DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	
Plaintiffs: **THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO**, a Colorado corporation; and **TERRILL JOHNSON**, an individual Defendants: **GERALD WHITMAN**, in his official capacity as the Chief of Police for the City and County of Denver; **ALVIN LaCABE**, in his official capacity as the Manager of Safety of the City and County of Denver; **THE DENVER POLICE DEPARTMENT**; and **THE CITY AND COUNTY OF DENVER**	▲ COURT USE ONLY ▲ Case Number: **04 CV 700** **Courtroom 18**

RULING ON ORDER TO SHOW CAUSE

Plaintiff Terrill Johnson was contacted and arrested by officers of the Denver Police Department on April 11, 2002. He was charged with a minor traffic violation and interference, and the charges were soon dropped by the prosecutor. Mr. Johnson made a complaint to the Denver Police Department that the arresting officers had engaged in racial profiling, used excessive force, made an unjustified arrest and engaged in other improper conduct. In December of 2002, Mr. Johnson was advised that the charges of excessive force were not sustained as a result of the investigation by the Internal Affairs Bureau ("IAB"). Later, he was told that "other charges were sustained."

On September 19, 2003, Mr. Johnson and the American Civil Liberties Union of Colorado ("ACLU") made a request under the Colorado Open Records Act and the Colorado Criminal Justice Records Act for all documents relating to his contact with the Denver Police Department on April 11-12, 2002 (Exhibit C to First Amended Complaint). The request included all documents relating to the internal affairs investigation and action taken as a result of the investigation; personnel files of the involved officers were not requested.

Through the City Attorney, the police department responded that all of the documents requested by plaintiffs were criminal justice records whose disclosure would be contrary to the

public interest, excepting only the traffic accident report arising from the incident, which was disclosed (Exhibit E to First Amended Complaint). This lawsuit ensued.

By their first amended complaint, plaintiffs seek two declaratory judgments concerning the expectation of privacy of police officers in IAB files. Those claims are not addressed in this order. Plaintiffs' third claim seeks an order to show cause under the Colorado Criminal Justice Records Act, C.R.S. §24-72-305. I issued the order to show cause, and a hearing was held on February 27, 2004. At the hearing, the officers who were involved in the incident with Mr. Johnson were allowed to intervene as defendants. Testimony was taken and exhibits were received. I now make the following findings and conclusions on the order to show cause.

All parties agree that the requested records are "criminal justice records" as defined in C.R.S. §24-72-302(4). Therefore, the records request must be evaluated under the Colorado Criminal Justice Records Act ("CJRA") rather than the more general Colorado Open Records Act. C.R.S. §24-72-202(6)(b)(1) ("Public records" does not include criminal justice records).

The CJRA contains a declaration by the General Assembly that it is the public policy of Colorado that records of official actions of criminal justice agencies shall be open to inspection by any person and that other criminal justice records may be open for inspection as provided in the statute or other laws. C.R.S. §24-72-301(2). The Colorado Court of Appeals has held that this section of the statute "implements the public policy that criminal justice records are open to public review." The Denver Post Corporation v. Cook, 2004 WL 169754 (Court of Appeals, January 29, 2004). The CJRA contains exceptions to the presumption of disclosure, but those exceptions must be narrowly construed. Bodelson v. Denver Publishing Company, 5 P.3d 373, 377 (Colo. App. 2000). The exceptions to disclosure are stated in C.R.S. §24-72-305. The relevant exception here provides that the custodian may deny access to "records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose" if disclosure would be contrary to the public interest.

The City's response to plaintiffs' records request identified only the public interest exception, the promise of confidentiality given to police officers giving statements in IAB investigations, and the deliberative process privilege. At the hearing, the City also claimed that some of the requested documents are protected as personnel files. The intervenors assert that police officers have a constitutional right of confidentiality in the entire contents of the IAB files.

At the hearing, the City submitted for *in camera* inspection a notebook of documents represented to contain everything the police department had concerning this incident, including the IAB files (that notebook was marked as Exhibit A). The City did not produce any personnel files because none was requested.

The City also tendered a second notebook, marked as Exhibit B, which was represented to contain a subset of the documents in Exhibit A which the City claims are protected against disclosure. That notebook includes documents behind five divider tabs entitled:

1. Deliberative Process Privilege
2. Personnel Documents: Privacy Interests Implicated
3. "Garrity" Statements: Officers statements made after promises of confidentiality
4. CCJRA
5. DA Attorney Work Product

The City stated that it had no objection to producing those documents from Exhibit A which were not also included in Exhibit B, and I ordered that subset of documents produced immediately. Plaintiffs' request for attorney fees concerning the delayed production of those documents was reserved for later ruling. I have done an *in camera* review of the documents in Exhibit B. I will now address each category of documents in Exhibit B which the City claims should not be open to inspection.

Deliberative Process Privilege

The Colorado Supreme Court has recognized the deliberative process privilege and has held that materials falling within its ambit are not subject to disclosure in response to requests for public records under the Colorado open records laws, C.R.S. §§24-72-201 to -309. City of Colorado Springs v. White, 967 P.2d 1042, 1045 (Colo. 1998). Although White did not concern criminal justice records, the Supreme Court's citation to open records laws includes the CJRA.

The deliberative process privilege is a qualified privilege, the primary purpose of which 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." Id. at 1051. "In light of the purposes of the privilege, it protects only material that is both pre-decisional (i.e. generated before the adoption of an agency policy or decision) and deliberative (i.e. reflective of the give and take of the consultative process)." Id. Pre-decisional material normally retains its protection even after the decision is made, and purely factual investigative material is not protected. Id. at 1052. The privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency. Id. at 1053.

The government entity asserting the deliberative process privilege has the burden of establishing that it applies; this burden is not met by conclusory and generalized allegations of privilege. Id. The requirements for assertion of the privilege are technical. Specifically, the agency must produce a "Vaughn index" which provides specific information concerning each document claimed to be privileged (author, recipient, subject matter and explanation of why the privilege applies to that document). The "Vaughn index" is required as an aid to reviewing courts. Id. at 1053-1054.

Here, the City has not produced anything close to a Vaughn index. The City's response to the records request by plaintiffs included a one-line reference to the deliberative process privilege, and the City's assertion of the privilege at the hearing consisted of placing 37 pages of

documents behind a tab in Exhibit B marked "Deliberative Process Privilege." Therefore, the City has failed to meet its burden of proving that the deliberative process privilege applies, and I decline to perform an *in camera* inspection of those documents or weigh the factors relevant to the balancing test prescribed by White. Those documents must be made available for plaintiffs' inspection.

Personnel Documents

Personnel files are excepted from the definition of public records in the Colorado Open Records Act, C.R.S. §24-72-202(4.5); that exception has not been carried through to the CJRA, but personnel files would not appear to fall within the definition of "criminal justice records." C.R.S. §24-72-302(4). Plaintiff's records request did not include personnel files, and Commander John Lamb of the IAB testified at the hearing that IAB files do not include personnel files. The City nevertheless asserts that 19 pages of documents concerning this incident should be protected from disclosure as "personnel documents."

Behind the "Personnel Documents" tab in Exhibit B, the City has placed the summary of the disposition of Mr. Johnson's complaints and the oral or written reprimands issued to two officers. Those documents concern the performance by these officers of their duties and do not fall within the definition of personnel files in C.R.S. §24-72-202 (4.5). In order for the personnel file exception to apply, the records sought to be disclosed must be maintained in a personnel file. Denver Post Corp. v. University of Colorado, 739 P.2d 874, 878 (Colo. App. 1987). The City has offered no evidence that these documents are maintained in the personnel files of the officers. The City also apparently claims protection for IAB complaint summaries for the four subject officers which show the history of all complaints and the disposition of those complaints for each officer. Likewise, those documents concern the activities of the officers on the job and are not protected against public inspection as personnel file material. Finally, there is a one-page driving history for one officer that is likewise not protected. Therefore, the City's assertion that some of the documents are protected as personnel files is rejected, and those documents must be produced.

Garrity Statements

Behind this tab, the City has placed the statements by the involved officers following the incident with Mr. Johnson. Although no Garrity advisements are included, some of the statements are entitled "Internal Affairs Bureau Statement," and I infer from the context that all of the statements were obtained as part of the IAB investigation.

The City and the intervenor officers assert that all officers have a reasonable expectation of confidentiality in all statements given in connection with an IAB investigation. This expectation flows from the advisement each officer is asked to sign before speaking to IAB investigators (DPD Form 455, attached to intervenor's brief as Exhibit A). That advisement tells the officer that the statement will be confidential and not disclosed to anyone, with three

exceptions, and states that the police department will resist every effort to produce "this statement or answers" in any civil or criminal case. The Denver City Charter, at §9.4.18, also provides that statements given as part of an internal investigation shall be confidential, again with certain enumerated exceptions.

The officers and the City assert that this promise of confidentiality amounts to a constitutional right of privacy which may only be breached after applying the three-part balancing test prescribed in Martinelli v. District Court, 612 P.2d 1083, 1091 (Colo. 1980). Martinelli holds that the person claiming a constitutional right to privacy must first show that he or she has an actual or subjective expectation that the information will not be disclosed, as, for example, by showing that he or she "divulged the information to the state pursuant to an understanding that it would be held in confidence or that the state would disclose the information for stated purposes only." Id. This formulation would appear to fit officer statements given to IAB pursuant to a Garrity advisement.

I reject plaintiff's contention that the officers fail to meet the Martinelli threshold here because they have failed to show that these files contain material that is "highly personal and sensitive" and that its disclosure would be "offensive and objectionable to a reasonable person of ordinary sensibilities." Id. Martinelli can be read that way, but that case itself, which concerned IAB files, as well as later cases applying it, do not support that construction. Rather, I read Martinelli to hold that materials of a highly personal and sensitive nature are at the top ranking of a descending order of sensitivity and constitutional interest. Materials in the "lower tiers" of this ranking are entitled to decreasing degrees of protection. Applying this construction of Martinelli to the facts here, I conclude that the officers have a reasonable expectation of limited confidentiality, based on the Charter provision and the Garrity advisement. However, my review of the IAB file shows that it does not contain highly personal and sensitive information such as family or medical data; rather, the officer statements relate "simply to the officers' work as police officers." Denver Policemen's Protective Assoc. v. Lichtenstein, 600 F. 2d 432, 435 (10th Cir. 1981). Thus, this material is in the lower tiers of information to be protected under Martinelli.

The Martinelli balancing test is fact-specific and must be done on a case-by-case basis. Intervenors suggest that there are ten factors to be considered in performing this balancing test (Intervenors' Brief at pp. 23-24), but those factors are prescribed by Martinelli for weighing the deliberative process (or official information) privilege, and have nothing to do with balancing a claim of a constitutional right to privacy against a compelling state interest.

The second step of Martinelli requires an assessment of whether a "compelling state interest" requires disclosure notwithstanding a legitimate expectation of privacy. Martinelli at 1092. In any case brought under the open records laws, an expectation of privacy collides with the compelling state interest, expressed in both statute and case law, in permitting public access to records of governmental activities. See, Denver Post Corporation v. University of Colorado, 739 P. 2d 874, 879 (Colo. App. 1987). More specifically, in the context of this case, I agree with plaintiffs that there is a compelling interest of the public in knowing how allegations of police misconduct are being investigated and the outcome of those investigations. Even though the incident involving Mr. Johnson may not have attracted wide media attention, there is certainly

public interest in the topic of racial profiling and whether it is occurring within the Denver Police Department. Commander Lamb testified that the Department is keenly interested in allegations of racial profiling and that it serves the public interest to dispel concerns that racial profiling is occurring. He also acknowledged that maintaining the standing, respect and integrity of the police department is in the public interest. In this case, there 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. I find that this interest outweighs the limited expectation of confidentiality the officers have in their statements to IAB.

The third prong of Martinelli calls for any disclosure to be done by the least intrusive means available. Here, the limited privacy interests of the officers have been protected by the *in camera* review performed by the Court. No further restriction on disclosure is necessary or appropriate in the context of an open records request.

CCJRA

Apparently, the documents behind the tab marked "CCJRA" in Exhibit B are sought to be protected under the public interest exception. Those documents consist primarily of portions of the IAB file other than Garrity statements obtained from officers. There is no personal or highly sensitive information and nothing that would otherwise appear to deserve confidential treatment. Commander Lamb testified that photographs of officers are ordinarily not released to the public, and this section does include photo arrays apparently shown to witnesses during the IAB investigation. However, no names or other data are associated with those photos, and most of the witnesses were unable to make an identification from the arrays. Therefore, I conclude that the City has failed to show that the public interest would be harmed by release of these portions of the IAB files in this case.

DA Attorney Work Product

The only documents behind this tab are two DA case filing forms which indicate the deputy district attorney's refusal to file criminal charges against officers arising from this incident. Those documents are attorney work product and need not be disclosed.

Attorney Fees

The CJRA provides that the court may order the City to pay plaintiffs' court costs and attorney fees "upon a finding that the denial was arbitrary or capricious." C.R.S. §24-72-305(7). I find that the City's refusal to produce promptly the portions of Exhibit A for which the City claims no protection against disclosure was arbitrary and capricious. The City offers no explanation as to why those portions of the file were not produced immediately in response to the request, as the statute contemplates. I also find that the City's failure to produce those documents it denominated as "personnel documents" was arbitrary and capricious. No personnel

files were even requested, and the so-called "personnel documents" did not come from a personnel file.

With regard to the remainder of the files, I find that the City had good faith arguments that they should not be produced and therefore do not find its refusal arbitrary and capricious. Therefore, it is reasonable that the City pay a portion of the costs and reasonable attorney fees incurred by plaintiffs in obtaining the order to show cause and this order. The attorney fees will not include any portion of those incurred in connection with plaintiffs' first and second claims for relief or the res judicata/collateral estoppel argument which has not been addressed in this order.

Plaintiffs are directed to submit their affidavit of costs and attorney fees within 15 days from the date of this order, and they should include their proposed method of allocating the fees. The amount to be awarded will be determined according to the procedures in C.R.C.P. 121, §1-22.

For the foregoing reasons, the City is ordered to produce for plaintiffs' inspection and copying the originals of the documents described in this order that are not exempt from inspection. The opportunity to inspect and copy must be made available no later than fifteen days from the date of this order. The order to show cause is made absolute as to those documents. Copies of the documents not required to be produced will be retained in the Court file in a sealed envelope.

SO ORDERED.

Dated this 30th day of March, 2004.

BY THE COURT:

Joseph E. Meyer III
District Court Judge

cc: Steven D. Zansberg, Attorney for Plaintiffs
Stan M. Sharoff, Attorney for Defendants
Michael T. Lowe, Attorney for Intervenors