "Answer" at 5 ¶ 27.[4] Ms. Dulacki also admits that the plaintiffs herein submitted a written request to inspect the IAB file, *id.* ¶ 24, and that she, by letter dated July 24, 2009, denied their request *in toto*, on grounds that disclosure would be "contrary to the public interest," on the sole articulated basis that "[t]he privacy interests of the individual officers in details of an investigation which resulted in 'not sustained' findings where no discipline was imposed outweigh any public purpose to be served by disclosing the details of the investigation." *id.* ¶¶ 25, 26; Ex. F to Complaint.

Accordingly, the hearing on the Order to Show Cause should properly be limited to any evidence the custodian, who bears the burden of proof, wishes to introduce in support of the sole

[4] Notably, the intervenors do not similarly dismiss this Court's previous "opinions" as set forth in paragraphs 8 and 34 of the Complaint.

grounds she asserted for the complete denial of access to any portion of the IAB file – namely that the privacy rights of the officers involved outweighs the public interest. Neither she nor the intervenors should be permitted to offer any evidence or argument in support of any new, previously unasserted basis for her withholding those documents. *See, e.g.*, Answer at 6 (asserting as affirmative defense that "some of the records sought by the plaintiffs are protected from disclosure by the attorney-client privilege, the attorney work product privilege, or the deliberative process privilege").[5] And, of course, the intervenors lack standing to assert the interests of the City and County of Denver concerning how it conducts its internal affairs investigations (which arguments, in any event, have been repeatedly rejected by this Court and the Court of Appeals).

APPLICABLE LAW

It is firmly established that internal affairs investigation files of law enforcement agencies, such as the Denver Police Department, are "criminal justice records" subject to inspection under the Criminal Justice Records Act ("CCJRA"). *See Freedom Colo. Info.*, 196 P.3d at 895. Section § 24-72-301(2), C.R.S. (2009), declares that "It is the public policy of this state . . . that *all*…records of criminal justice agencies in this state may be open for inspection as provided in this [Act] or as otherwise specifically provided by law" (emphasis added).

[5] Moreover, with respect to the "deliberative process privilege," although the City Attorney has informed undersigned counsel that the City has prepared a Vaughn index, as of this date, Ms. Dulacki has not complied with the procedural prerequisites for asserting that privilege. *See* § 24-72-204(3)(a)(xiii), C.R.S.; *see also ACLU of Colo. v. Whitman*, Case No. 04-CV-700 (Denver Dist. Ct. Mar. 30, 2004) at 3-4 (finding that the City's failure to comply with the statutory procedures for invoking the deliberative process privilege waives its right to assert that privilege) (attached hereto as Ex. 4).

Because IAB files are not "records of official actions" which *must* be disclosed, *id.*, the CCJRA authorizes custodians of IAB files to deny access, in their discretion, upon making the determination (after weighing all relevant factors[6]) that "disclosure would be contrary to the public interest." § 24-72-305(5), C.R.S. Upon the filing of an Application in the District Court by one who is denied access to such records, and the issuance of an Order commanding the custodian "to *show cause why [the] custodian should not permit inspection of such records*," § 24-72-305(7), C.R.S. (2009) (emphasis added), the custodian bears the burden of demonstrating that her determination that disclosure of the requested records, or any portion thereof, would be "contrary to the public interest" was not an abuse of discretion. *See Prestash v. City of Leadville*, 715 P.2d 1272, 1272-73 (Colo. App. 1985) (affirming trial judge's decision to release portions of police investigatory file over objections of custodian) (citation omitted); *Freedom Colo. Info.*, 196 P.3d at 904 (requiring trial courts to determine if the custodian's articulated "reasons which, though explained, do not withstand examination under an abuse of discretion standard").

The Colorado Supreme Court has mandated the process by which the Court is to proceed at the Show Cause hearing. "[U]nder an abuse of discretion standard for reviewing the CCJRA custodian's determination, the district court does three things[:]

First, the court reviews the criminal justice record at issue.

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[6] Those factors are: "the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Freedom Colo. Info.*, 196 P.3d at 899 (citation omitted).

> Second, the court takes into account the custodian's balancing of the interests and articulation of his or her determination.
>
> Lastly, the court decides whether the custodian has properly determined to: (1) allow inspection of the entire record, (2) allow inspection of a redacted version of the record,[]or (3) prohibit inspection of the record.

Freedom Colo. Info., 196 P.3d at 900 (footnote omitted). An abuse of discretion is found when the custodian's decision reflects either a misconstruction or misapplication of applicable law. *Id.* at 899-900.

The Court's review must necessarily determine whether the custodian properly exercised her authority to release redacted records to the applicant:

> By providing the custodian of records with the power to redact names, addresses, social security numbers, and other personal information, disclosure of which may be outweighed by the need for privacy, the legislature has given the custodian *an effective tool to provide the public with as much information as possible*, while still protecting privacy interests when deemed necessary.

Id. at 900 n.3 (emphasis added).[7] The Court emphasized this point by stating, unequivocally, that "[a] custodian *should* redact *sparingly* to promote the CCJRA's *preference for public disclosure*." *Id.* (emphasis added). Indeed, the Court berated the El Paso County Sheriff for his failure, either in response to the records request or in response to the Court's Show Cause Order, to "consider release of a redacted file that would satisfy the CCJRA objectives of

[7] While the Court recognized that "[r]edaction may also protect identities of informants or *undercover* police officers," *id.* at 900 n.3 (emphasis added), none of the three officers involved in this IAB file are "undercover" police officers. Although the Court of Appeals has recognized, that in certain unique circumstances, a peace officer may have a valid *security* interest in the confidentiality of his *undercover* identity and/or his photographic image, *ACLU of Colo. v. Whitman*, 159 P.3d. 707, 711 (Colo. App. 2006) , *overruled sub silentio, Freedom Colo. Info.*,196 P.3d at 901, those circumstances are not present here where the intervening officers' names and at least two of their faces are publicly available on the Internet.

disclosure while also addressing privacy concerns involved in the inspection request." *Id.* at 902.

If the Court determines that the failure to redacts and the custodian's complete denial of access to each and every page of the file was "arbitrary or capricious," the plaintiffs are entitled to an award of their reasonable attorneys fees and costs. See § 24-72-305(7), C.R.S.

APPLICATION OF THE RELEVANT STATUTES AND CASE LAW TO THE RECORDS AT ISSUE

I. POLICE OFFICERS ENJOY VERY LITTLE OR NO LEGITIMATE EXPECTATION OF PRIVACY IN INTERNAL AFFAIRS INVESTIGATION FILES EXPLORING THEIR ON-DUTY CONDUCT IN INTERACTING WITH MEMBERS OF THE PUBLIC

The fundamental premise of Ms. Dulacki's denial decision is contrary to firmly-established Colorado law: law enforcement officials either enjoy no reasonable expectation of privacy with respect to IAB files that focus exclusively on their discharge of official duties as peace officers, or, to the extent that any such legitimate interest exists (in a particular case) it is a "limited" one, and one that is "minimal" in comparison to the public interest in disclosure of materials that shed light on the conduct of public officials and the Denver Police Department.

A. MS. DULACKI'S ASSERTED JUSTIFICATION FOR HER DENIAL OF ACCESS IS CONTRARY TO SETTLED COLORADO LAW AND THEREFORE WAS AN ABUSE OF DISCRETION.

Colorado District Courts examining this issue have repeatedly rejected Ms. Dulacki's position, and have held, to the contrary, that police officers do not have a reasonable expectation of privacy in department IAB files that focus exclusively upon an officer's on-duty official

conduct, or, at most, they may have only the most limited and "minimal" expectation of confidentiality. *See*

Denver County District Court:

1. *Brotha 2 Brotha v. City & Cty. of Denver*, Case No. 96CV6882 (Denver Cty. Dist. Ct. Feb. 4, 1997) (attached as Exhibit 1) at 8 (finding officers' statements to IAB concerning "the officers' conduct and observations while deployed" were at lowest end of privacy interest spectrum and "the [CCJRA's interest] in favor of disclosure" outweighed that minimal privacy expectation).[8]

2. *ACLU of Colo. v. City and Cty. of Denver*, Case No. 97-CV-7170 (Denver Cty. Dist. Ct. Apr. 7, 1998) (attached as Exhibit 2) at 3 (finding that "the information sought to be protected [in an IAB file] is not 'highly personal and sensitive' and its disclosure would not be offensive and objectionable to a reasonable person. . . . In short, Intervenor's confidentiality argument is unpersuasive."), *aff'd*, *ACLU of Colo. v. Grove*, Case No. 98CA981 (Colo. App. Oct. 21, 1999) (not selected for publication) (attached as Exhibit 3) at 3-4 (expressly holding that "the intervenors [DPD police officers] *do not have a legitimate expectation of privacy* in the IAB file") (emphasis added).

[8] In *Brotha-2-Brotha*, Judge Markson was the first of several judges, in this Court and at the Court of Appeals, to reject the claim that the Denver City Charter provision (invoked by the intervenors here) accords a right to blanket confidentiality in the statements officers provide to the IAB. Indeed, *every* Denver District Court judge who has considered that provision has concluded that it, (and Denver's Revised Municipal Code and the "Garrity" advisement), does *not* shield such statements from public inspection under the CCJRA. *See also Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986) (same); *Cf. Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) ("An agreement by a government entity that information in public records will remain confidential is insufficient to transform a public record into a private one.") (citation omitted).

3. *ACLU of Colo. v. Whitman*, No. 04CV700 (Denver Cty Dist. Ct. Mar. 30, 2004) (attached as Exhibit 4) at 6 (finding that four intervening officers, including Sergeant Speelman, had only a "limited" privacy expectation in IAB files concerning their on-duty conduct, which was greatly outweighed by the "compelling state interest in allowing the public to see how the police department is policing itself and that its internal investigations are performed in a thorough and unbiased manner."), *aff'd*, 159 P.3d 707 (Colo. App. 2006).

4. *Nash v. Whitman*, No. 05CV4500 (Denver Cty. Dist. Ct. Dec. 7, 2005) (attached as Exhibit 5) at 11 (following *in camera* review of file, finding that ,with exception of inappropriate e-mails on officers' computers, there was no "highly personal and sensitive information" in IAB files giving rise to a privacy expectation by officers involved).

Larimer County District Court:

5. *City of Loveland v. Loveland Publ'g Corp*., No. 03CV513, 2003 WL 23741694 at *3 (Larimer Cty. Dist. Ct. June 16, 2003) (attached as Exhibit 6) ("**state and federal courts hold that police officers have no privacy interest in records concerning their conduct while on duty**, so long as those records do not contain personal, intimate information in which an officer would have such an interest") (emphasis added) (citations omitted).

Garfield County District Court:

6. *Walter v. Colo. Mountain News Media Co*., No. 05CV79 (Garfield Cty. Dist. Ct. Nov. 15, 2005) (attached as Exhibit 7) at 7 (where "the information at issue involves conduct committed in a public place as part of Officer Munoz's official duties as a police officer . . . [the documents do not] fall within the zone of protection of Officer Munoz's rig hot privacy").

El Paso County District Court:

7. *City of Colo. Springs v. ACLU,* Case No. 06CV2053, (El Paso Cty. Dist. Ct. Feb. 5, 2007) (attached as Exhibit 8) at 3 (the officer's "conduct [was] performed while on duty, in public and in the presence of witnesses . . . is not personal and sensitive such that there is a significant public policy in not making them available to the public.").

Plaintiff's counsel have litigated this issue in each of the above District Courts and are unaware of any District Court Judge deciding a CCJRA Show Cause hearing by finding a police officer's expectation of privacy in an IAB file focusing exclusively on official conduct (even if any is existent) outweighed the compelling public interest in disclosure of such records.[9]

In sum, courts in Colorado and elsewhere have consistently found that information regarding only the official conduct of a police officer, acting while on duty and in the public, is not "highly personal and sensitive," and thus is not subject to a reasonable expectation of privacy on the part of the officers who are the subject of such reports. *See, e.g., Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (**"[P]olice internal investigation files [are] *not protected by the right to privacy* when the 'documents relate[] simply to the officers' work as police officers."**)[10] (emphasis added); *Mangels*, 789 F.2d at 839

[9] *See also* Amy Hamilton, *Fruita probe of Loy's stop by police is released*, Grand Junction Daily Sentinel (Aug. 9, 2009) (attached as Exhibit 9) at A-1(containing link to entire IAB file released by Fruita Police Department in response to newpaper's request under CCJRA, in case where two police officers were found not to have violated any departmental policy and were therefore not subject to any discipline).

[10] *Stidham* cites two earlier Tenth Circuit decisions which held that police officers do not have a legitimate expectation of privacy in documents that "related simply to the officers' work as police officers." *See Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981).

(same, with respect to officers in the Denver Fire Department, advised of their rights under City's "Garrity" advisement); *State of Haw. Org. of Police Officers v. Soc'y 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'") (citations omitted).[11]

Under Colorado law, as elsewhere, police officers are considered "public officials," *see Willis v. Perry*, 677 P.2d 961, 963-64 (Colo. App. 1983), and "**a public official . . . has no right of privacy as to the manner in which he conducts himself in office**. . . . Hence, a truthful account of *charges of misconduct in office* cannot form the basis for an action for invasion of privacy." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (emphasis added); *Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) (same); s*ee also Citizens to Recall Mayor James Whitlock v. Whitlock*, 844 P.2d 74, 77-78 (Mont. 1992) (rejecting as "unreasonable as a matter of law" a public officer holder's expectation of privacy "in performance of his public duties"); *see also* RESTATEMENT (SECOND) TORTS § 652D cmt. e ("a public officer has no cause of action [for invasion of privacy] when his . . . activities in that capacity are recorded, pictured, or commented on in the press"); *cf. Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004)

[11] *See also 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"); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (a police officer who was subject to suspension and reprimand for on-duty conduct did not have a "legitimate expectation of privacy" because the disclosed information was "not of a highly personal and sensitive nature"); *Kallstrom v. City of Columbus, Ohio*, 165 F. Supp. 2d 686, 695 (S.D. Ohio 2001) (finding no privacy expectation in "disciplinary records . . . and other documents detailing how each officer is performing his or her job"); *Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994) (police office enjoys no privacy expectation in "items [that] concern . . . official, duty-connected types of information" including their "performance evaluations").

(police officer has no legitimate expectation of privacy in his conduct "while he was on duty performing an official function in a public place"); *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (holding that police officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties).

B. PEACE OFFICERS HAVE NO REASONABLE EXPECTATION OF PRIVACY IN THEIR IAB COMPLAINT SUMMARY

It is also firmly established that an "IAB complaint summary" -- the document setting forth the history of IAB investigations that have been completed with respect to an individual officer (*see* Ex. A to the Compl.) is not subject to a reasonable expectation of privacy by that officer. *See, e.g.*, *ACLU of Colo. v. City & County of Denver*, Case No. 97-CV-7170 (Denver Dist. Ct. Apr. 7, 1998) (Ex. 2) at 3 - 5 (finding that the entirety of the IAB file must be disclosed, including the IAB Complaint Summary for Badge Nos. 95030 (Stanford) and 91042 (Grove)); *see also ACLU of Colo. v. Whitman*, No. 04-CV-700 (Denver Dist. Ct. Mar. 30, 2004) (Ex. 4) at 4 ("The City also apparently claims protection for IAB complaint summaries for the four subject officers which show the history of all complaints and disposition of those complaints for each officer . . . [t]hose documents concern the activities of the officers on the job and are not protected against public inspection as ['personal and private'] personnel file material."). Numerous IAB complaint summaries from Denver Police internal affairs files have been disclosed to the ACLU, without any need to resort to litigation, and such complaint history summaries will be introduced as an exhibit at trial.

In light of the above, neither the intervening police officers, nor Ms. Dulacki, should be heard to assert that there officers have a reasonable expectation of privacy in their disciplinary complaint summaries.

C. IAB FILES CONCERNING (ONLY) POLICE OFFICER'S OFFICIAL ON-DUTY CONDUCT ARE NOT "PERSONNEL FILES" UNDER THE CORA

Based upon their "Answer," it is anticipated that the intervenors will argue at the Show Cause Hearing that the IAB files at issue are akin to "personnel files" under the CORA (a statutory exemption not present in the CCJRA). That argument has been uniformly rejected by every Colorado court that has considered it. Colorado courts have unequivocally restricted what constitutes "personnel files" under the CORA to *highly personal and private demographic* information such as social security number, home address and other personal data. *Daniels*, 988 P.2d at 651-52 (holding that to qualify as "personnel file" material, the information "maintained" by the public entity, regardless of the label affixed to the folder in which the information is housed, "must be of the same general nature as an employee's home address and telephone number or personal financial information."). District Courts, including this one, have repeatedly followed this precedent and have rejected previous attempts by Denver Police officers to exempt IAB files from disclosure as "personnel file" information. *See, e.g., ACLU of Colo. v. Whitman*, (Ex. 4) at 4 (documents in IAB file that "concern the performance by these officers of their duties" and "concern the activities of the officers on the job" are "not protected . . . as personnel file material"); *ACLU v. City & Cty. of Denver*, (Ex. 2) at 2 n.1 (finding that "personnel files" exemption of CORA does not apply to IAB files and "is not relevant"); *Nash v. Whitman*, (Ex. 5) at 4 ("IAB files do not contain personnel files."); *Brotha 2 Brotha v. City & Cty. of Denver*, (Ex. 1) at 3-4 (finding that IAB files are not maintained as "personnel files" by Denver Police

Department); *see also* cases cited *supra* at 10-11 (all ordering disclosure of police department internal affairs investigation files under CCJRA); *Freedom Colo. Info.,* 196 P.3d at 900-02 (ordering Sheriff, on remand, to consider release of redacted IA files, without any mention of "personnel files" exemption under the CORA).

Even records in the nature of professional evaluations and performance ratings are not within the ambit of the "personnel files" exemption. *See City of Boulder v. Avery*, 30 Media L. Rep. (BNA) 2345, 2437-38 (Boulder Cty. Dist. Ct. March 18, 2002) (performance evaluation of judge was not exempt from disclosure as "personnel file"); s*ee also* § 24-72-202(4.5), C.R.S. (expressly excluding "performance ratings" from definition of "personnel files").

In other words, only purely ***private*** information – *i.e*., information that does not pertain to the public official's discharge of his or her official duties – is exempt. *See Nixon v. Admin. Gen. Servs.*, 433 U.S. 425, 457 (1977) (holding that public official enjoys a right of privacy only with respect to government-held information concerning "matters of personal life *unrelated to any acts done by them in their public capacity*") (emphasis added). To the extent that any such information is contained in the criminal justice records sought by the plaintiffs, such information, and *only* such information, should properly be withheld from inspection by redacting it. *See Freedom Colo. Info.,* 196 P.3d at 900 n.3.

II. DISCLOSURE OF THE IAB DOCUMENTS SOUGHT BY THE PLAINTIFFS IS IN THE PUBLIC INTEREST – NOT CONTRARY TO IT

Ms. Dulacki refused to allow the plaintiffs access to on the grounds that disclosure of the IAB Documents would be "contrary to the public interest," because the IAB did not sustain the complaints against them, and she therefore determined that the officers' privacy interests in those files "outweigh any public purpose to be served " by disclosure. *See* Ex. F to Compl. Both

aspects of her purported "balancing" of competing interests are plainly in error: First, as demonstrated above, the officers have no legitimate privacy interests in this IAB file focusing exclusively on their official conduct. Second, the fact that the Denver Police Department did not find the charges against the officers were "sustained" – despite Judge Ortiz-White's judicial findings of "extreme, profane, and racially motivated" conduct by the officers– actually *enhances*, rather than diminishes the public interest to be served from disclosure. *See Waller v. Georgia*, 467 U.S. 39, 47 (1984) ("The public . . . has a strong interest in exposing *substantial allegations* of police misconduct to the salutary effects of public scrutiny.") (emphasis added).

The quintessential purpose of open records laws (both state and federal) is to provide citizens the opportunity to assess the propriety of government officials' conduct in exercising duties "authorized by law or administrative rule." *See, e.g., Wick Commc'ns Co. v. Montrose Cty. Bd. of Cty. Comm'rs*, 81 P.3d 360, 364-66 (Colo. 2003) (purpose of CORA is to "facilitat[e] a forum of open and frank discussion about issues concerning public officials and the citizenry they serve"); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) (purpose of the federal Freedom of Information Act is "'to open agency action to the light of public scrutiny,'" to inform the citizenry "'about what their government is up to'").

The public's ability to scrutinize the basis for a law enforcement agency's conclusion, following an investigation of own officers' official conduct, is no different than its ability to scrutinize the decisions reached by judges based upon their review and evaluation of "criminal justice records" that form the basis for judicial decisions. *See, e.g., P.R. v. District Ct.*, 637 P.2d 346, 353 (Colo. 1981) ("'Public confidence cannot long be maintained where important . . .

decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the . . . decision sealed from public view.'") (citation omitted). There can be little if any public confidence and trust in a decision issued by public officials without providing the public access to the facts, reasoning and analysis that underlie the agency's conclusion. *See, e.g. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 570, 572 (1980) (Burger, C.J.) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."). This is all the more true in this case where a County Court Judge, having heard live sworn testimony from both the plaintiffs and one of the officers involved, expressly found the plaintiffs credible and the officer not credible.

A. COLORADO TRIAL COURTS HAVE RECOGNIZED THAT DISCLOSURE OF IAB DOCUMENTS IS IN THE PUBLIC INTEREST

There is a compelling public interest in providing citizens with information about how their police force is policing itself. Nine Colorado District Courts examining this issue have so held. *See* eight cases cited at 9-11, *supra*, and District Court ruling in *Freedom Colo. Info.*, 196 P.3d at 892. Colorado's courts have observed, "**[D]isclosure [of IAB files] promotes the public interest** in maintaining confidence in the honesty, integrity and good faith of Denver's Internal Affairs Bureau." *ACLU of Colo. v. City & Cty. of Denver*, (Ex. 2) at 3 (emphasis added); *Nash v. Whitman*, (Ex. 5) at 5 (finding that "[o]pen access to internal affairs files enhances the effectiveness of internal affairs investigations, rather than impairing them . . . . Transparency also enhances public confidence in the police department"); *ACLU of Colo. v. Whitman*, (Ex. 4) at 6 ("[T]here is a *compelling* state interest in allowing the public to see how the police department is policing itself and that its internal investigations are performed in a thorough and unbiased

manner.") (emphasis added); *Id.* at 5 ("[T]here is a compelling interest of the public in knowing how allegations of police misconduct are being investigated and the outcome of those investigations."); *Loveland Publ'g*, (Ex. 6)at 4 ("[T]he public does have a legitimate and *compelling* interest in ensuring that its police officers properly perform their official duties and honestly investigate complaints from citizens related to the performance of those duties.") (emphasis added); *Cf. Freedom Info. Colo.*, 196 P.3d at 902 (chastising the Sheriff for "failing to consider release of a redacted [IAB] file that would satisfy the CCJRA objectives of disclosure").

There is a paramount public interest, codified in Colorado's public records laws, of permitting the public to assess the performance of its public officials in conducting internal investigations. *See Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 879 (Colo. App. 1987) ("[A]ny possible danger of discouraging internal review is outweighed by the public's interest in whether the internal review was adequate, whether the actions taken pursuant to that review were sufficient, and whether those who held public office . . . should be held further accountable."); *Daniels*, 988 P.2d at 652 (holding that public's interest in being able to assess the competency of internal investigations of government agencies is a "compelling" one). Courts throughout the country have reached the same conclusion as Colorado's courts – finding that disclosure of IAB files *promotes* the public interest because transparency is a necessary prerequisite to public confidence in the *results* of internal affairs investigations. *See, e.g., Jones v. Jennings*, 788 P.2d 732, 738-39 (Alaska 1990) ("There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law."); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong

interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely."); *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) ("There can be little doubt that allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern."); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) ("Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist."); *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) ("The general public's health and safety are at issue whenever there are serious allegations of police [misconduct]. The manner in which such allegations are investigated is a matter of significant public interest."); *City of Portland v. Oregonian Publ'g Co.*, 112 P.3d 457, 460 (Or. Ct. App. 2005) ("the public . . . need[s] to have complete confidence that a thorough and unbiased inquiry [into police misconduct] has occurred . . . [and] [t]hat confidence comes from transparency").

In sum, Ms. Dulacki's cursory assertion that any "public purpose to be served" by disclosing any portion of the IAB file was outweighed by the officers' privacy rights is contrary to well established law, as set forth above, and constitutes an abuse of discretion.

III. THE PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS BECAUSE THE RECORDS CUSTODIAN ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER

Section 24-72-305(7), C.R.S., provides for the custodian to pay the applicant's court costs and attorneys fees "upon a finding that the denial was arbitrary or capricious." Given the clear rules guiding the custodian's exercise of discretion, including the unambiguous direction that Colorado's highest court has given to records custodians to consider release of redacted

documents, and the myriad prior judicial decisions finding little or no legitimate privacy expectation of police officers in IAB files that are focused exclusively on their official conduct, Ms. Dulacki's wholesale refusal to disclose *even a single word* contained in the IAB file at issue was unquestionably "arbitrary and capricious" (i.e., a misapplication of clearly-established Colorado law and wholly unsupported by any facts).

Accordingly, the Court should so find and award the plaintiffs their reasonable attorneys' fees and costs.

CONCLUSION

For the reasons set forth above, and based upon the numerous judicial authorities the Ms. Dulacki ignored or misapplied in reaching her decision to deny access to any portion of the IAB file in question, at the close of the Show Cause hearing, the Court should enter an Order finding that that decision was an abuse of discretion; the Court should order Ms. Dulacki to disclose the entirety of the IAB file to the plaintiffs (with only truly "personal and private" information, such as home address, phone numbers and social security numbers) redacted. The Court should also find that Ms. Dulacki's decision to deny access to any portion of the IAB was arbitrary and capricious; accordingly, the Court should enter an Order awarding the plaintiffs their reasonable attorneys fees and costs in being forced to litigate this matter.

Respectfully submitted this 1st day of June, 2010.

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I hereby certify that on this 1st day of June, 2010, a true and correct copy of the foregoing **OPENING HEARING BRIEF OF PLAINTIFFS** was served on the following counsel through the Lexis/Nexis File-and-Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

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