DATE FILED: November 20, 2013 11:35 AM

Exhibit 1

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

Exhibit 2

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO. 80202,	
Stephen Nash, et al., Plaintiffs, vs. **Gerald Whitman, et al.,** Defendants, **Adolph Chavez, et al.,** Intervenors.	▲ COURT USE ONLY ▲ Case Number: 05CV4500 Ctrm: 5

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

THIS MATTER is before the Court upon Plaintiffs' request for judicial review of Defendants' refusal to disclose to Plaintiffs the documents contained in two files that were generated by the Internal Affairs Bureau ("IAB") of the Denver Police Department ("DPD") during investigations of alleged police misconduct related to the "Spy Files" controversy. Plaintiffs sought disclosure of the files pursuant to the Criminal Justice Records Act ("CJRA"), § 24-72-301, et seq., C.R.S., and the Colorado Open records Act ("CORA"), § 24-72-201, et seq., C.R.S. Plaintiffs have not requested a declaration that all IAB files should be available upon demand. Defendants refused to disclose the files, with the exception of a handful of documents that had been received from the Plaintiffs. Defendants provided a "Vaughn Index," in which they set forth their asserted grounds for nondisclosure of each document in the files. Both sides have substantially complied with the procedural requirements of the applicable statutes.

At the inception of the case, the documents sought by Plaintiffs included a large volume of emails exchanged within DPD that were alleged to be inappropriate in a variety of ways. The Plaintiffs dropped their request for disclosure of the emails after the Colorado Supreme Court's decision in Denver Publishing Co. v. Board of County Commissioners of the County of Arapahoe, Colorado, 121 P.3d 190 (Colo. 2005).

FINDINGS OF FACT

Plaintiffs Stephen Nash and Vickie Nash are community activists who are involved with an organization known as CopWatch. They were among the people who learned that the Intelligence Unit of the DPD had monitored their peaceful protest activities and kept files on them.

On or about July 1, 2002, during the pendency of litigation regarding the larger "Spy Files" controversy, the Nashes filed a written complaint alleging improper monitoring by DPD of their legal expressive activities. By letter from Chief Gerald Whitman dated March 16, 2004, the Nashes were informed by DPD that their complaint had been investigated by the IAB and that "there was a preponderance of evidence to support the sustaining of violations." The letter further stated that the investigation of the Nashes' complaint had resulted in changes to DPD policy and procedures. The letter did not identify the officers found to have violated rules or regulations, or the rules or regulations that were violated, or the policies or procedures that were changed.

By letter from Mark Silverstein dated April 14, 2004, Plaintiffs requested disclosure of the entire record of the investigation of the Nashes' complaint and the entire records of two other related investigations described in the letter. Further communications between the parties revealed that there were only two IAB files, not three, containing all of the documents sought by Plaintiffs. Plaintiffs' letter stated that it "should not be construed as a request for any portions of any documents that contain highly personal and private information about any officers' off-duty activities that are not directly related to the discharge of their official duties. Accordingly, this is not a request for, and you may redact, such information as social security numbers, home addresses, home phone numbers, personal medical and financial information, and similar information."

Plaintiffs' request was denied in its entirety in a letter from Assistant City Attorney Richard A. Stubbs on June 10, 2005. This was later followed by a Vaughn Index and an amended Vaughn Index. Defendants' primary basis for refusing to disclose the requested files is the assertion that disclosure of these or any other IAB files would be contrary to the public interest because disclosure would have a chilling effect on DPD's ability to obtain information in investigations and its ability to properly discipline its employees. They also asserted the deliberative process privilege and the attorney/client privilege as to some of the documents. Seven present and former DPD officers intervened in the case to argue that their privacy rights would be violated by disclosure of the files at issue.

The investigations embodied in both IAB files resulted in sustained violations and the imposition of discipline.

Three of Defendants' witnesses testified that civilians would likely be reluctant to make complaints or give statements or interviews in IAB investigations if they knew their involvement would be disclosed publicly. However, in this case, there were no civilian witnesses, except the Nashes. Civilians participating in IAB investigations are not given the same Garrity Advisement as officers receive (see below), but they are told that their statements are confidential.

DPD officers are required to cooperate with IAB investigations, to give statements and to answer questions truthfully and completely, without omitting any material facts. They are also forbidden to retaliate against any officer or civilian for making complaints or cooperating in IAB investigations. Officers are subject to discipline for failure to comply with these requirements. Although the potential for retaliation against cooperating officers and civilians was argued in Defendants' briefs as a significant reason for refusing to disclose IAB files, Commander Lamb, the head of IAB and the main witness for Defendants at the hearing in this matter, testified that he is not concerned about retaliatory conduct and that he is confident that officers would continue to cooperate and tell the truth in IAB investigations, as they are required to do, whether or not their statements might be disclosed.

Before giving a statement in an IAB investigation, officers are given a written "Advisement Pursuant to Internal Investigation" ("Garrity Advisement"), which they and the investigator sign. It informs the officers that they may be subject to discipline for failure to give a statement or answer questions, but only under the circumstances enumerated in the Advisement. These circumstances include that the questions be reasonably related to work performance or fitness of an officer; that neither the statement nor answers to questions be considered a waiver of his or her right against self-incrimination; that the statement or answers will not be used in any criminal proceeding against him or her and the Department will resist every effort to produce the statement or answers in any civil or criminal case; that the statement or answers will be kept confidential except that they may be disclosed to people at DPD on a need-to-know basis, they may be disclosed to the District Attorney or the City Attorney on a need-to-know basis, and they may be offered in evidence (and become part of the public record) in the event of an appeal of disciplinary action; and he or she is given the Advisement prior to giving the statement or answering any questions. Thus, officers are promised limited confidentiality before giving statements or answering questions in IAB investigations.

There have been at least three district court decisions in recent years ruling in favor of parties who, like Plaintiffs, requested IAB files from the DPD pursuant to the CJRA and the CORA. In addition, IAB files or portions thereof are ordered to be produced in discovery in criminal and civil cases approximately 18 times each year. The decisions, and the fact that disclosure may be ordered by courts, are known within the Department, but according to Commander Lamb, have not had a chilling effect on DPD's ability to obtain information in IAB investigations or to discipline officers because the number of such cases is few in comparison to the large number of IAB investigations conducted each year.

Once an IAB investigation is completed, a summary report is prepared and sent through the subject officer's chain of command (Lieutenant, Captain, Division Chief, Deputy Chief and Chief). Commander Lamb described this summary as a summary of the facts, though it may contain "limited" impressions or opinions; summaries do not contain recommendations. The disciplinary decision is made in the chain of command, not by the IAB. An officer who is subject to discipline has a variety of appeal avenues. The officer and his or her representative are permitted to review the entire IAB file after the investigation is completed, although not before. If the officer pursues an administrative appeal, the IAB file, including witness statements made pursuant to the Garrity Advisement, may be admitted into

evidence, at which point it becomes publicly available. This happens about a dozen times each year.

DPD makes serious and substantial efforts to maintain the confidentiality of IAB files within the Department. Except for the Chief of Police, the Manager of Safety and an officer who is the subject of a sustained complaint, all employees with access to IAB files are required to sign confidentiality agreements. The physical files are kept in a locked area, separate from other police files, and computer files are protected by a firewall.

IAB files do not contain personnel files.

DPD resists each and every request for disclosure of IAB files, whether the request is made pursuant to the CJRA or the CORA, or is made in discovery in a civil or criminal case. Each and every request is denied by DPD, without exception, and documents from IAB files are never disclosed except upon court order. Production of IAB files in criminal and civil discovery is usually accompanied by a protective order, limiting use of the materials to the particular case. IAB documents become part of the public record if they are admitted into evidence at trial, which happens occasionally.

Commander Lamb, whose candor and credibility were very helpful to the court, testified that civilians' and police officers' willingness to come forward would be chilled if IAB files were routinely open for inspection by the public, and that it is "amazing how forthcoming they are" now. He further testified that cooperation of civilians and officers is crucial to IAB's ability to conduct thorough investigations. If IAB files were available to the public upon demand, officers' interviews would be more difficult, with officers volunteering less and the interviewer more frequently having to follow a Q & A format. Commander Lamb was clear, however, that he was not concerned about officers not telling the truth in interviews, and that retaliation, harassment and ostracizing of cooperating officers were not significant concerns. He essentially debunked the stereotypes about police officers that were raised as justification for secrecy.

Mr. Williams, the defense expert, opined that, if IAB files were open to the public, civilians would be less likely to come forward and officers would be less forthcoming, making them "harder interviews" for IAB investigators. He testified that the public needs to be assured "in all cases" that the IAB process is fair and that resulting discipline is right. He opined that this public need can be satisfied by civilian oversight mechanisms and that public access to IAB documents is not necessary. However, Mr. Williams was not familiar with the experience of states such as Florida, Ohio, Montana and Arizona, which permit open public access to internal affairs files.

Plaintiffs' expert on police internal affairs policies and procedures was Lou Reiter. The court found his testimony more persuasive than Mr. Williams', primarily because it was more grounded in specific experience, including auditing of internal affairs files and processes around the country, and because he has had extensive experience in states, such as Florida, Ohio, Montana and Arizona, that allow open access to internal affairs files and states that do not. The court also found his analysis more logically sound and internally consistent. Accordingly, the court finds the following facts based upon Mr. Reiter's testimony. There are

several key factors that lead police officers to be frank and open in internal affairs investigations, and promises of confidentiality are not among them. Internal affairs secrecy contributes to the "code of silence" or "blue wall", by creating the expectation that things will be kept in house and away from objective outsiders. Open access to internal affairs files enhances the effectiveness of internal affairs investigations, rather than impairing them. Knowing that they will be scrutinized makes investigators do a better job and makes them and the department more accountable to the public. Transparency also enhances public confidence in the police department and is consistent with community policing concepts and represents the more modern and enlightened view of the relationship between police departments and the communities they serve. Civilian review boards are not an effective substitute for transparency.

Marcy Kaufman, a civilian member of the Disciplinary Review Board, testified that civilians might not come forward if they knew their complaints or statements might be made public, because people fear police harassment, even though it rarely if ever happens, and do not understand law enforcement. These are problems that could be ameliorated by greater transparency.

The Nashes were signatories of the May 2003 settlement agreement in the federal "Spy Files" case, which contained language by which plaintiffs released all claims against Denver, its Departments and agents "which might exist with regard to any and all claims in any way related to or arising from the matters that are the subject matter of the Lawsuit...." Defendants argue that the settlement agreement released the Nashes' claims in the instant case. The Court does not agree. This release language does not apply to the Nashes' CJRA claim, which did not accrue until 2005, when their request for records was denied. By settling the earlier lawsuit, and all related claims, they did not give up their rights under the CJRA to request documents and to seek judicial review if their request was denied.

CONCLUSIONS OF LAW

Section 24-72-305(5), C.R.S. provides that access to records of police investigations, such as those at issue here, may be denied "[o]n the ground that disclosure would be contrary to the public interest...." Section 24-72-305(7), C.R.S. provides that any person denied access may apply to the district court for an order directing the custodian "to show cause why said custodian should not permit the inspection of such record." The court must hold a hearing and "[u]nless the court finds that the denial of inspection was proper, it shall order the custodian to permit such inspection..." This statutory language casts the burden of proof upon the custodian to show that denial of access was proper. The question then becomes, what is the nature and extent of that burden? The statutory language could be construed to support the conclusion that the custodian's burden is to satisfy the court by a preponderance of the evidence that disclosure of the records would, in fact, be contrary to the public interest. This appears to have been the burden imposed in past cases. See, e.g., Johnson v. Colorado Department of Corrections, 972 P.2d 692 (Colo. App. 1998).

However, after the hearing in this case, the Colorado Supreme Court issued its opinion in Harris v. The Denver Post Corp., No. 04SC133, slip. op. (Colo. Nov. 15, 2005), which provides that the custodian's burden is to satisfy the court that his decision that disclosure of

the records would be contrary to the public interest was not an abuse of discretion. Harris involved the Denver Post's effort to obtain videotapes that were made by Harris and Klebold as they prepared for their 1999 attack on Columbine High School. The tapes were later seized pursuant to a valid search warrant of the Harris home. The primary issue in the case was whether the tapes were "criminal justice records", subject to the CJRA, or "public records", subject to the CORA, or whether they were, as found by the district court, private property not subject to either act. The Court concluded that the tapes were "criminal justice records", and went on to discuss the implications of that conclusion. In the instant case, the parties are all in agreement that the IAB files at issue are "criminal justice records" and subject to the CJRA.

In Harris, the Court held that, pursuant to the CJRA, the tapes "are subject to the sheriff's exercise of sound discretion to allow the requested inspection or not, utilizing a balancing test taking into account the relevant public and private interests." Id., slip op. at 4. The competing interests recognized by the Court in Harris were the privacy interests of the Harris and Klebold parents and the public purpose to be served in allowing inspection. The Court held that the sheriff's decision to allow or not allow inspection of the record "is subject to judicial review under an abuse of discretion standard." Id., slip op. at 24. In so holding, the Court emphasized the differences between the CJRA and the CORA, calling into question arguments based on earlier cases that often appeared to treat the two acts as interchangeable. Because the Sheriff had incorrectly determined that the tapes were private property and not subject to the CJRA and did not, therefore, attempt to exercise any discretion, the Court in Harris remanded the case to the Sheriff to decide whether to allow inspection of the tapes.

In the instant case, the court pressed counsel for Defendants at the hearing on the question of whether there had been an exercise of discretion under the CJRA and was assured that DPD's refusal to allow inspection, as it does in every case, was an exercise of its discretion under the CJRA, which Defendants acknowledged governs this case. This is not the situation facing the Harris court, where the decision maker did not recognize that the CJRA applied and, therefore, made no decision under it. Accordingly, the court will proceed to review the refusal decision under an abuse of discretion standard, rather than remand the matter to DPD for reconsideration.

It should also be noted that, although defense witnesses and counsel made mention of a City Charter provision and ordinance requiring confidentiality, Defendants have not argued that these provisions govern the case or in any way excuse compliance with the CJRA. The Legislative Declaration to the CJRA states, "The general assembly hereby finds and declares that the maintenance, access and dissemination...of criminal justice records are matters of statewide concern and that, in defining and regulating those areas, only statewide standards in a state statute are workable." § 24-72-301(1), C.R.S.

Defendants make two primary arguments: that their blanket denial of all requests for IAB files constitutes a proper exercise of the discretion conferred by the CJRA because allowing inspection of any part of any IAB file would be "contrary to the public interest"; and that certain individual documents contained in the subject IAB files are protected by the attorney/client privilege and the deliberative process privilege.

Abuse of Discretion.

The court concludes that Defendants' blanket policy of denying every request for disclosure of IAB files is an abuse of the discretion conferred by the CJRA, rather than a proper exercise of it. The statutory scheme contemplates a balancing of competing interests and the exercise of judgment on a case by case basis. "In making this statutory determination, the custodian takes into account and balances the pertinent factors, which include 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." Harris, slip. op. at 24. The exercise of discretion contemplated by Harris can only be done on a case by case basis, taking into account every "pertinent consideration relevant to the *circumstances of the particular request.*" [Emphasis added.]

Here, although Defendants prepared a lengthy Vaughn Index purporting to set forth on a document by document basis their reasons for nondisclosure, this was admittedly a *post hoc* effort to justify a foregone conclusion rather than a genuine consideration of whether disclosure of these particular records would be contrary to the public interest. Review of the voluminous submission from Defendants to the court reveals that most of the documents submitted for *in camera* review are devoid of sensitive content and some are devoid of any substantive content at all. Moreover, the descriptions of the documents and the asserted grounds for not disclosing them in the Vaughn index often bear little resemblance to the documents themselves. One example is Document #9 in the first IAB file, which was the subject of the following entry:

> Document number 9 is a three-page comparative discipline document. It provides information regarding discipline imposed upon officers involved in incidents other than the instant one but who were found to have violated the same Police Department rules that the involved officers in the instant matter were alleged to have violated. It contains information regarding the complainants, the substance of their complaint, and the names of officers who were possibly involved in the incident that was the subject of the complaint. It is unknown who prepared the document, with recipients being the command staff who will review the IAB file and the members of the Disciplinary Review Board. (1) The documents qualify for the deliberative process privilege because they contain information that will be used to determine the appropriate level of discipline, if any, to impose upon the subject officers. (2) Disclosure would be contrary to the public interest because in many instances disclosure would identify officers who had been disciplined by the Department, thereby chilling the Department's desire to discipline its officers. (3) Disclosure would also implicate officer privacy interests because in many instances disclosure would identify specific officers who had been disciplined by the Department.

Document #9 is a blank form document titled, "Main Comparative Discipline Report." It contains no information about the subject investigations or any other investigations. It contains no information about any officers. Assuming that a blank or redacted

document had been submitted by mistake, the court inquired of defendants and was informed that it is, indeed, the complete document that is the subject of the above-quoted description.

The court further concludes that a decision that disclosure of these particular IAB files would be contrary to the public interest, even if such a decision had been made, would be an abuse of discretion. Defendants' primary argument, that cooperation of civilian and officer witnesses in IAB investigations would be "chilled" by fears of embarrassment, harassment, retaliation, and the like, did not find significant support in the evidence. On the contrary, there are no civilian witnesses involved in this case, the witness statements do not contain highly sensitive information about anyone, and the evidence was clear that harassment, retaliation, and the like are not significant concerns within DPD. The promise of confidentiality given to officers in the Garrity Advisement is limited and conditional, and officers understand that their statements might be disclosed in any of several circumstances. Disclosure of similar information in other cases has not had a chilling effect on the cooperation of DPD officers or the public in IAB investigations. As the Supreme Court of Colorado pointed out in Martinelli v. District Court, 612 P.2d 1083, 1090 (Colo. 1980), disclosure of IAB files in cases such as this is unlikely to have the chilling effects argued by Defendants.

Weighing in favor of disclosure is the public's strong interest in knowing how DPD handles IAB investigations of citizen complaints in general and how it handled these investigations in particular. There was a great deal of public and media attention paid to the "Spy Files" controversy and these investigations relate to that larger controversy. The Nashes are well-known community activists and there is significant public interest in knowing that DPD handled the investigation of their complaint thoroughly and fairly, and that the resulting discipline was fair and appropriate. The complaint was sustained and resulted both in officer discipline and in changes to DPD policies. The evidence presented at the hearing of this matter overwhelmingly supported the conclusion that disclosure of nonprivileged documents contained in these two IAB files would serve the public interest.

Privileges.

Defendants have asserted two privileges as applicable to specific documents, the attorney/client privilege and the deliberative process privilege.

Two of the documents for which the attorney/client privilege was asserted are protected by that privilege and need not be disclosed. They are Document #8 in the first IAB file, and Document #16 in the second IAB file. The third document for which the attorney/client privilege was asserted (Document # 6 in the second IAB file) is not protected by the privilege because it does not contain confidential communication to or from counsel relating to the giving of legal advice.

The Colorado Supreme Court recognized the "deliberative process privilege" in City of Colorado Springs v. White, 967 P.2d 1042 (1998), and held that it is synonymous with the "official information," "governmental," and "executive" privileges previously

recognized in Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980). "The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decision making process where disclosure would discourage such discussion in the future." City of Colorado Springs, 967 P.2d at 1051. Consequently, the privilege "protects only material that is both pre-decisional (i.e., generated before adoption of an agency policy or decision) and deliberative (i.e., reflective of the give and take of the consultative process)." Id. at 1051. Post-decisional documents are not protected from disclosure for two reasons. "First, the quality of a decision will not be affected by the forced disclosure of communications occurring after the decision is finally reached. [Citation omitted.] Second, the public has a strong interest in the disclosure of reasons that do supply the basis for an agency policy actually adopted." Id. In contrast, "the public has only a marginal interest in the disclosure of 'reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground.'" Id. In order to be found to be "deliberative," the material "must reflect the 'give-and-take of the consultative process.'" Id. at 1052. Purely factual or investigative material is not "deliberative." In determining whether a document is "deliberative," a "key question...is whether disclosure of the material would expose an agency's decision making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." Id. at 1051.

In the discovery context, the deliberative process privilege is a qualified one, and "may be overcome upon a showing that the discoverant's interests in disclosure of the materials is greater than the government's interests in their confidentiality." Id. at 1054. "In contrast to the discovery context, however, the need of the party requesting disclosure is not relevant to a request for public records...because the open records laws only require disclosure of materials which would be routinely disclosed in discovery....Therefore, once the government has met its burden of proof by satisfying the procedural requirements, the privileged material is beyond public inspection." Id. at 1056. The court understands this portion of the Supreme Court's opinion to mean that the privilege is not a qualified one when the case is a CORA or CJRA case.

Defendants assert the deliberative process privilege with respect to so many documents for which the claim is plainly inappropriate that the court will not set forth a document by document explanation of the issue, except for a few instances where the question was a close one or the court agrees that the privilege applies.

Document #10 in the first IAB file is an Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration to Gerald R. Whitman, Chief of Police, dated January 19, 2004. Its subject is the investigation of the Nashes' complaint. It contains a factual summary description of the complaint, the investigation and the conclusions reached in the investigation. It sets forth the outcome of the investigation, including the decision to sustain some alleged violations and not sustain others and the reasons for those decisions. It is not deliberative; it is not part of the give and take of the deliberative process while a decision is under consideration and disclosure of internal discussions might undermine the Department's ability to function. It also appears to be

post-decisional because it was prepared after the decision to sustain and not sustain violations was made. While it may have predated the decision regarding specific disciplinary penalties for the violations, it does not address or make recommendations with respect to the imposition of disciplinary penalties. This document is not protected by the deliberative process privilege.

Document #13 in the first IAB file is an Inter-Department Correspondence from David Quinones, Lieutenant in the Internal Affairs Bureau to Marco Vasquez, Commander of the Internal Affairs Bureau, dated September 30, 2003, regarding the Nashes' complaint. It is not protected by the deliberative process privilege because it is a factual summary of the investigation and is not deliberative.

Several documents in both IAB files are witness statements. They are factual and not deliberative and, therefore, not protected from disclosure by the deliberative process privilege.

Document #6 in the second IAB file is an Inter-Department Correspondence from Lt. D.K. Dilley, Lt. Dave Quinones and Lt. Judy Will to Commander Vasquez, dated July 7, 2003. It sets forth an extensive factual summary of the history of the Intelligence Bureau and its activities under various commanders and a list of rules and regulations that might have been violated. It does not discuss whether violations occurred or make recommendations. It is not deliberative and is not, therefore, protected from disclosure by the deliberative process privilege.

Documents #46 and 47 in the second IAB file are Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration, to Gerald R. Whitman, Chief of Police, dated January 19, 2004 and May 27, 2004. They are protected by the deliberative process privilege. They are pre-decisional and predominantly deliberative, with extensive recommendations for policy changes and accompanying opinion and analysis.

Document #51 in the second IAB file is an Intelligence Bureau Assessment Report for the Denver Police Department by the Rocky Mountain Information Network, dated September 10, 2002. It is a pre-decisional consultant's report on the Intelligence Bureau that is predominantly deliberative, including evaluative analysis of problems and recommendations for policy changes. Thus, it is protected by the deliberative process privilege.

Document #52 in the second IAB file is a draft policy for the Intelligence Bureau. It is pre-decisional and deliberative and, therefore, protected by the deliberative process privilege.

Documents #55, 59, 81 and 82 of the second IAB file are all protected by the deliberative process privilege because they are pre-decisional and deliberative. They contain and reveal the process, both substantive and procedural, by which the Department evaluated the problems of the Intelligence Bureau and developed policy changes.

Privacy Interests of the Officers

In Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), the Colorado Supreme Court addressed the question of the privacy interests of police officers in IAB files. The Court recognized a right to confidentiality, which it characterized as an "aspect of the right to privacy which protects 'the individual interest in avoiding disclosure of personal matters.'" The Court stated that, "this right to confidentiality encompasses the 'power to control what we shall reveal about our intimate selves, to whom, and for what purpose.'" Id. at 1092. Thus, the threshold question in the analysis of whether the right of confidentiality prevents disclosure is whether the information is the sort of "highly personal and sensitive" information with respect to which one may have a "legitimate expectation of privacy." In this regard, the person claiming protection "must show that the material or information which he or she seeks to protect against disclosure is 'highly personal and sensitive' and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities." Id. Such documents were expressly excluded from Plaintiffs' request for disclosure and review of the *in camera* submission of the first IAB file makes clear that no highly personal and sensitive information about any person is included in it. However, there are several documents in the *in camera* submission of the second IAB file that contain highly personal and sensitive information that would be embarrassing to individual officers if it were disclosed. These documents all concern the inappropriate emails that were found on the computers of the officers. The emails themselves are not criminal justice records and the documents that talk about them and identify the officers who sent and received them should be redacted to delete the names, badge numbers and other identifying information of the individuals involved. This conclusion is the result of the balancing of factors called for by Martinelli that must be undertaken with respect to documents that are found, as a threshold matter, to contain "highly personal and sensitive" information. Disclosure of the individuals' identities would serve no purpose but to embarrass the individuals; it would not serve the public interest. These are Documents # 45 and 64 - 80 in the second IAB file. In addition, if the documents to be disclosed contain any references to individuals' home addresses, home telephone numbers or social security number, Defendants may redact them before disclosure.

Attorney fees

Section 24-72-305, C.R.S. provides for the custodian to pay the applicant's court costs and attorney fees "upon a finding that the denial was arbitrary or capricious." The court finds that the Defendants' blanket denial of every request for IAB files, without any case-by-case consideration, and their inappropriate invocation of the deliberative process privilege for most of the documents in the files, including documents with no substantive content at all, constitute arbitrary and capricious denial of Plaintiffs' rights under the CJRA. There is no legal justification for these actions. Furthermore, one apparent purpose for this conduct, and the inevitable effect of it, is to impose upon every citizen who seeks to exercise his or her rights under the CJRA the many burdens of bringing suit against the government, including the cost of litigating. The fact that the court has agreed with Defendants' withholding of ten of the documents out of the

voluminous files does not argue against the finding that Defendants' blanket denial of Plaintiffs' request and their wholesale assertion of privilege were arbitrary and capricious. If Defendants exercised their discretion as required by law and if their Vaughn index asserted only colorable grounds for withholding, Plaintiffs might have been able to discern which documents were fairly protected by the privilege and not requested them. Because of Defendants' conduct, however, such an exercise of judgment was not reasonably possible. Accordingly, Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs.

ORDER

In light of the foregoing, Defendants shall disclose to Plaintiffs all of the documents submitted for *in camera* inspection, except the following documents:

First IAB file, document #8; and

Second IAB file, documents #16, 46, 47, 51, 52, 55, 59, 81 and 82.

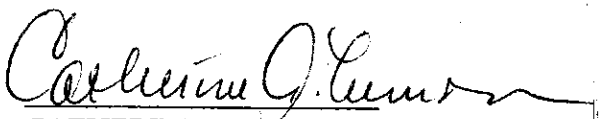
Defendants may redact from all documents to be disclosed the home addresses, home telephone numbers and social security numbers of any individuals.

Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs in this matter. Plaintiffs shall file their affidavit and supporting documentation regarding costs and fees within 30 days of the date of this order. Defendants shall file any opposition to the amounts claimed within 20 days of service of Plaintiffs' affidavit and, if the amount is contested, shall set the matter promptly for a hearing on the reasonableness of the amounts claimed.

Defendants shall pick up from Courtroom 5 the documents submitted for *in camera* inspection and shall maintain them intact until the time for appeal has expired or any appeal is finally concluded.

Done this 9th day of December, 2005.

BY THE COURT:



CATHERINE A. LEMON
District Court Judge

Exhibit 3

2003 WL 23741694
Colorado District Court.

THE CITY OF LOVELAND, Colorado,
a Home-Rule Municipality, Petitioner,
v.
LOVELAND PUBLISHING CORPORATION,
a Colorado Corporation, d/b/a Loveland Daily
Reporter Herald, Respondent/Counterclaimant,
and
JOHN DOE NO. 1; John Doe No. 2; John
Doe No. 3; John Doe No. 4., Respondents.

No. 03 CV 513. | June 16, 2003.

Opinion

ORDER REGARDING REQUEST FOR DECLARATORY RELIEF

BLAIR, J.

***1** Petitioner filed a Petition for *In Camera* Review Under C.R.S. § 24-72-204(6)(a) or, Alternatively, for Interpleader and Declaratory Relief Under C.R.C.P. 22 and 57. Respondent Loveland Publishing Corporation (hereinafter referred to as "the Newspaper") filed an Answer and Counterclaim on April 24, 2003. Respondent John Doe No. 1 (hereinafter referred to as "John Doe") filed an Answer on May 7, 2003. The respondents identified as John Doe Nos. 2, 3 & 4 did not file an answer and apparently are not contesting the release of the records requested by the Loveland Reporter Herald. The Court then issued an Order to Show Cause on May 9, 2003, and the matter came on for hearing on May 29, 2003. Present at the hearing were John Duvall, Loveland City Attorney, counsel for Petitioner City of Loveland, Lt. Rob McDaniel of the Loveland Police Department, Christopher Beall, counsel for the Loveland Reporter Herald, and Michael Lowe, counsel for John Doe No. 1. The Court, having reviewed the submissions of counsel and considered the arguments of counsel, makes the following findings, conclusions, and orders:

I. This matter comes before the Court upon the Petition of the City of Loveland for Interpleader and Declaratory Relief pursuant to C.R.C.P 22 and 57. The City seeks guidance from the Court to determine whether it must release an internal affairs investigation file (IAB file) regarding four Loveland police officers and their actions when arresting a Loveland citizen, Barry Floyd, approximately five years ago. The party seeking the release of the IAB file is the Newspaper. The Newspaper asserts that the file is a public document that must be released to them pursuant to the Colorado Open Records Act (CORA) or the Colorado Criminal Justice Records Act (CCJRA) and argue that this action is not properly before the Court as an Interpleader action. John Doe admits that the records may be subject to release pursuant to CORA or CCJRA, or both. However, it is John Doe's position that the City cannot simply give the Newspaper "unfettered access to a broad range of documents," upon its request. Rather, there needs to be an *in camera* review done by an independent tribunal wherein the Court applies the criteria established in *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083, to determine whether all or any portion of the records requested should be released.

Initially, the Court determines that the action is appropriately before the Court as an Interpleader and finds further that the City of Loveland has made a sufficient showing that it is "unable, in good faith, and after exercising reasonable diligence and making reasonable inquiry, to determine if disclosure of the Internal Affairs File is prohibited under Colorado Law." C.R.S. § 24-72-204(6)(a). As a result, it is appropriate for the City to request that this Court enter an order allowing or prohibiting disclosure of the IAB file after a hearing on the issue.

II. The Newspaper argues that the IAB file is a public record, not a criminal justice record, but further asserts that it is irrelevant because they are entitled to the file in either instance. The Court finds that the IAB file is a criminal justice record as defined in Section 24-72-302(4), which states in pertinent part:

> ***2** "Criminal justice records" means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule ...

The IAB file at issue is currently kept and maintained by Lieutenant McDaniels, the IAB investigator involved in this case. The Loveland City Manager, Don Williams, reviewed

the file and made the final determination that there was no misconduct by any of the police officers against whom the complaints were lodged. The Court finds that the file is clearly a series of documentary materials made, kept or maintained by a criminal justice agency, the Internal Affairs Bureau, for use in the exercise of its functions in investigating allegations of police misconduct. Accordingly, the Court finds the IAB file to be a criminal justice record.

Pursuant to C.R.S. § 24-72-301(2), it is the public policy of the state of Colorado that criminal justice records shall be open to inspection by any person, subject to the provisions of C.R.S. §§ 24-72-301, *et seq.* The custodian of the criminal justice records may allow any person to inspect such records unless an exception to such disclosure applies. C.R.S. § 24-72-305(1). The only exception asserted at the hearing was that disclosure would be contrary to the public interest, thereby allowing the custodian of the records to deny access to them. The Newspaper argues that it has the right to access the records to advance the public interest in safeguarding and overseeing the acts of public officials when exercising their official duties, a concept inherent in our democratic system of government. The Court agrees in part. While the Court does not believe the Newspaper should have access to any and all criminal justice records in every instance, the 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.

At hearing, John Doe argued that although the IAB file may be subject to disclosure pursuant to CCJRA, he has a right to privacy in certain pieces of information within that file. Thus, he requests that the Court perform an *in camera* review and redact private information, should it exist, concerning himself. All parties were substantially in agreement that the Court should proceed in this fashion. The position of the Newspaper was that while it did not object to an *in camera* review, such a review was unnecessary under the circumstances. As a result, the Court received two three-ring binders from Mr. Duvall, which contained the entire IAB file contents. The Court has since performed an *in camera* review. In determining what documents are private or confidential, the Court applied the balancing test as discussed in *Martinelli v. District Court*, 612 P.2d 1083 (Colo.1980).

***3** 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?

Martinelli, 612 P.2d at 1091.

Regarding the first question, John Doe must show that he has an "actual or subjective expectation" that the information will not be disclosed. *Id.* The parties appear to agree that, in a general sense, 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. *See e . g.*, *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir.1989); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597 (Wash.1988); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir.1981). As argued by John Doe, the officers' right to confidentiality is not absolute, but needs to be assessed by the Court on a case by case basis. The assessment must include a process of balancing the competing interests consistent with the criteria set forth in *Martinelli.* The Court finds that John Doe does have an actual expectation that certain elements of his employment application and personal information will not be disclosed. John Doe must then show that the information he seeks to protect is "highly personal and sensitive" and that disclosure "would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Id.* Information regarding his family or personal references are highly personal and also irrelevant to the substance of the investigation at issue. Accordingly, the Court finds that John Doe has satisfied this burden only as to a small portion of information in the IAB file.

Regarding the second element of the tri-partite balancing test, the Court can still order disclosure of John Doe's personal information if a compelling state interest exists to override his privacy interests. Here, the Court finds that no compelling state interest exists to justify disclosure of highly personal and sensitive information regarding John Doe. The IAB file exists because of an internal investigation of four Loveland police officers and their actions surrounding the

arrest of Mr. Floyd. The Court has already recognized that the Newspaper has an interest in ensuring adequate response by its law enforcement agencies to citizen allegations of police misconduct. However, the Court notes that the incident in question occurred over 5 years ago and several articles have already appeared in the Newspaper regarding this incident. In addition, it is obvious by the pleadings and submissions in the Court's file that the Newspaper has already received much of the documentation that exists surrounding the arrest of Mr. Floyd and his subsequent complaint about several police officers involved in this matter. As such, the "compelling" nature of the Newspaper's interest seems modified, at best. There appears to be no compelling or legitimate public interest in disclosing any information contained in the IAB file regarding John Doe that is highly personal and irrelevant to the substance of the internal investigation. Such information might be who John Doe's family members are, his personal references, information related to employment he might have had prior to a career in law enforcement, and other information clearly irrelevant to his actions when arresting Mr. Floyd. Thus, in balancing the officer's right to privacy in some of the records sought, against the nature of the Newspaper's legitimate interest in the IAB file, the Court finds that the IAB file shall be disclosed, with some minor portions of the records omitted. There is no compelling state interest in the disclosure of information irrelevant to the investigation itself. Lastly, the Court must disclose the relevant information by the least intrusive means. Here, the Court has performed an *in camera* review and redacted small portions of confidential information. Thus, the Court has utilized the least restrictive means, as suggested in *Martinelli*.

***4** III. Regarding attorney's fees, the Newspaper requests an order of the Court directing the Petitioner to pay its reasonable attorney's fees and costs for failing to disclose the IAB file when requested. Pursuant to C.R.S. § 24-72-305(7), if the Court finds that Petitioner's failure to disclose the IAB file was arbitrary and capricious, it may order them to pay the Newspaper's court costs and attorney fees. Here, the Court finds that Petitioner's failure to disclose the IAB file was neither arbitrary nor capricious. All parties have raised legitimate arguments supporting their positions under Colorado law, and Petitioner's confusion as to what action they should have taken is meritorious. Accordingly, the Court orders all parties to pay their own attorney's fees and costs.

IT IS HEREBY ORDERED that the City of Loveland shall retrieve the two, three-ring binders reviewed by the Court. The Court has removed certain materials and placed them in a manila file on the right side of the Court's file. The balance of the file shall be made available for review by the Newspaper as soon as practicable thereafter.

SO ORDERED

Parallel Citations

32 Media L. Rep. 1853

Exhibit 4

-7'98 CTRM 19

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 97 CV 7170, Courtroom 19

COURT'S ORDER RE: COMPLAINT FOR RECORDS DISCLOSURE

THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,

Plaintiff,

vs.

CITY AND COUNTY OF DENVER, COLORADO; FIDEL MONTOYA, Manager of Public Safety for City and County of Denver, and DAVID MICHAUD, Chief of Police for the Denver Police Department,

Defendants,

and

NICHOLAS GROVE and PHIL STANFORD, Denver Police Officers,

Intervenors.

THIS MATTER comes before the Court pursuant to Plaintiff's Complaint filed December 2, 1997. Plaintiff seeks disclosure of the Denver Police Department's internal investigation records arising out of events that occurred on March 26, 1997, when Denver police arrested Gil F. Webb II for auto theft and vehicular homicide. This incident was widely covered in the media. The Court, having reviewed the file, the pleadings and being fully advised, FINDS AND ORDERS as follows:

I. INTRODUCTION

1. Plaintiff brought this action under the Colorado Open Records Act, C.R.S. § 24-72-201, et seq. (hereinafter referred to as "CORA") and the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301, et seq. (hereinafter referred to as "CCJRA"). Plaintiff is seeking complete disclosure of the Denver Police Department's Internal Affairs Bureau file (hereinafter referred to as the "IAB File") relating to the investigation of Denver Police Officers Stanford and Grove in order to understand the basis for the Police Department's disciplinary action against them. Jurisdiction is not contested and the standing of the parties is not an issue.

2. On the evening of March 26, 1997, an automobile collision occurred in Denver involving a stolen Ford Mustang and a Denver police cruiser. Rookie Denver Police Officer Ronald DeHerrera was killed in the collision. Gil F. Webb II, a seventeen year old

African American, was arrested and subsequently convicted of causing the death of Officer DeHerrera. A KWGN TV (Channel 2) reporter videotaped events shortly after the crash. This videotape and other media reports raised concerns about the treatment of Mr. Webb by the Denver Police Department and paramedics.

3. A Special Prosecutor, Jefferson County District Attorney Dave Thomas, was appointed to investigate whether criminal charges should be brought against anyone involved in the arrest or care of Mr. Webb. Internal investigations were undertaken by the Denver Police Department and the Denver Health Medical Center. On or about May 27, 1997, the Special Prosecutor decided not to bring criminal charges. Notwithstanding this decision, two Denver Police Department disciplinary hearings were held and upon their conclusion in late July 1997, disciplinary action was taken against Denver Police Officer Phillip Stanford and Denver Police Officer Nicholas Grove. In early August 1997, the Manager of Public Safety, Fidel Montoya, accepted the recommendation of Police Chief Michaud and ordered five-day suspensions of the two officers. Officer Stanford accepted the discipline. Officer Grove has appealed to the Civil Service Commission. A hearing is set for April. Any matters disclosed in the hearing will become public.

4. Plaintiff asserts that since the present system allows the police to investigate themselves, disclosure of the requested information serves the public interest by establishing the credibility (or lack thereof) of the Police Department's investigation of its members. Defendants contend that disclosure of such information compromises the effectiveness of their self-investigation because confidentiality is promised to police officers in an effort to encourage them to come forward with information. Without such assurances, Defendants assert that their self-investigatory process would be undermined and that the public's confidence in the Police Department would be undermined as well. Intervenors contend that they have a right to confidentiality concerning the files.

II. CORA/CCJRA

5. Under CORA, the IAB file is not by definition a "public record." See, C.R.S. § 24-72-202 (6)(a) defining "public records" and exempting "criminal justice records" per § 24-72-202(6)(b). It is a "criminal justice record" as defined in the CCJRA at 24-72-302(4). It is therefore exempt from any CORA disclosure.[1] In making this finding, the Court notes that both the Plaintiff and the Defendant argued principally under the CORA and not the CCJRA. The Court also notes the awkward interrelationship between the CORA and the CCJRA as demonstrated by C.R.S. 24-72-204(2)(a)(I) and 24-72-305(5).

---

1. City urges that "portions" of the IAB file are "personnel files" per 24-72-202(4.5) of CORA and are exempt from disclosure per 24-72-204(3). While "portions" of the IAB file relate to discipline, this argument is unpersuasive. The fact that a document may be filed in more than one place and that one such place may be protected from disclosure does not necessarily justify suppression of the document. This is particularly so here, where any IAB file document that may find its way into a "personnel file" was first generated elsewhere. In addition, the Court finds CORA inapplicable to its analysis and so the "personnel file" exception is not relevant.

6. The IAB file may be disclosed under the CCJRA unless Defendant establishes that such disclosure would be "contrary to the public interest." C.R.S. 24-72-305. The Court finds that the Defendant has failed to meet this burden. Indeed, as to this case, disclosure promotes the public interest in maintaining confidence in the honesty, integrity and good faith of Denver's Internal Affairs Bureau. The public has viewed the event leading to disciplinary action and is aware of the result. The only thing it does not know is how or why the disciplinary decision was made.

III. INTERVENOR'S PRIVACY RIGHTS

7. Intervenors allege that disclosure would violate their right to privacy or confidentiality. Under Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), a tripartite balancing inquiry must be undertaken by the Court. Consideration must be given to whether:

1) The party asserting confidentiality has a legitimate expectation of same;

2) disclosure would serve a compelling state interest; and

3) disclosure can occur in the least intrusive way.

In evaluating these factors, the Court notes that the Intervenors only have a limited expectation of privacy. Denver City Charter § C5.78-1 and the IAB "Advisement Pursuant to Internal Investigation" allow for disclosure in any appeal. Officer Grove is appealing his discipline. Officer Stanford is not. Intervenors note that C.R.S. 24-72-204(2)(a) and C.R.S. 13-90-107(e) create an expectation of privacy. However, these statutes allow for discretionary disclosure after review by the record's custodian and/or the Court. Moreover, 24-72-204(2)(a) is under CORA and so is inapplicable given the Court's earlier analysis. Also, the information sought to be protected is not "highly personal and sensitive" and its disclosure would not be offensive and objectionable to a reasonable person. Martinelli, *supra* at 1091. In short, Intervenor's confidentiality argument is unpersuasive in this case.

IV. OFFICIAL INFORMATION PRIVILEGE

8. The City argues that portions of the IAB file contain information that falls under the common law "official information" privilege which was recognized in Martinelli, *supra* at 1088. Such a privilege is separate and distinct from the statutory and confidentiality claims discussed above. Martinelli requires a multifaceted balancing test in evaluating documents claimed to be subject to the "official information" privilege. The documents in issue here are mainly the summary and recommendation parts of the IAB file. Without making specific findings as to each enumerated Martinelli factor (but after considering them), the Court concludes that disclosure of these portions of the IAB file (i.e., the

summaries and recommendations) is warranted in this case. The public knows what started the IAB investigation and it knows the results thereof. It is entitled to know what happened in between these two events. Indeed, such disclosure may serve the public interest by showing a conscientious and thorough effort by the IAB.

V. ITEMS REVIEWED

9. The files and documents reviewed by the Court consisted of the following:

(1) Unedited Channel 2 VHS Videotape;

(2) Channel 9 VHS Enhanced Videotape;

(3) Cassette Audiotape of Police Radio Transmissions;

(4) Cassette Audiotape of Civilian Witness Kevin Miller;

(5) Cassette Audiotape of Telephone Interview Between IAB Investigator Lt. Murphy and Denver Police Officer J. Dennis;

IAB FILE

(1) Cover Sheet

(2) Disciplinary Badge No. 95030 (Stanford);

(3) Additional Statements Badge No. 95030 (Stanford);

(4) Disciplinary Badge No. 91042 (Grove);

(5) Administrative Reports;

(6) Civilian Statements;

(7) Police Officer Statements;

(8) Miscellaneous Supporting Documents.

In addition, the Police Department has a BETA version of the Channel 2 Video in its file. This tape has not been reviewed as the Court does not have the technical ability to view tape in this format.

VI. CONCLUSION

VIDEOTAPES

The Court orders the release of all videotapes that exist in connection with this matter. This information has already been broadcast to the public and there is no reasonable justification for withholding any videotapes from the Plaintiff.

CASSETTE AUDIOTAPES

All cassette audiotapes shall be released. There are no persuasive legal reasons why these items should not be disclosed.

THE IAB FILE

The IAB file shall be released in its entirety. There are no persuasive legal reasons why, in this case, these items should not be disclosed.

To the extent the Court is in the possession of original items to be disclosed, Defendants are instructed to promptly contact the Court and arrange their return (unless they need to be maintained in the file pending appeal).

DONE this 7th day of April, 1998.

BY THE COURT:

Herbert L. Stern III

Herbert L. Stern, III
District Court Judge

cc: Thomas B. Kelley, Esq.
Daniel B. Slattery, Esq.
David J. Bruno, Esq.

Exhibit 5

COLORADO COURT OF APPEALS
No. 98CA0981

October 21, 1999
NOT SELECTED FOR PUBLICATION

American Civil Liberties Union of Colorado, a Colorado corporation,

Plaintiff-Appellee,

v.

Nicholas Grove and Phil Stanford, Denver Police Officers,

Intervenors-Appellants.

Appeal from the District Court of the City and County of Denver
Honorable Herbert L. Stern, III, Judge
No. 97CV7170

Division II
Opinion by JUDGE JONES
Plank and Vogt, JJ., concur

JUDGMENT AFFIRMED

Faegre & Benson, LLP, Thomas B. Kelley, Steven D. Zansberg, Christopher P. Beall, Denver, Colorado, for Plaintiff-Appellee

Holland & Hart LLP, A. Bruce Jones, Denver, Colorado, for Amici Curiae for Plaintiff-Appellee, Colorado Press Association, The Associated Press, and The Colorado Freedom of Information Council.

Bruno, Bruno & Colin, P.C., Marc F. Colin, R. Stephen Hall, Denver, Colorado, for Intervenors-Appellants

Stephen R. McSpadden, Washington, DC, for Amicus Curiae for Intervenors-Appellants, National Association of Police Organizations

Intervenors, Nicholas Grove and Phil Stanford, appeal the judgment entered in favor of plaintiff, The American Civil Liberties Union of Colorado (ACLU), and against defendants, City & County of Denver, Fidel Montoya, Manager of the Denver Department of Public Safety, and David Michaud, Denver Police Chief, on plaintiff's complaint for records disclosure. The ACLU's complaint sought full disclosure of the records of the Denver Police Department's Internal Affairs Bureau (IAB) concerning an incident, relating to which intervenors received administrative disciplines from defendants. We affirm.

This case arises out of an automobile accident on March 26, 1997, caused when a 17 year old, who had stolen a vehicle, collided with a Denver Police Department (Department) patrol car, causing the death of one officer and serious injuries to another officer and to himself. The youth was restrained and arrested at the scene by Denver police officers, including intervenors. Based on television video tapes of police officers' and paramedics' actions in placing the youth on a gurney and into an ambulance, IAB, which investigates allegations of police misconduct, conducted an investigation of the incident. After the investigation, intervenors were each disciplined administratively by being suspended for five days without pay.

The ACLU action was brought pursuant to the Colorado Open Records Act (CORA), §24-72-201, et seq., C.R.S. 1999, and the Colorado Criminal Justice Records Act (CCJRA), §24-72-301, et seq., C.R.S. 1999. The ACLU requested the court to order full disclosure of the IAB file, including video tapes, sworn statements, evaluative summaries, and audio tapes, relating to allegations of misconduct by police officers, including intervenors, and the IAB investigation of the allegations.

On December 5, 1997, the trial court issued an order to defendants to show cause why the ACLU should not be allowed to inspect and copy the IAB records. At a hearing on the show cause order, intervenors were allowed, without objection, to intervene in this matter. As well, the court received testimony of witnesses and heard arguments of counsel.

After additional briefing by the parties, the court, on April 7, 1998, ordered that the subject IAB file be released in its entirety, along with certain audio and video tapes in defendant's custody.

Intervenors, who do not object to disclosure of the video tapes referenced in the record, appeal the order of disclosure as to the remainder of the IAB file. Defendants are not a part of this appeal.

I.

Intervenors contend that, based on their expectation of privacy, the trial court erred in releasing the information contained in the IAB file. We disagree.

At the time the intervenors gave statements to the IAB, the intervenors knew that their statements could be released if a target of the IAB investigation chose to appeal any resulting discipline to the Civil Service Commission. Moreover, the intervenors were aware that another court had ordered disclosure of an IAB file in another high-profile investigation. Thus, the intervenors did not have a subjective expectation that the IAB file would not be disclosed.

Intervenors also argue that disclosure of the IAB file would be offensive and objectionable to any reasonable person of ordinary sensibilities because the IAB file might contain names, addresses, or other similar biographical information. We disagree.

Intervenors do not cite any law that makes disclosure of biographical information, or the like, per se confidential. Further, because the intervenors have not presented a record to this court that contains the information reviewed by the district court, we must presume that the trial court's ruling regarding the nature of the information was correct. See Sherman v. District Court, 637 P.2d 378 (Colo. 1981). The

testimony referenced by intervenors in their reply brief does not suffice to overcome this presumption.

Thus, the intervenors do not have a legitimate expectation of privacy in the IAB file and, therefore, we do not address intervenors' remaining arguments concerning the balancing test set forth in Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (Colo. 1980).

II.

Intervenors next contend that disclosure of the IAB file is contrary to the public interest pursuant to §24-72-301, et seq., C.R.S. 1999. They argue that non-disclosure would ensure a free-flow of information in investigations, thereby maintaining the integrity of the Department. The district court found that the public interest would be "served," not harmed, by disclosure of the IAB file.

Because the record does not contain the IAB file, we must presume that the trial court's determination is correct.

III.

Lastly, the intervenors contend that the trial court erred in concluding that the ability to appeal a disciplinary decision to the Civil Service Commission limits a police officer's expectation of confidentiality. This contention is based on the fact that officer Grove appealed the disciplinary decision in his case to the Denver Civil Service Commission.

However, because the trial court's order is sustainable even without reference to the officer's appeal, the fact that he later withdrew his appeal does not warrant reversal of the order.

The judgment is affirmed.

JUDGE PLANK and JUDGE VOGT concur.