

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO</p> <p>270 South Tejon Colorado Springs, CO 80903</p> <p>PO Box 2980 Colorado Springs, CO 80901-2980</p>	
<p><b>Plaintiffs:</b> CITY OF COLORADO SPRINGS, a Home Rule City and Colorado Municipal Corporation</p> <p>v.</p> <p><b>Defendant:</b> THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC.</p>	<p>COURT USE ONLY</p>
<p><b>Attorneys for</b> THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC.</p> <p>Steven D. Zansberg, #26634 Christopher P. Beall, #28536 FAEGRE &amp; BENSON LLP 3200 Wells Fargo Center 1700 Lincoln Street Denver, CO 80203-4532 Telephone: (303) 607-3500 Fax: (303) 607-3600 SZansberg@faegre.com CBeall@faegre.com</p> <p>Mark Silverstein, #26979 Taylor Pendergrass, #36008 American Civil Liberties Union of Colorado 400 Corona Street Denver CO 80218 Phone: (303) 777-2740 Fax: (303) 777-1773 msilver2@worldnet.att.net tpendergrass@aclu-co.org</p>	<p>Case Number: 06CV2053</p> <p>Division: 5</p>
<p align="center"><b>ANSWER AND COUNTERCLAIMS OF THE AMERICAN CIVIL LIBERTIES UNION (With Request for a Show Cause Order)</b></p>	

Defendant/Counterclaimant The American Civil Liberties Union of Colorado, Inc., (herein “ACLU”) by its attorneys at Faegre & Benson LLP, submits this Answer and Counterclaim to the Complaint for Declaratory Relief and for Relief Pursuant to C.R.S. § 24-72-204(6)(a), (herein “Complaint”), filed by the Plaintiff, City of Colorado Springs, a Home Rule City and Colorado Municipal Corporation (herein “the City”), as follows:

### **ADMISSIONS AND DENIALS**

As to the allegations of the Complaint, the ACLU states the following:

1. Paragraph 1 states only a proposition of law, and therefore need not be admitted or denied.

2. The ACLU admits the allegations in ¶ 2.

3. The ACLU admits the allegations in the first sentence of ¶ 3; denies the remaining allegations of ¶ 3.

4. Paragraph 4 states only a proposition of law, and therefore need not be admitted or denied.

5. Paragraph 5 states only a proposition of law, and therefore need not be admitted or denied.

6. The ACLU admits the allegations in ¶ 6.

7. In response to ¶ 7 of the Complaint, the ACLU incorporates its answers to the prior paragraphs of the Complaint as if set forth herein.

8. The ACLU admits the allegations in ¶ 8.

9. The ACLU denies the allegations in ¶ 9.

10. The ACLU denies the allegations in ¶ 10.

11. The ACLU denies the allegations in ¶ 11.

12. The ACLU denies the allegations of ¶ 12.

13. The ACLU denies the allegations of ¶ 13.

1. [sic] 14., In response to ¶ 1 [sic] 14 of the Complaint, the ACLU incorporates its answers to the prior paragraphs of the Complaint as if set forth herein.

12. [sic] 15., ¶ 12 [sic] 15 states only a proposition of law, and therefore need not be admitted or denied.

13. [sic] 16., ¶ 13 [sic] 16 states only a proposition of law, and therefore need not be admitted or denied.

17. The ACLU denies each and every allegation not specifically admitted.

### **COUNTERCLAIMS BY THE AMERICAN CIVIL LIBERTIES UNION**

Defendant/Counterclaimant ACLU, for its Counterclaim against the City, states and alleges as follows:

### **JURISDICTION AND PARTIES**

1. This Court has jurisdiction over the Counterclaims pursuant to the Criminal Justice Records Act (“CCJRA”) § 24-72-305(7), C.R.S. §§ 24-72-301, *et seq.*, and 13-51-105.

2. Counterclaimant ACLU is a public interest organization incorporated in Colorado and headquartered in Denver, Colorado.

3. Lieutenant Robert Driscoll of the Colorado Springs Police Department (herein “CSPD”) is both the “custodian” and the “official custodian” of the criminal justice records at issue in this case. *See* C.R.S. §§ 24-72-302(5) and (8).

4. The CSPD is an agency of the City and is also a “custodian” of the criminal justice records at issue in this case. *See* C.R.S. § 24-72-302(5).

### **APPLICABLE LAW**

5. All records “made, maintained, or kept” by the CSPD for use in the exercise of functions required or authorized by law or administrative rule are “criminal justice records,” as defined by C.R.S. § 24-72-302(4).

6. Unless specifically exempt, all criminal justice records should be made available for public inspection pursuant to C.R.S. § 24-72-305.

7. If access to criminal justice records is denied by the custodian, upon application to the District Court for the District in which the criminal justice records can be found, the Court is to enter an Order to Show Cause “at the earliest practical time” at which time the custodian of records must demonstrate why the records at issue should not be disclosed. C.R.S. § 24-72-305(7).

8. Unless the Court finds that the custodian's refusal to permit access to the records at issue was proper, the Court shall order the custodian to permit such access. *Id.*

9. Upon a finding that the custodian's denial of access was arbitrary or capricious, the Court may order the custodian to pay the applicant's court costs and attorney's fees in an amount to be determined by the Court. *Id.*

10. This Court is authorized under C.R.S. §§ 13-51-102, *et seq.* to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and to clarify and declare what are the rights of the parties with respect to their competing claims.

### **BACKGROUND EVENTS GIVING RISE TO THE COUNTERCLAIMANT'S REQUEST TO INSPECT PUBLIC RECORDS**

11. Delvikio Faulkner is, and by physical appearance is identifiable as, African American.

12. On June 2, 2005, Officers K. Hardy and J.V. Andrews performed a traffic stop, for failure to display a front license plate, on a vehicle occupied by three black males. Mr. Faulkner was the backseat passenger.

13. Upon request to identify himself, Mr. Faulkner reported to Officer K. Hardy what Officer Hardy believed to be a false name and birth date. Officer K. Hardy proceeded to arrest Mr. Faulkner.

14. Officer Hardy believed that Mr. Faulkner did not initially submit cooperatively to arrest. Officer K. Hardy then used excessive force to restrain Mr. Faulkner. Officer K. Hardy used a full-sized flashlight to strike Mr. Faulkner multiple times in the head, shoulders, and back.

15. As a result of Officer K. Hardy's excessive and unnecessary use of force, Mr. Faulkner required immediate medical attention and was transported to Memorial Hospital. Mr. Faulkner was treated for severe shoulder bruising and multiple head lacerations.

### **COUNTERCLAIMANT'S REQUEST FOR ACCESS TO PUBLIC RECORDS**

16. In a letter dated May 15, 2006, the ACLU requested that the Internal Affairs Bureau ("IAB") of the CSPD allow ACLU to inspect and copy all records made, maintained, or kept by the City that relate to the CSPD's contact with Mr. Faulkner beginning on July 2, 2005, including the subsequent IAB investigation and any resulting disciplinary action. A copy of this letter is attached hereto as Exhibit A and is incorporated herein by reference.

17. On May 15, 2006, the ACLU received a voicemail message from Sergeant Sean Mandel. Sergeant Mandel stated that he was replying to the ACLU's letter. He also stated that it was the policy of the CSPD to not release any IAB investigation files unless compelled to do so by a court order.

18. On May 16, 2006, the ACLU wrote a letter to Sergeant Sean Mandel, again requesting to inspect and copy all records made, maintained, or kept by the City that relate to the CSPD's contact with Mr. Faulkner beginning on July 2, 2005, including the subsequent IAB investigation and any resulting disciplinary action. A copy of this letter is attached hereto as Exhibit B and is incorporated herein by reference.

19. On May 27, 2006, the ACLU received a letter from the CSPD's Records Custodian, Lieutenant Robert Driscoll, refusing to disclose the requested records. The letter relied on the "personnel file" exception in the Colorado Open Records Act ("CORA"). Alternatively, Lieutenant Robert Driscoll's letter asserted that disclosure of the IAB investigative records would be contrary to the public interest. A copy of this letter is attached hereto as Exhibit C and is incorporated herein by reference.

20. On June 6, 2006, the ACLU wrote a letter to Lieutenant Robert Driscoll asking him to reconsider the City's denial of access. In that letter, counsel noted that the public is entitled, pursuant to the CCJRA, to inspect documentary materials made, maintained or kept by a criminal justice agency, including investigation reports. Additionally, the letter cited cases in which Colorado courts have concluded that public disclosure of IAB investigative files promotes the public interest. A copy of this letter is attached hereto as Exhibit D and is incorporated herein by reference.

21. By letter dated June 9, 2006, the City, through its counsel, Staff Attorney Gregory S. Garland, disclosed the offense report, summons and complaints, custody reports, and supplemental reports relating to the July 2, 2005 incident involving Mr. Faulkner. In that letter, counsel for Colorado Springs noted that the documents should have been provided pursuant to the ACLU's initial request, but were inadvertently retained instead of being sent. The City, however, again refused to release the IAB investigative records. A copy of this letter is attached hereto as Exhibit E and is incorporated herein by reference.

22. The ACLU of Colorado regularly requests to inspect and copy records in the custody of law enforcement agencies in Colorado, including the categories of criminal justice records sought in this case.

23. The ACLU of Colorado has requested access to the internal affairs investigations of a number of Colorado law enforcement agencies and intends to continue doing so in the future.

24. The ACLU of Colorado has received additional reports of alleged police misconduct that have been the subject of IAB investigations by the Colorado Springs Police Department. In order to investigate these allegations, the ACLU of Colorado intends to request additional records from the CSPD, including the records of these additional IAB investigations.

### **FIRST CLAIM FOR RELIEF**

#### **(Order to Show Cause and Award of Reasonable Attorneys' Fees) § 24-72-305, C.R.S.**

25. The ACLU incorporates by reference herein the preceding paragraphs of this Answer and Counterclaim.

26. The records originally requested by the ACLU on May 15, 2006 have been made, maintained, and kept by the CSPD for use in the exercise of functions required or authorized by law or administrative rule and therefore constitute "criminal justice records" under the CCJRA, C.R.S. § 24-72-302(4).

27. The City has refused to provide access to the criminal justice records, specifically the IAB investigative files, pursuant to the ACLU's request.

28. No statutory exemption under the CCJRA warrants the City's decision to deny access to the criminal justice records requested by the ACLU.

29. Providing the ACLU with access to the criminal justice records sought herein would promote the public interest and would not, as the City contends, be contrary to the public interest.

30. The City's denial of access to the criminal justice records sought by the ACLU herein violates the CCJRA.

31. The ACLU is entitled to an Order directing the City to show cause "at the earliest practical time" why the City should not permit access to the records which are the subject of this Answer and Counterclaim. *See* C.R.S. § 24-72-305(7).

32. Upon hearing this matter on an Order to Show Cause, the ACLU is entitled to a further order making the order absolute and directing the custodian of records to provide the ACLU with access to all of the requested records on the grounds that the City's decision to deny access was not proper. *See* C.R.S. § 24-72-305(7).

33. Upon finding that the CSPD's withholding of the records at issue was arbitrary or capricious, the Court should enter an Order awarding the ACLU its reasonable attorneys' fees under C.R.S. § 24-27-305(7).

## **SECOND CLAIM FOR RELIEF**

### **(Declaratory Judgment — IAB Files do not Constitute “Personnel Files” under CORA) § 13-51-105, C.R.S**

34. The ACLU incorporates by reference herein the preceding paragraphs of this Answer and Counterclaim.

35. The CSPD’s denial of access to the IAB investigative files is consistent with the Department’s long-standing policy that the entirety of every IAB file in its possession is a “personnel file” exempt from public disclosure under Colorado’s public records laws.

36. IAB investigative files in possession of the CSPD do not constitute “personnel files” under the CORA; instead, they are “criminal justice records” expressly exempt from the CORA.

37. The ACLU is entitled to a declaratory judgment stating that the IAB files of the CSPD are not “public records” and therefore not “personnel files” under the CORA. C.R.C.P. 57 and C.R.S. § 13-51-105.

## **PRAYER FOR RELIEF**

WHEREFORE, the American Civil Liberties Union, pursuant to C.R.S. §§ 24-72-305(7) and 13-51-105, seeks judgment in its favor and against all parties as follows:

- A. An order denying the request of the Plaintiff for a declaratory judgment in favor of the Plaintiff and against the Defendant/Counterclaimant.
- B. An order directing the City to show cause why they should not permit inspection and copying of the requested criminal justice records described above (a proposed order is attached with this Counterclaim).
- C. The Court conduct a hearing pursuant to such order “at the earliest practical time,” at which time the Court should make the order to show cause absolute.
- D. An order directly the CSPD to provide ACLU with access to some or all of the IAB records requested.
- E. An order directing the City to pay the ACLU’s court costs and reasonable attorneys’ fees, as provided by C.R.S. § 24-72-305(7).

- F. A declaratory judgment declaring that the IAB files of the CSPD are not “personnel records” under the CORA, pursuant to C.R.C.P. 57 and C.R.S. § 13-51-105.
- G. An award of any other relief that the Court deems just and proper.

**DEFENDANT/COUNTERCLAIMANT, the American Civil Liberties Union, hereby requests that the Court enter the attached Order to Show Cause and that the Court set a hearing at the earliest practicable time.**

Respectfully submitted this 13th day of July 2006.

By: /s/ Steven D. Zansberg

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THIS ANSWER AND COUNTERCLAIMS WAS FILED WITH THE  
COURT THROUGH THE LEXIS/NEXIS COURT LINK ELECTRONIC  
FILING SERVICE, UNDER C.R.C.P. 121(c), § 1-26. PURSUANT TO  
THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS  
MAINTAINED IN THE FILES OF FAEGRE & BENSON LLP.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of July, 2006, a true and correct copy of the foregoing **ANSWER AND COUNTERCLAIMS OF THE AMERICAN CIVIL LIBERTIES UNION (With Request for a Show Cause Order)** was served on the following counsel of record through the Lexis/Nexis File-and-Serve system:

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/s/ Cynthia Ruder

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