DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St.
Denver, CO 80202

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**Plaintiffs:** THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado Corporation, and TERRILL JOHNSON, an individual,

**v.**

**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.

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**Attorneys for Plaintiffs**

Steven D. Zansberg, #26634
Christopher P. Beall, #28536
FAEGRE & BENSON LLP
1700 Lincoln St., #3200
Denver, Colorado 80203
Telephone: (303) 607-3500
Facsimile: (303) 607-3600
E-mail: szansberg@faegre.com
cbeall@faegre.com

Mark Silverstein, #26979
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, Colorado 80218
Telephone: (303) 777-2490
Facsimile: (303) 777-1773

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Case Number: **04-CV-700**

Division: **18**

**PLAINTIFFSô HEARING BRIEF**

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Plaintiffs, Terrill Johnson and the American Civil Liberties Union of Colorado (collectively hereinafter ñJohnsonò), respectfully submit this Hearing Brief for the Courtôs consideration in resolving the issues presented at the Show Cause Hearing set in this action for Friday, February 27, 2004 at 1:30 p.m.

## INTRODUCTION

As set forth in greater detail in the First Amended Complaint and Application for Order to Show Cause,[1] the plaintiffs have previously requested access, pursuant to Coloradoôs Criminal Justice Records Act (ñCCJRAò), to criminal justice records that were made, maintained, or kept by the City and County of Denver, the Denver Police Department, Police Chief Gerald Whitman, and Manager of Safety Alvin LaCabe, as a result of the surveillance and arrest of Terrill Johnson on April 11 and 12, 2002, and all records relating to the investigation of Mr. Johnsonôs complaint to the Police Department about how he was treated by police officers on that occasion. The American Civil Liberties Union, a public interest organization with a long-standing concern for police-community relations and protection of civil rights, has requested access to these records (on behalf of Mr. Johnson), and has been refused such access by their official custodians. The Court has entered a Show Cause Order directing the defendants to show why the requested records should not be made public. The plaintiffs offer the following factual and legal analysis to guide the Courtôs consideration of the issues at the Show Cause Hearing. As set out more fully below, because

[1] Plaintiffs adopt and hereby incorporate by reference all to the facts alleged in the First Amended Complaint (ñFACò).

the public interest will be served, rather than harmed, by disclosure of the requested records, and because the defendants can make no showing that outweighs the public benefit in release of the requested records, at the conclusion of the Show Cause Hearing, the Court should make the Show Cause Order absolute and direct that the requested records be made public under the CCJRA.

## FACTUAL BACKGROUND

The essential background facts, as they relate to the public records at issue in this case, are as follows:

On the night of April 11, 2002, Mr. Johnson was driving westbound on I-70, returning home from his work at the Denver airport. Denver Police Department Officers Troy Ortega and Luis A. Estrada, driving a DPD Gang Unit car, began following extremely closely and then pulled up alongside Mr. Johnsonôs vehicle and shined a spotlight on Mr. Johnson. Shortly after Mr. Johnson arrived home, the same officers showed up. The officers crashed their car into the car owned by Mr. Johnsonôs wife, Melinda Jarvis.

Officers Ortega and Estrada then got out of the squad car and drew their weapons on Mr. Johnson, who was not armed and was posing no threat. They yelled at Mr. Johnson to ñdrop his weapon,ò even though he had no weapon. Additional officers arrived on the scene, and they forcibly subdued and handcuffed Mr. Johnson while slamming him onto the police vehicle and shouting out racial slurs.

According to the complaint that Mr. Johnson filed with DPD, Officer Ortega attempted to explain his actions to Ms. Jarvis by stating that he ñonce lost a partner to a black

manò and he told Mr. Johnson that his car was a common type of car driven by gang members. After transporting Mr. Johnson downtown, police booked him on two minor traffic charges and disobeying a lawful order. He then spent the night in jail and, as a result, missed a day of work.

On or about June 17, 2002, Mr. Johnson filed a formal complaint with the Internal Affairs Bureau of the Denver Police Department. Mr. Johnson complained that he was the victim of racial profiling, false arrest, excessive use of force, harassment, and property damage, among other things.

On June 19, 2002, all charges filed against Mr. Johnson were dismissed.

By letter dated July 8, 2003, Defendant Chief Gerald Whitman wrote to Mr. Johnson and informed him that the complaint he had filed (Case Number C2002C0129) had been investigated by the Internal Affairs Bureau and had also been reviewed by the Denver District Attorneyôs Office. The letter further stated that although Johnsonôs allegations of excessive use of force by the arresting officers had not been substantiated, ñother charges were sustained.ò Nevertheless, the letter did not state which charges were sustained, against which of the officers, nor whether any of the officers were disciplined for having been found to have violated departmental policies.

Subsequent to his receiving the July 8, 2003 letter from DPD, Mr. Johnson sought to discover what charges he had leveled against the arresting officers ñwere sustainedò and whether any of the officers had received any discipline for their improper and unprofessional

conduct.[2] Despite his, and the ACLUôs having sought access to these records under the statutory right to inspect such records, the defendants herein have refused to disclose any records to Mr. Johnson other than the accident report filed by Officer Speelman concerning Officer Ortegaôs ramming the police cruiser into Ms. Jarvisô car.

## APPLICABLE LAW GOVERNING ACCESS TO PUBLIC RECORDS AND CANONS OF STATUTORY CONSTRUCTION

The records that are the subject of the plaintiffsô request, and that are the center of this litigation, were ñmade, maintained, or keptò by the Denver Police Department[3] ñfor use in the exercise of functions required or authorized by law or administrative rule.ò Accordingly, all of the records at issue are ñcriminal justice records,ò as defined by § 24-72-302(4), C.R.S. (2003). Unless specifically exempt from disclosure, all criminal justice records should be made available for public inspection. *See* § 24-72-305, C.R.S. (2003).

The CCJRA creates a presumption of access to records documenting the performance of criminal justice agencies. § 24-72-301(2), C.R.S. (2003); *see Denver Post Corp. v. Cook*,

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[2] Specifically, the documents sought by plaintiffs, to which defendants have denied access, are:

> all documents that relate to the Denver Police Departmentôs contact with Mr. Johnson beginning on the evening of April 11, 2002, a contact that resulted in Mr. Johnsonôs arrest on April 12, 2002.
>
> This request includes all documents related to Mr. Johnsonôs complaint about this treatment, the subsequent internal affairs investigation, and the subsequent action taken by the Department, if any, as a result of the investigation.

FAC, ¶ 27 and Ex. C.

[3] The Denver Police Department is a ñcriminal justice agencyò as defined by § 24-72-302(3), C.R.S. (2003).

Case No. 02CA1327, __ P.3d __, 2004 WL 169754 (Colo. App. Jan. 29, 2004) (presumption of access attaches to all criminal justice records) (citing *Bodelson v. Denver Publ*ô*g Co.*, 5 P.3d 373 (Colo. App. 2000)). In addition to identifying specific statutory exemptions from the presumption of access, § 24-72-305(1) & (5), C.R.S., the General Assembly also authorizes custodians of criminal justice records to deny access on the basis that ñdisclosure would be contrary to the public interest.ò § 24-72-305(5), C.R.S. As ñremedial legislationò intended to effectuate a broad public policy guaranteeing that government business will not be shielded from public scrutiny, § 24-72-301(2), C.R.S., the CCJRA must be construed to permit the maximum amount of public access, and exemptions are to be narrowly construed. *Cook*, Case No. 02CA1327, 2004 WL 169754.

Any person denied access to any criminal justice record may file an application in the District Court, which shall thereafter order the official custodian to show cause why such records should not be made available for public inspection and copying. At such hearing, the custodian of records must convince the court why disclosure would, in fact, be ñcontrary to the public interest.ò § 24-72-305(7), C.R.S. (2003); *Prestash v. City of Leadville*, 715 P.2d 1272, 1273 (Colo. App. 1985) (affirming trial judgeôs decision to release portions of police investigatory file over objections of custodian); *Cook*, Case No. 02CA1327, 2004 WL 169754.

## DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL AS APPLICABLE AGAINST DEFENDANTS HERE

In addition to the statutory provisions applicable to the plaintiffs claims, this case also requires the application of the doctrines of *res judicata* and collateral estoppel because the

defendants here have previously litigated and lost the very same defenses and issues that they seek to raise here.

The doctrine of *res judicata* ñbars subsequent claims by identical parties based on the same claim for relief after there has been a final judgment on the merits.ò *Kuhn v. Colorado*, 897 P.2d 792, 795 (Colo. 1995); *see also OôNeill v. Simpson*, 958 P.2d 1121, 1123 n.4 (Colo. 1998); *Westminster v. Church*, 167 Colo. 1, 8, 445 P.2d 52, 55 (1968). Not only does *res judicata* bar the claim or defense previously asserted, but it also bars any claim or defense that might have been asserted with respect to the same subject matter. *See OôNeill*, 958 P.2d at 1123.

The doctrine of collateral estoppel is narrower than *res judicata* in that in only applies to issues that actually were decided in the prior proceeding, but it is also broader in the sense that it applies not only when there is true identity of parties, but also when the party against whom the doctrine is being asserted stands in privity with the party against whom the prior judgment was obtained. *See City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824, 830 (Colo. 1991). To establish collateral estoppel, a party must show the following elements:

(1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceedings;

(2) The party against whom estoppel was sought was a party to or in privity with a party to the prior proceeding;

(3) There was a final judgment on the merits in the prior proceeding; and,

(4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

*Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84-85 (Colo. 1999); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1240 (Colo. 1998); *Block 173 Assocs.*, 814 P.2d at 831; *Industrial Comm'n v. Moffat Cty. Sch. Dist. RE No. 1*, 732 P.2d 616, 620 (Colo. 1987); *Pomeroy v. Waitkus*, 183 Colo. 344, 350, 517 P.2d 396, 399 (1973).

The Colorado Supreme Court, as well as the United States Supreme Court, has repeatedly stressed the salutary benefits of the doctrines of claim preclusion and issue preclusion: "The doctrines of *res judicata* and collateral estoppel 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication.'" *Block 173 Assocs.*, 814 P.2d at 830 (quoting *Salida Sch. Dist. R-23J v. Morrison*, 732 P.2d 1160, 1163 (Colo. 1987) (internally quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

As demonstrated below, the collateral estoppel doctrine clearly precludes the defendants from re-litigating certain issues in this proceeding. Additionally, to the extent there is an identify of parties and issues between this case and prior cases, *res judicata* also may apply to bar certain of the City's defenses.

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

### A. DISCLOSURE TO THE PUBLIC OF THE IAB FILE CONCERNING THE DEPARTMENT'S INVESTIGATION (AND FINDINGS) WITH RESPECT TO MR. JOHNSON'S CLAIMS THAT DPD OFFICERS ACTED IMPROPERLY ON THE JOB WILL *NOT* CAUSE SUBSTANTIAL INJURY TO THE PUBLIC INTEREST

As the basis for his assertion that release of the documents at issue is contrary to the public interest, Chief Whitman has contended that the officers involved in the IAB investigation

have a protectable privacy interest in these records. The Colorado Supreme Court has previously addressed whether police officers have a constitutional right of privacy ï also denominated as the ñright to confidentialityò ï in the information contained in an internal police department investigation of alleged misconduct. *See Martinelli v. District Ct.*, 199 Colo. 163, 612 P.2d 1083 (1980). The court held that a person may have a constitutional right to prevent the governmentôs disclosure of ñpersonal materials or informationò[4] in the governmentôs possession if the person can overcome a ñtri-partite balancing inquiryò:

> (1) [D]oes the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
>
> (2) [I]s disclosure nonetheless required to serve a compelling state interest?
>
> (3) [I]f 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; *see also Flanagan v. Munger*, 890 F.2d 1557, 1560-61 (10th Cir. 1989) (applying *Martinelli* factors, and finding no constitutional right of privacy to prevent disclosure by police chief of his discipline, and the rationale for it, against three police officers); *Denver Policemenôs Protective Assôn v. Lichtenstein*, 660 F.2d 432, 435-36 (10th Cir. 1981) (applying *Martinelli* factors, and affirming trial courtôs decision to allow

[4] Because the records at issue here do not contain intimate or personal details relating to any public officials, it is doubtful that the *Martinelli* inquiry has any applicability. Arguably, this test should be employed only with respect to those records for which a colorable argument can be mounted that the records are ñpersonalò or ñprivate.ò A complaint of police brutality or other improper conduct, perpetrated while the officers were on duty is, as explained in greater depth below, is not entitled to a presumption of ñprivacy,ò and cannot seriously be deemed ñpersonalò information.

disclosure of internal affairs reports on arresting officers requested by defendant in state criminal case); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (applying *Martinelli* factors, and finding no constitutional right of privacy to prevent disclosure in police department newsletter of investigation into misconduct complaints against police officer, and rationale for the officerôs forced resignation).

Under *Martinelli*, to establish the ***threshold*** requirement of a ñlegitimate expectationò of confidentiality the proponent must show (1) ñóan actual or subjective expectation that the information . . . not be disclosedôò ***and*** (2) that the requested material ñis óhighly personal and sensitiveôò ***and*** (3) that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities.ò *Martinelli*, 612 P.2d at 1091.

The first element of this inquiry requires the Court to determine whether the allegedly confidential material was obtained under a promise of confidentiality or any other limitations that would support a legitimate subjective belief by the proponent that the information would subsequently be kept secret. *See id.*

The second element requires the Court to categorize the nature of the information that the proponent wishes to preserve as secret on the continuum of confidentiality that the Colorado Supreme Court discussed in *Martinelli*:

> At the top of this ranking are those materials and information which reflect the intimate relationships of the claimant with other persons. . . . Below this ranking: the progressively lower tiers would include . . . (the claimantôs) beliefs and self-insights; his personal habits; routine autobiographical material; and finally, his name, address, marital status, and present employment . . . .

*Id.* at 1092 (quotations and citations omitted). The *Martinelli* court explained that although circumstances in each case will vary, the lower reaches of the continuum of privacy interests are ñless likely . . . [to] come within the zone of protectionò for the constitutional right of confidentiality. *Id.*

Finally, the third element under *Martinelli* requires the Court to determine whether disclosure of the information at issue would be objectionable to a reasonable person of ordinary sensibilities. *Id.* at 1091. This element imposes on the Court a duty to construe the objective reasonableness, as a matter of law, of disclosure of the information at issue.

## B. THE OFFICERS WHO ARE THE SUBJECT OF THE IAB INVESTIGATION, AND OFFICERS WHO GAVE STATEMENTS TO IAB INVESTIGATORS, CANNOT DEMONSTRATE EITHER A SUBJECTIVE OR OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN THE REPORT

### 1. Collateral Estoppel Bars the Defendants from Relitigating Whether There Is an Objectively Reasonable Expectation of Privacy for Police Officers in an IAB Investigation

The defendants here, or their predecessors in office, previously litigated precisely the same issue that they now seek to raise again, *i.e.*, that Denver police officers have an objectively reasonable expectation of privacy in what they say and what occurs during an IAB investigation. In this case, the City has asserted that the statements of officers contained in the IAB file were compiled under a promise the City made to the officers that those statements would not be disclosed. However, the question whether DPD officers who provide statements to IAB investigators subject to ñthe Garrity Advisementò (DPD Form 455) enjoy a protectable expectation of confidentiality in those statements has already been fully and fairly litigated by the defendants, and this Court has twice previously ruled that

DPD officers under these circumstances enjoy no such expectation of privacy in those statements. *See American Civil Liberties Union of Colo. v. City & Cty. of Denver*, (ñCourtôs Order Re: Complaint For Records Disclosureò), Case No. 97CV7170, at 3 (Colo. Dist. Ct., Denver Cty., Apr. 7, 1998) (slip op.) (attached to FAC as Exhibit H) (finding that Denver Police Department police officers did not have basis to believe that their statements to internal affairs investigators pursuant to the ñGarrity Advisementò were subject to promises of confidentiality when any confidentiality could be breached without the officerôs permission), *affôd*, Case No. 98CA981 (Colo. App. Oct. 21, 1999);[5] *Brotha 2 Brotha v. City & Cty. of Denver*, Case No. 96CV6882, at 8 (Colo. Dist. Ct., Denver Cty., Feb. 4, 1997) (attached to FAC as Exhibit G) (same). Thus, under the collateral estoppel doctrine, the defendants are precluded from claiming herein that the police officers who provided statements to IAB investigators concerning Johnsonôs arrest have a protectable expectation of privacy pertaining to any part of the internal affairs report. *See Block 173 Assocs.*, 814 P.2d at 830.

**2. <u>The Documents at Issue Do Not Contain Personal Information About the Officers Who Are the Subject of the IAB Investigation</u>**

Even if this Court were free to depart from its previous rulings and determine that the officers who gave statements to IAB investigators subject to the Garrity Advisement did enjoy an expectation of privacy in those statements, both they, and the officers who are the subject of the IAB investigation, could not satisfy the additional requirement under

[5] A copy of the unpublished Court of Appeals decision in *ACLU* was mistakenly omitted from the exhibits to the FAC. It is attached here as Exhibit I.

*Martinelli*, of establishing that the information in the records at issue that concerns their *official* conduct is ñhighly personal and sensitive information,ò or information that reflects their ñintimate relationships.ò *See Martinelli*, 612 P.2d at 1091; *see also ACLU*, Case No. 97CV7170 (Ex. H to FAC), at 3; *Brotha 2 Brotha*, Case No. 96CV6882 (Ex. G to FAC), at 8; *City of Loveland v. Loveland Publ'g Co.*, Case No. 03CV513 (Colo. Dist. Ct., Larimer Cty., June 16, 2003) (finding that information in internal affairs report concerning police officersô discharge of official duties does not constitute ñpersonal and intimateò information subject to *Martinelli*ôs balancing test) (attached to this Hearing Brief as Ex. J); *Cf. Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (holding that Denver firefighters had no expectation of privacy with respect to non-disclosure of internal affairs investigation file compiled by Denver Police Department).

Other courts throughout the country have reached the same conclusion as Coloradoôs courts have on this question. For example, the Hawaii Supreme Court concluded that ñinformation regarding charges of misconduct by police officers, in their capacities as such, . . . is not óhighly personal and intimate sensitive information.ôò *State of Haw. Org. of Police Officers v. Society of Prof'l Journalists*, 927 P.2d 386, 407 (Haw. 1996); *see also Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1154-56 (10th Cir. 2001) (stating that the a peace officerôs employment evaluation ñcastigat[ing his] on-the-job-performanceò is not highly personal or intimate); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (ñInstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officerôs life.ò).

Moreover, to the extent that any particular record or records within the IAB file does contain such sensitive and personal information about an officerôs private life (*e.g.*, family or marital problems not directly affecting his discharge of official duties), the appropriate remedy is for such discrete information to be redacted. *See Loveland Publôg Co.*, Case No. 03CV513, at 5.

**3. <u>Disclosure of the Information Contained in IAB Files is Not Objectionable to a Reasonable Person</u>**

Even more fundamentally, however, the defendants cannot establish that the officers enjoy an ***objectively*** reasonable expectation of non-disclosure of information related to charges of their own misconduct when acting in their official capacities as police officers. There is an abundance of judicial precedents holding that police officers lack a cognizable privacy interest in maintaining the confidentiality of internal investigative records, particularly when such records relate to official performance while on duty:

*American Civil Liberties Union*, Case No. 97CV7170 (Ex. H to FAC), at 3 (concluding that disclosure information relating to a Denver internal affairs investigation would not be objectionable to a reasonable person);

*Brotha 2 Brotha*, Case No. 96CV6882 (Ex. G to FAC), at 8 (Colo. Dist. Ct., Denver Cty., Feb. 4, 1997) (slip op.) (finding no reasonable expectation of privacy in ñdescriptions of officersô conduct and observations while deployedò at the scene of a crime);

*DiManna v. Kearney*, Case No. 00CV1858, at 3 (Colo. Dist. Ct., Denver Cty., Aug. 28, 2000) (dismissing ñinvasion of privacyò claim brought by Denver Police

officers grounded upon publication concerning how officers conducted themselves on duty) (a copy of this unreported decision is attached to this brief as Ex. K).

*Mercer v. City of Cedar Rapids*, 308 F.3d 840, 845-46 (8th Cir. 2002) (holding that disclosure of comments relating to an officerôs ability to perform her job and the impact of her actions within the law enforcement workplace do not implicate a constitutional liberty or privacy interest);

*Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (holding that a police officer has no constitutional privacy interest in allegations against the officer that may ñcastigate Appellantôs on-the-job performance, foreclose his employment opportunities, and may invoke tort liability for defamationò);

*Flanagan*, 890 F.2d at 1570-71 (finding that police officers have no privacy interest in documents related to discipline for off-duty conduct);

*Lichtenstein*, 660 F.2d at 435-36 (finding no privacy right in documents that relate ñsimply to the officersô work as police officersò);

*Worden*, 806 F. Supp. at 1515-16 (D. Utah 1992) (finding a police officer has no ñlegitimate expectation of privacyò in information about his conduct while on duty);

*Coughlin v. Westinghouse Broad. & Cable. Inc.*, 603 F. Supp. 377, 390 (E.D. Pa. 1985) (ñA police officerôs on-the-job activities are matters of legitimate public interest, not private facts.ò), *affôd*, 780 F.2d 340 (3rd Cir. 1985);

*Department of Pub. Safety v. Freedom of Info. Commôn*, 698 A.2d 803, 806-08 (Conn. 1997) (explaining that ñthe fact of exoneration is not presumptively sufficient to overcome the publicôs legitimate concern for the fairness of the investigation leading to that exonerationò and concluding that a police officer does not have a reasonable expectation of privacy in his on-the-job conduct);

*Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 546 N.W.2d 143, 149-50 (Wis. 1996) (ñThe public has a particularly strong interest in being informed about public officials who have been derelict in their duty. . . . When exposing such misconduct, the fact that reputations may be damaged would not outweigh the benefit to the public in obtaining inspection.ò) (internal citation omitted);

*Society of Profôl Journalists*, 927 P.2d at 407 (finding no objectively reasonable expectation of privacy in internal affairs investigations);

*Cowles Publôg*, 748 P.2d at 605 (ñInstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officerôs life.ò).

Because the defendants will not be able to satisfy the first factor of the *Martinelli* test, they cannot prevail on their claim that the subject police officers enjoy a constitutional right of privacy with respect to the records at issue. *See Martinelli*, 612 P.2d at 1092 (noting that

establishing a legitimate expectation of privacy requirement is ña threshold matterò in the analysis of whether a person has a constitutional right to confidentiality). Accordingly, this Court need not address the second and third prongs of the *Martinelli* ñbalancingò test. *See Grove v. ACLU*, Case No. 98CA981 (Colo. App. 1999) at 4.

## C. DISCLOSURE IS WARRANTED UNDER *MARTINELLI* BECAUSE THE PUBLIC INTEREST IN INFORMATION CONCERNING AN OFFICERôS PERFORMANCE OF HIS PUBLIC DUTIES OUTWEIGHS ANY PRIVATE INTEREST

Even if the Court were to proceed to *Martinelli*ôs second prong, it would be compelled to conclude that disclosure is required. Under *Martinelli*, a court must allow disclosure of even legitimately private (ñhighly personal and sensitiveò) information if the release of the material would serve a compelling state interest. *See Martinelli*, 612 P.2d at 1092.

In this case, there is a clearly compelling public interest in providing citizens with information about how their police force is policing itself. As this Court has previously observed, ñ[D]isclosure [of IAB files] promotes the public interest in maintaining confidence in the honesty, integrity and good faith of Denverôs Internal Affairs Bureau.ò *ACLU*, Case No. 97CV7170 (Ex. H to FAC), at 3; *see also Loveland Publôg*, Case No. 03CV513, at 4 (Colo. Dist. Ct., Larimer Cty., 2003) (ñ[T]he public does have a legitimate and compelling interest in ensuring that its police officers properly perform their official duties and honestly investigate complaints from citizens related to the performance of those duties.ò).

Thus, even if the officers who are the subject of the IAB investigation could establish a legitimate and cognizable privacy interest in a portion of the IAB report, it would be

overcome by the paramount public interest, codified in the public records laws, of permitting the public to assess the performance of its public officials. *See Denver Post Corp. v. University of Colo.*, 739 P.2d 874, 879 (Colo. App. 1987) (ñ[A]ny possible danger of discouraging internal review is outweighed by the publicôs interest in whether the internal review was adequate, whether the actions taken pursuant to that review were sufficient, and whether those who held public office . . . should be held further accountable.ò); *see also Cowles Publôg Co.*, 748 P.2d at 605 (explaining that instances of officer misconduct while on duty ñare matters with which the public has a right to concern itself . . . matters of police misconduct are of legitimate public concernò); *Jones v. Jennings*, 788 P.2d 732, 738-39 (Alaska 1990) (ñThere is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the publicôs trust in those charged with enforcing the law.ò); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) (ñ[T]he public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.ò); *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) (ñ[T]here can be little doubt that allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern.ò); *DiManna v. Kearney*, Case No. 00CV1858, at 3 (Colo. Dist. Ct., Denver Cty., Aug. 28, 2000) (ñ[I]t is difficult to conceive of an area of greater public interest than the actions of law enforcement officers in their official capacity.ò); *Cassidy v. American Broad. Cos.*, 377

N.E.2d 126, 132 (Ill. Ct. App. 1978) (ñthe conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focusedò); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) (ñMisconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist.ò).

In sum, under the analysis set forth in *Martinelli*, the Court should reject the defendantsô claim that the internal affairs report must be withheld. The report does not implicate a legitimate expectation of privacy of the officers who are the subject of the IAB investigation, and even if it did, the officersô privacy interest is clearly outweighed by the compelling governmental interest of providing public access and accountability in the Police Department.

**D. THE DEFENDANTS CANNOT MEET THEIR BURDEN OF ESTABLISHING THAT EACH AND EVERY DOCUMENT CONTAINED WITHIN THE IAB FILE, AND OTHER DOCUMENTS REQUESTED BY THE DEFENDANTS, ARE SUBJECT TO THE ñDELIBERATIVE PROCESSò PRIVILEGE**

One of the bases upon which the defendants have refused to disclose any of the records requested by the plaintiffs is their blanket and unsupported assertion that the records are subject to a ñdeliberative processò privilege. This Court has twice previously held that not all documents contained within a Denver Police Department IAB file are subject to that privilege. *See ACLU v. City & Cty. of Denver*, Case No. 97CV7170 (Ex. H to FAC), at 3-4 (finding that no part of IAB file was subject to deliberative process privilege); *Brotha 2 Brotha*, Case No. 96CV6882 (Ex. G to FAC), at 6-7 (finding only a portion of the IAB was privileged). The Colorado Supreme Court had previously found that the ñdeliberative

processò privilege requires a careful consideration of ten non-exhaustive factors: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information or of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intra-departmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiffôs suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiffôs case. *Martinelli*, 199 Colo. at 171, 612 P.2d at 1089.

In order to make it possible for the Court to apply these factors, the burden rests squarely upon the government agency claiming the privilege to provide ña specific designation and description of each item of material for which the privilege is claimed, as well as precise and certain reasons for preserving the confidentiality of each item.ò *Id.*, 199 Colo. at 170 n.3, 612 P.2d at 1089 n.3. *See also City of Colorado Springs v. White*, 967 P.2d 1042, 1053 & 1056 (Colo. 1998) (requiring government to produce a detailed ñVaughn indexò and affidavits to invoke the privilege), legislatively overturned in part by HB 99-1191, codified at § 24-72-204(3)(a)(XIII), C.R.S. Significantly for the present proceeding,

Coloradoôs Supreme Court emphasized that ñthe trial court may properly reject a broad, non-particularized claim of the privilege, made with respect to an entire group of materials.ò *Martinelli*, 199 Colo. at 170 n.3, 612 P.2d at 1089 n.3. Here, the defendants have asserted precisely the type of ñbroad, non-particularized claim of the privilegeò that the Colorado Supreme Court has instructed trial courts to reject.[6] Unless and until the defendants come forward with a ñspecific designation and descriptionò of each document for which it claims the privilege, ñas well as precise and certain reasonsò why the privilege attaches, the Court should summarily deny the Cityôs asserted claim of ñdeliberative processò privilege.

Of course, the *Martinelli* test was fashioned in the context of a discovery dispute in civil litigation, and not all of its factors are appropriately transferred to the context of records requests under the Criminal Justice Records Act. The legislative term immediately following the Colorado Supreme Courtôs ruling in *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998), the General Assembly amended the Colorado Open Records Act to reverse the ñmandatory nondisclosureò portion of that opinion and require courts to ñweigh, based on the circumstances presented in a particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.ò *See* § 24-72-204(3)(a)(XIII). In this context, it is worth noting that other courts have recognized that the publicôs interest in learning about the effectiveness, thoroughness, and fairness of internal police

[6] Of course, the deliberative process privilege is not applicable to any documents that reflect or follow the agencyôs decision, nor any pre-decisional documents that are expressly relied upon as the basis for the agencyôs decision. *White*, 967 P.2d at 1051-52.

investigations is a compelling one. *See supra* at 16-18; *see also Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998) (ñthe [Open Records Act] recognizes the *compelling public interest* in access to information.ò) (emphasis added); *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) (ñ[W]e reject appellantsô contention that the newspapersô interest in the [internal investigation] report is lower ï and thus less compelling ï than the interest of . . . a litigant seeking discovery relevant to a civil lawsuit.ò); *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (where access is sought to files of an internal investigation by a government agency, ñthe public may have an interest in knowing that a government investigation itself is comprehensive, the report of an investigation released publicly is accurate, any disciplinary measures imposed are adequate, and those who are accountable are dealt with in an appropriate manner.ò).[7]

To the extent that the City will argue that providing public access to the IAB file will ñchillò or frustrate the governmental objective of receiving candid and forthright assessments of the officersô conduct (*see Martinelli* factor no. 3), such broad and empirically unsupported

[7] Particularly in circumstances such as those present in this case ï where the public has been informed that the internal investigation *sustained* the citizenôs charges ï there is a compelling state interest in allowing the public to discover the *reasons* for governmental action. *See, e.g., White*, 967 P.2d at 1054 (one of the factors for court to consider in balancing is ñwhether there is reason to believe the documents may shed light on government misconductò); *American Fedôn of State, Cty. & Mun. Employees, Local 1650 v. Regents of Univ. of Cal.*, 146 Cal. Rptr. 42, 44 (Ct. App. 1978) (in case involving request for access to internal audit of state university department, stating that ñwhere charges are found true, or discipline is imposed . . . a member of the public is entitled to information about the complaint, the discipline, and the óinformation upon which it was basedôò) (citation omitted); *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) (ñSo long as it is barred from seeing the [internal investigation] report, the newspaper [and the public] is effectively prevented from assessing the reasonableness of the official action.ò).

assertions have previously been rejected by courts in Colorado and elsewhere. *See, e.g.*, *ACLU v. City & Cty. of Denver* (Ex. H to FAX) at 3-4; *Denver Post Corp.*, 739 P.2d at 879 (ñAny possible danger of discouraging internal review is outweighed by the publicôs interest in whether the internal review was adequate, whether the actions taken pursuant to that review were sufficient, and whether those who held public office . . . should be held further accountable.ò); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) (ñóDefendants cannot meet their burden simply by asserting, *without empirical support*, that officers will refuse to cooperate with Internal Affairs investigations if their statements are subject to even limited disclosure.ôò) (emphasis added) (quoting *Kelly v. City of San Jose*, 114 F.R.D. 653, 672 (N.D. Cal. 1987)); *King v. Conde*, 121 F.R.D. 180, 193 (E.D.N.Y. 1988) (ñ[I]f the fear of disclosure . . . does have some real effect on officersô candor, the stronger working hypothesis is that fear of disclosure is more likely to increase candor than to chill it.ò).

Accordingly, even if the City were to now, belatedly, meet its burden to present adequate evidentiary support for its assertion of the deliberative process privilege, application of the *Martinelli* factors (and the balancing required under § 24-72-204(3)(a)(XIII)) requires disclosure of many, if not all, of the records that were requested by plaintiffs.

Respectfully submitted this _____ day of February, 2004.

FAEGRE & BENSON LLP

Steven D. Zansberg
Christopher P. Beall

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
Mark Silverstein

Attorneys for Plaintiffs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO and TERRILL JOHNSON

**CERTIFICATE OF SERVICE**

I hereby certify that on this _____ day of February, 2004 a true and correct copy of the foregoing **PLAINTIFFSô HEARING BRIEF** was hand delivered to:

Stan M. Sharoff, Esq.
Assistant City Attorney
Department of Law - Civil Litigation Practice Group/Claims
City & County of Denver
201 West Colfax Ave., Dept. 1207
Denver, CO 80202-5332

Mark Silverstein, Esq.
American Civil Liberties Union Foundation of Colorado
400 Corona St.
Denver, CO 80218

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