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COURT OF APPEALS, STATE OF COLORADO

Court Address: 2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203

District Court, City & County of Denver
Hon. Joseph E. Meyer III
Case No. 04CV700

Appellant: THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado Corporation

Appellees: 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, and the CITY AND COUNTY OF DENVER

Intervenors: LUIS ESTRADA, TROY ORTEGA, RICHARD EBERHARTER, and PERRY SPEELMAN, Police Officers for the City and County of Denver

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Case Number: 05CA397

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APPELLANT'S CORRECTED REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

OTHER AUTHORITIES

The American Civil Liberties Union of Colorado ("ACLU") by and through its undersigned counsel, respectfully replies to the Answer Brief of the Appellees Gerald Whitman, Alvin LaCabe, and the City and County of Denver (collectively "the City"), and the separate Answer Brief of the Intervenor-Appellees Luis Estrada, Troy Ortega, Richard Eberharter and Perry Speelman (collectively "Officers").

I. The ACLU's Second Amended Complaint Set Forth Sufficient Factual Allegations to Establish a Justiciable Case or Controversy

Curiously, in arguing that the District Court did not err when it denied the ACLU's Motion for Leave to File a Second Amended Complaint, the City premises its position exclusively upon a ground the District Court did *not* rely upon in its Order: that the allegations of the Second Amended Complaint ("SAC") failed to establish a justiciable controversy, and as a result, the ACLU lacked standing to seek a declaratory judgment. *See* City's Br. at 1, 3. The City contends that the allegations of the SAC failed to establish a factual basis for the court to conclude that the City had in place a policy and practice of refusing to provide public access to the portions of files of the Internal Affairs Bureau ("IAB") that relate exclusively to the official conduct of police officers, such that the ACLU was likely, in the future, to be required to re-litigate the same issue it has previously litigated (successfully) on three previous occasions. *Id.* at 3. Thus, the City states, the ACLU's SAC only established that twice prior to the present case had the City required the ACLU to bear the cost of litigating against the City's meritless position that police officers enjoy a constitutional privacy interest in the portions of IAB files that

related exclusively to their actions as police officers. *Id.* at 3 (noting that only two prior cases filed by the ACLU were fully tried on this issue, but that on a third previous occasion the City produced IAB records after forcing the ACLU to prepare and file a Complaint). Thus, the City declares, the District Court was correct in denying the ACLU's leave to amend, because "the gist of the [SAC] was an attempt to obtain a blanket declaratory judgment that *in the future* Denver may not withhold from public inspection criminal justice records . . . ." *Id.* at 3 (emphasis added); *Id.* at 6 (describing the relief sought by the ACLU as presented "in anticipation of future events" and "a mere possibility of a future legal dispute"); *see also* Officers' Br. at 5.

There's an obvious reason why the District Court did not reply upon this theory as the basis for its ruling denying leave to amend: unlike the City, the District Court apparently reviewed the entirety of the SAC, and the exhibits appended thereto. In the SAC, the ACLU alleged not only that it had twice previously[1] been forced to litigate (successfully) the lack of officer privacy rights in the portion of IAB files that concern only their discharge of official duties; it also alleged that it had already made numerous additional requests to inspect IAB files, including several tendered since the filing of the Original Complaint in this action, and on each such occasion the City had categorically refused to provide access. R. at 466-68, 480, 483, 486, 495, 517. Moreover, on each and

[1] The Second Amended Complaint was filed *after* the District Court had ruled that the IAB file of the investigation instigated by Terrell Johnson's complaint must be disclosed. R. at 343-49. Accordingly, technically, the ACLU had previously been forced to litigate this issue through trial on *three* previous occasions.

every occasion, in response to *past* requests for access, the City asserted that "release of the documents would infringe upon the officers' privacy interests" as the basis for refusing to provide access. R. at 466-68, 480, 483, 486, 495, 517. Thus, if it did not seek declaratory relief, the only other way the ACLU could vindicate its statutory right to inspect and copy the portions of the IAB files that "relate[] simply to the officers' work as police officers"[2] that *it had already sought to inspect* would be to litigate separately each of the four *sets* of files to which it had been denied access, and the dozens more it anticipated seeking and was committed to seek. (Moreover, under the City's and Officers' view, *each IAB file requires a separate legal proceeding to determine access;* thus, the four requests that were already filed by the ACLU, which sought access to all prior IAB investigations involving the six officers who arrested Terrell Johnson,[3] R. at 487-94, and all IAB files that involve charges (since January 1, 1999) of "racial profiling" or "biased policing," R. at 481, would themselves result in dozens of cases having to be individually litigated). In light of the SAC's express allegations of the City's "pattern and practice" of asserting officer privacy as a basis to deny public access

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[2] Each and every one of the ACLU's written requests to inspect the IAB files expressly disclaimed any interest in inspecting any information in the files that did not concern an officer's on-duty conduct. R. at 418, 484, 487, 503. In fact, the ACLU expressly requested the City to redact any such "personal and private information" from the files before providing access to the portions of the files that focused exclusively upon how the officers involved discharged their official duties as police officers. *Id.*

[3] Obviously, the City is mistaken when it asserts that "the ACLU is not seeking access . . . to records relating to the officers who were involved in [Terrell Johnson's] arrest." City's Br. at 5-6.

to any portion of IAB files, R. at 463, 466-70 (¶¶ 24, 26, 28, 30, 37 of SAC), 470 (¶¶ 41-42 of SAC), which were amply supported by documentary exhibits to the SAC, R. at 543-47,[4] and the further factual assertion that the ACLU "intends to continue seeking access to IAB files of Denver police officers," R. at 471(¶ 43 of SAC), there can be no serious contention that the SAC did not sufficiently establish that the ACLU had standing to challenge that policy and practice by seeking a declaratory judgment. *Citizens Progressive Alliance v. Southwestern Water Conservation Dist.*, 97 P.3d 308, 311 (Colo. App. 2004) ("a party seeking declaratory relief must . . . demonstrate that the challenged [conduct] will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future."), *cert. denied*, 2004 WL 1921022 (Colo. Aug. 30, 2004) (No. 04SC317). In light of the actual case or controversy between the parties to the litigation, as framed by the SAC, the ACLU was entitled to seek a judicial declaration that Denver police officers do not enjoy any constitutionally protected privacy interest in the portions of IAB that concern only how they perform their duties as police officers. *See id.* (holding that plaintiff had standing to seek declaratory judgment announcing rights under Colorado's Open Records Act: "[plaintiff]

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[4] In addition to four recent denials of access by the DPD, the ACLU also alleged that it had asked the City to expressly disavow its policy and practice of asserting "officer privacy" as a basis for withholding the portions of IAB files that relate to official conduct while on duty, and that the City expressly declared that it would continue to assert that improper basis for denial of access in the future. R. at 468-69 (¶¶ 31-32 of SAC); 497-521; 572-73.

demonstrated more than 'a mere possibility of a future legal dispute over some issue.'") (citation omitted).

II. The CCJRA Does Not Preclude the Court's Authority to Issue Declaratory Relief, Which is Particularly Appropriate in This Case

Both sets of Appellees argue that the District Court properly denied the ACLU's motion for leave to amend because, according to Appellees, declaratory relief is not available in a case concerning access to records governed by Colorado's Open Records Act ("CORA") or the portion of that Act referred to as the Criminal Justice Records Act ("CJRA"). City's Br. at 8-9; Officers' Br. at 9-12. To the contrary, this Court has previously determined that "[N]either § 24-72-204(6)(a), C.R.S. nor any other CORA provision precludes proceeding by way of a declaratory judgment action." *Citizens Progressive Alliance*, 97 P.3d at 312; *see also Bodelson v. City of Littleton*, 36 P.3d 214 (Colo. App. 2001) (declaratory judgment action brought by county coroner seeking access to public records). Just as the Southwestern Water Conservation District ("SCWD") did, the ACLU has "sought a declaration of its rights . . . under CORA. Such a declaration is a type of relief expressly contemplated under the declaratory judgments law." *Citizens Progressive Alliance,* 97 P.3d at 311. And, just like SCWD, the ACLU sought that judicial declaration to avoid having to bear the economic burdens of litigating the legal issues repeatedly in each of the records request cases it would have to bring if the declaratory judgment it seeks were denied. *See id.* (holding that SCWD "did not have to risk the monetary and other sanctions it would face" for refusal to produce records and

then litigate the issue, "before it could seek declaratory relief"). Here, too, as demonstrated above, the SAC unquestionably demonstrated that there existed a live case or controversy between the ACLU and the City regarding access to a large number of criminal justice records, over which the City had repeatedly and without exception asserted "officer privacy rights" as a basis for denying access. *See supra* at 3-4. The ACLU is not required to bear the cost[5] of litigating the same legal issue repeatedly in each of those cases; instead, it has the option and right, under law, to seek *a declaration of its rights under CORA* – that *it* is entitled to inspect the portion of criminal justice or public records that concern only a police officer's on-duty conduct as a police officer, without having to argue (and succeed) in each and every case that police officers enjoy no constitutionally protected right of privacy in that portion of the subject records. After all, "[t]he primary purpose of the declaratory judgment procedure is to provide a *speedy, inexpensive and readily accessible means* of determining actual controversies" such as

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[5] The City argues that because attorneys fees are recoverable upon a judicial finding that withholding of records was "arbitrary or capricious," there is no cost to be borne by unnecessary but successful litigation of each open records case. City Br. at 12 n.4. Of course, this argument overlooks the fact that not all costs and expenses of litigation are likely to be recovered, even if the judge in each case were to find the City's withholding "arbitrary and capricious." *See* Opening Br. at 7 n.6. Moreover, the unrectified "cost" of being forced to successfully litigate this same legal issue, again and again, is the *delay* in obtaining access to public records that the litigation process necessarily entails. This delay is itself antithetical to the General Assembly's clear intent in enacting a statutory scheme that provides a maximum of seventy-two hours for a records custodian to respond to a request to inspect public records. *See* §24-72-305(6), C.R.S.; *see also Citizens Progressive Alliance,* 97 P.3d at 311 (expressing concern that records custodian may interpose litigation improperly as a means to delay providing access to government records).

the one that presently exists between the ACLU and the City concerning the rights of police officers and members of the public who wish to inspect records under CORA. *See Toncray v. Dolan*, 197 Colo. 382, 384, 593 P.2d 956, 957 (1979) (emphasis added).

III. The City and Intervenor Officers Cannot Recast The Nature of the Relief Sought by the ACLU's Declaratory Judgment Claim By Simply Ignoring the Text of the Second Amended Complaint

Both sets of Appellees seek to divert this Court's attention from the legal issue before it by mischaracterizing the nature of the relief sought by the SAC. Both Appellees argue to this Court that the ACLU sought (and seeks) a declaration that Denver police officers enjoy no privacy expectation "in their IAB files," Officers' Br. at 3, 4, 17, 22, 26; City Br. at 3. In fact, a cursory review of the SAC makes clear that no such sweeping declaration was sought. The ACLU, which also litigates in state and federal courts vigorously to protect *the right of privacy* enjoyed by private citizens and public employees,[6] has never sought to inspect (or to obtain any judicial declaration concerning) the portion of IAB files that contain truly "personal" and "private" information about individuals (e.g., information *unrelated* to officers' on-duty discharge of official functions). *See* R. at 481, 484, 488, 503, and 506 (expressly disclaiming any such interest).[7] Thus, the City's suggestion that the ACLU has advocated for automatic

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[6] *See Denver Publ'g Co. v. Arapahoe Cty. Bd. of Cty. Comm'rs*, 121 P.3d 190 (Colo. 2005) (ACLU appearing as invited amicus to represent privacy interests of public employees in sexually explicit e-mails exchanged while on duty).

[7] The Officers contend that the City is not *required* to redact truly personal information, as the ACLU had requested in each of its letters to DPD, and "therefore,"

disclosure of "how an officer's family or marital problems may be affecting his/her work performance," City's Br. at 11, is contradicted by the express disclaimer in each of the ACLU's letters requesting to inspect the IAB files.

Despite the Appellees' efforts to reframe the scope of the declaratory relief sought below, the ACLU explicitly and unequivocally sought (and seeks) a judicial declaration only that DPD police officers do not enjoy a constitutionally protected privacy interest in the portions of records that "relate simply to the officers' work as police officers." R. at 471 (¶ 45 of SAC). Only by completely (and intentionally[8]) mischaracterizing the nature of the relief actually sought by the SAC can the Appellees attempt to justify the District Court's ruling denying leave to amend. Notably, not a single sentence contained in the combined 41 pages of briefing by Appellees is devoted to arguing that police officers actually *do* enjoy a constitutionally recognized right of privacy in the portions of

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there is no basis for issuance of declaratory relief. Officers' Br. at 2 n.1 & *id.* at 7. Of course, the holding of *Office of State Ct. Adm'r v. Background Info. Sys.*, 994 P.2d 420 (Colo. 1999), is expressly limited to its unique factual context of access to "bulk data" contained in voluminous digitized databases. *See id.* at 429 ("Nothing in our holding today is intended [to address] . . . individual case files. . . . Rather, we are dealing here with requests for bulk data, which, in our view, raise very different questions."). Moreover, the declaratory judgment herein sought does not *require* records custodians to redact privileged information; it merely declares that *no privilege exists* with respect to certain clearly identified portions of public records.

[8] Intervenor Officers demonstrate that they are aware of the limited nature of the relief sought in the SAC. *See* Officers' Br. at 2 n.1. Despite this fact, the Officers' brief continues to pretend that the ACLU sought declaratory relief that would "prohibit[] police officers from ever in the future asserting legitimate privacy rights against the disclosure of IAB records." Officers' Br. at 3; *see id.* at 17, 22, 26.

governmental records (IAB files or others) that "relate simply to the officers' work as police officers." This complete lack of argument (and absence of any precedent) to support the contrary position, more than anything else, demonstrates forcefully why the District Court's ruling that the amendment sought was "futile" is not only erroneous, but clearly erroneous.

IV. *Martinelli* Does not Purport to Preclude Courts from Declaring the Rights of Parties Before the Court (ACLU and the DPD) With Respect to Certain Categories of Public Records Under Colorado's Public Records Acts

At base, the dispute between the parties herein does not focus on a substantive issue, but a procedural one – whether *Martinelli v. District Ct.*, 199 Colo. 163, 612 P.2d 1083 (Colo. 1980) requires a court (not a records custodian) to determine, in *every* case (and exclusively on a case-by-case basis), whether certain narrowly delimited categories or portions of government records are subject to a constitutional right of privacy, or whether this Court may declare, as a matter of law with respect to a particular *class* of documents, that no constitutional right of privacy attaches to them (thereby obviating the need for cases-by-case determination). As demonstrated above, neither the DPD nor the Officers has been able to cite a single reported judicial opinion (from any jurisdiction) that expressly holds contrary to the holdings of *Stidham*, *Flanagan*, *Mangels*, *Lichtenstein*, and their progeny, *i.e.*, that police officers *actually do* enjoy a constitutional right of privacy in the portions of IAB files that concern only their actions as police officers. Instead, the appellees argue, this same *purely legal issue* must be determined again and again, *ad infinitum*, by a court, and cannot be resolved as a binding precedent,

in the "abstract," with respect to an entire category or class of documents. *See* Officers' Br. at 29 (asserting that "each allegedly unlawful denial of access to criminal justice records is a discrete claim that must be addressed by a district court pursuant to a show cause order").

Colorado's Supreme Court has expressly endorsed the concept of courts (when acting as custodians of criminal justice records) issuing broad declarations of whether certain *categories* of records are (or are not) accessible to the public under Colorado's open records statutes. *See* Chief Justice Directive 05-01 § 4.60(c) (authorizing courts, when determining whether to provide access to court records under the open records acts, *see* § 5.00(b) of CJD 05-01, to declare certain categories of records exempt from disclosure); *see id.* § 4.60(a), declaring, as matter of judicial, not legislative determination, that certain identified *classes* or *portions* of court records are exempt from disclosure under Colorado's records acts). Clearly, the appellees are mistaken when they contend that judges are without authority to declare the rights of parties with respect to categories or classes of records. *See also Citizens Progressive Alliance*, 97 P.3d at 311-12 (providing declaratory judgment in case concerning rights of access to records under CORA, rather than requiring determination of reasonableness of rules on a case-by-case basis).

Perhaps the simplest way to demonstrate the logical fallacy of the appellees' procedural argument – that court review is *required,* in response to each and every

individual records request, to determine whether a constitutional right of privacy attaches to a particular category of government records – is to apply this same proffered rule to other public records, *outside* the context of IAB files. Suppose that DPD repeatedly refused to provide public access to *arrest reports*, or officers' badge numbers, or their salary information, and repeatedly asserted (as the basis for non-disclosure) that police officers enjoyed a constitutional right or privacy in such information.[9] Would the court take seriously that, as appellees maintain, the mere assertion of a constitutional privacy interest in such information would require trial judges, in each and every case where such obviously non-private information was requested and denied, to engage in the *Martinelli* balancing,[10] and would be precluded from declaring "police officers do not have a constitutionally recognized privacy interest in the portions of government records that

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[9] For purposes of this hypothetical, it is also assumed that the City had provided some assurances to the officers that it would maintain this information as "confidential," thereby giving rise to some "subjective" expectation of non-disclosure (albeit, as here, an illegitimate one). *See* R. at 143-44, *Grove v. ACLU*, Case No. 98CA981, at 3-4 (Colo. App. Oct. 21, 1999) (not selected for publication) (expressly rejecting the argument that a promise of confidentiality in IAB investigations creates an objectively reasonable expectation of privacy in information that is not personal and sensitive, and therefore holding that "the intervenors *do not have a legitimate expectation of privacy*"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (same; "The legitimacy of an individual's expectations [of privacy] depends . . . upon the *intimate* or *otherwise personal nature* of the material which the state possesses," rendering a mere promise of confidentiality, by itself, legally insufficient).

[10] The Officers' position is unambiguous: "Once the right [of privacy] is asserted [no matter how baseless the assertion], a court must engage in the *Martinelli* balancing test." Officers' Br. at 16; *see also id.* at 26 (asserting that "privacy interests must be balanced on a case-by-case basis pursuant to the requirements of the CCJRA").

disclose their name, badge number, or salary, such that no *Martinelli* balancing is required; henceforth, the DPD shall not withhold such information on grounds of officer privacy"? Of course not. And yet, that is precisely the position advocated by the appellees with respect to the portions of IAB files that address only the police officers' conduct as police officers. The position advocated by appellees deserves no more serious consideration in the IAB file context than it would be given if officer privacy rights were repeatedly asserted as a basis for withholding disclosure of arrest records or salary information.

V. The Officers' Herculean Efforts to Reinterpret the Holdings of Prior IAB Cases are Unavailing

In an apparent effort to distract this Court from the purely legal issue presented by this appeal – whether it would be futile for the ACLU to seek a judicial declaration that DPD officers enjoy no constitutional right of privacy in the portions of IAB files that concern only their discharge of official duties as police officers – by attempting to explain away the prior decided cases which ordered disclosure of such records and expressly found *no cognizable privacy interest* in those portions of IAB files. *See* Officers' Br. at 18–27. Because the Officers have flagrantly misrepresented the rulings of those courts, their efforts to diminish their significance are ultimately unpersuasive.

In *Brotha 2 Brotha*, Judge Markson considered the same assertion of officer privacy with respect to *the entirety* of IAB files that the Intervenor Officers assert

herein.[11] Admittedly, Judge Markson did not make any finding that was explicitly limited to the portion of the IAB files that concerned only the discharge of official duties by DPD officers involved in the Thomas Jefferson High School incident. Instead, he found that the public's interest in disclosure of records that reflect how those government officials perform their duties – embodied in the broad presumption of public access that is enshrined in the open records statute, *not* the particular facts of the case, R. at 79 – outweighed whatever minimal privacy interests the officers *might have* in such information. R. at 78-79.

In *ACLU v. City & Cty. of Denver* (*affirmed sub nom. Grove v. ACLU*), both Judge Stern, and later this Court, expressly held that despite the City's assurance of confidentiality to officers with respect to their "Garrity" statements, the officers who provided such statements (and those whose conduct was the subject of the IAB investigation) ***did not enjoy any reasonable expectation of privacy*** with respect to such information. R. at 83 (expressly finding that information at issue was not "highly personal or sensitive[12]" and that its disclosure would be "offensive and objectionable to a

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[11] The Officers emphasize that Judge Markson did not have the benefit of briefing by the officers involved, Officers' Br. at 20, but they fail to explain why the City's briefing on that issue, plainly addressed by Judge Markson in his ruling, *see* R. at 79, was inadequate to apprise the Court of their asserted privacy interests. It is obvious from reviewing the Order that Judge Markson had considered and *rejected* the exact same arguments the Officers have made herein.

[12] Interestingly, in the case presently before this Court, the District Court similarly concluded that the documents "concern the performance by the these officers of their duties" and "concern the activities of the officers on the job." R. at 346. Accordingly, the

reasonable person"), 143 (same). Therefore, the information in question – the portions of IAB files that concerned the officer's official conduct as police officers – did not trigger the second and third prongs of *Martinelli* (balancing of interests and least restrictive means of disclosure). *See* R. at 143-44, *Grove* (noting that "[i]ntervenors do not cite any law that makes disclosure of biographical information, or the like, *per se* confidential" and expressly holding that "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 Ct.*, 199 Colo. 163, 612 P.2d 1083 (Colo. 1980)"). Despite the Officers' strained efforts to limit this case to its unique facts – suggesting that the outcome turned upon the high level of publicity that the arrest of Gil Webb II had received, see Officers' Br. at 21 -- it is abundantly clear from reviewing the two written rulings in that case, that the finding of no officer privacy rights in the IAB file was made independent of any such consideration; instead, both Judge Stern *and this Court* premised the "no legitimate privacy expectation" finding on the *nature* of the information in question, which was found not to be "highly personal and sensitive." R. at 83, 143-44. Nor was the fact the Officer Grove had initially filed an administrative appeal of his suspension determinative of the "no legitimate expectation of privacy" finding in that case, as the Officers herein erroneously assert. Officers' Br. at 22. Indeed, (and as counsel for the Intervenor Officers is aware, having

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Court ruled, the documents were not properly characterized as "personnel records," which requires that the information be personal and private. *Id.*

represented Grove), both Judge Stern and this Court expressly refused to reconsider their rulings that there was a complete lack of officer privacy rights in the file in light of Officer Grove's subsequent voluntary dismissal of his administrative appeal before the Civil Service Commission. *See* R. at 145 (holding that "the fact that [Grove] withdrew his appeal does not warrant reversal of the [District Court's] order").

The Officers also cite *Gordon v. Boyles*, an unreported decision from Denver District Court that involved a discovery dispute in civil litigation. Officers' Br. at 23-26. The ACLU is at a loss to decipher what possible relevance the *Gordon v. Boyles* decision has to this matter, as it did not involve a request for records under Colorado's open records statutes, did not involve any claim concerning the discharge of *official* duties while on duty by police officers, and, most importantly, essentially turns on an *evidentiary* determination by Judge Stern under the Rules of Evidence and discovery, rather than any application of privilege or privacy rights of officers. *See* R. at 221 (the court stating that it had "looked at the personnel files and didn't find anything of any consequence whatsoever here; and I've looked at the other IAB files and can't find anything of any consequence there"). Moreover, the court's ruling in *Gordon v. Boyles* was based upon its express finding that all of the names of the individuals contained in the IAB file concerning the altercation at Pierre's Supper Club (involving off-duty DPD officers, R. at 236), were already known to the defendant's counsel, and he could thereby obtain the same information through depositions of the identified individuals as part of

the civil discovery process. *See* R. at 238-41. Indeed, although Judge Stern acknowledged that there is generally a public interest in "maintaining the integrity of the Internal Affairs process" – separate from any consideration of officer *privacy* – *see* R. at 253-54; 259, he ultimately determined that because the file showed undisputedly that Officer Gordon had left Pierre's Supper Club prior to the stabbing incident which served as the basis for his libel claim against Peter Boyles, the documents in the file were simply *not relevant* (or reasonably calculated to lead to the discovery of admissible evidence) or germane to Gordon's libel claim. *See* R. at 259-60.[13]

Curiously, the Officers omit any mention of the only other Colorado District Court decision that applies the Criminal Justice Records Act to internal affairs investigations. The Larimer County District Court addressed the exact same issues that have been repeatedly litigated by the ACLU in seeking access to internal affairs files concerning official conduct of police officers while on duty. As every other court to address the issue head-on has done, the Larimer County District Court concluded "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." *City of Loveland v. Loveland Publ'g Co.*, Case No. 03CV513 at 5 (Colo. Dist. Ct., Larimer Cty., 2003), R. at 131(emphasis added).

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[13] Notably, although Judge Stern concluded in the hearing transcript that he would issue a written ruling, R. at 260, the Officers have not provided that for the Court's review.

In addition to the thirteen separate judicial opinions cited in support of this proposition in the Opening Brief, *see* Opening Br. at 21-29, the Court may also find the following additional authorities instructive: *Moore v. Deschutes Cty.*, Civ. No. 01-6189-HO, 2003 U.S. Dist. LEXIS 25627 (D. Or. 2003 at *11) ("internal investigations and reasons for dismissal are not highly personal" and therefore there is no invasion of a police officer's privacy if such records are disclosed to the public); *Kallstrom v. City of Columbus, Ohio*, 165 F. Supp. 2d 686, 695 (S.D. Ohio 2001) (finding no privacy expectation in "disciplinary records . . . and other documents detailing how each officer is performing his or her job"); *Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994) (police office enjoys no privacy expectation in "items [that] concern . . . official, duty-connected types of information" including their "performance evaluations").

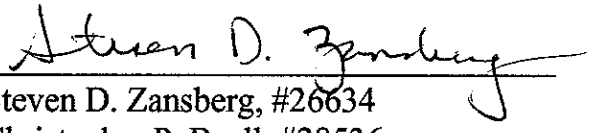
In light of this unbroken chain of judicial decisions, from numerous jurisdictions, concluding that police officers enjoy no expectation of privacy with respect to records reflecting their discharge of official duties as police officers – and particularly in light of the lack of any authority, from any jurisdiction, holding to the contrary – the ACLU is entitled to a declaratory judgment against the Denver Police Department that will preclude it from making this assertion with respect to the numerous IAB files the ACLU has already requested, and the additional files it has committed to request in the immediate future.

CONCLUSION

For the reasons set forth in this Reply and in the Opening Brief, the ACLU respectfully asks this Court to reverse the ruling of the District Court and to remand to the District Court with instructions to enter an order permitting the filing of the Second Amended Complaint that properly asserts a claim for declaratory relief, namely, that police officers within DPD enjoy no constitutional right of privacy with respect to the portions of IAB files "that relate simply to the officers' work as police officers."

Respectfully submitted this 21st day of November, 2005

FAEGRE & BENSON LLP



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