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COURT OF APPEALS, STATE OF COLORADO

Court Address: 2 East Fourteenth Ave., 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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APPELLANT'S OPENING BRIEF

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2. Whether the District Court erred in denying the plaintiff's motion for leave to file a second amended complaint to add factual allegations in support of claims for declaratory relief on the grounds that those allegations did not sufficiently relate to the original claims asserted by the plaintiffs.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal seeks reversal of the District Court's denial of the plaintiff's motion for leave to file a Second Amended Complaint that pleaded claims for declaratory relief under Rule 57 of the Colorado Rules of Civil Procedure. If the declaratory relief sought in the amended complaint were granted, that judicial determination would eliminate the burden upon plaintiff of having to re-litigate the same legal issue repeatedly (and successfully) each time it seeks access to criminal justice records that reflect exclusively upon the discharge of official duties by uniformed police officers. It would also greatly reduce the burden on the courts of this State.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

In their original Complaint filed on January 28, 2004, R. at 1-40, plaintiff the American Civil Liberties Union of Colorado ("ACLU") and former plaintiff Terrill Johnson[1] sought disclosure of records, pursuant to the Colorado Criminal Justice Records Act, concerning the Denver Police Department's investigation of a citizen complaint filed by Mr. Johnson. Mr. Johnson claimed that police officers engaged in racial profiling, used excessive force, made an unjustified arrest, and engaged in other improper conduct when they held him at gunpoint and arrested him allegedly for minor traffic violations and "interference" on April 12, 2002. R. at 5. Mr. Johnson filed the formal complaint with the Internal Affairs Bureau ("IAB") of the Denver Police Department ("DPD") on June 17, 2002, and, two days later, all charges that had been filed against him were dismissed. *Id.*

When the DPD's internal affairs investigation was completed, Mr. Johnson received a letter informing him that although his complaints of excessive use of force were not sustained, certain other unspecified complaints he had made against the arresting officers *had been* sustained. R. at 16. He was not informed, however, which claims were sustained, against which officers, and what, if any, discipline

[1] Mr. Johnson is not a party to this appeal.

was imposed. *Id*. Subsequently, Johnson and the ACLU sought access to all documents connected with the investigation of Mr. Johnson's complaint under Colorado's Criminal Justice Records Act ("CCJRA"). R. at 17-20. The City defendants denied that request. R. at 21.

In their original complaint in the District Court, plaintiffs claimed that the defendants' refusal "was made pursuant to a longstanding policy and practice of the DPD to resist public disclosure of information concerning the DPD's investigation of allegations of police misconduct." R. at 2. Pursuant to the policy, as alleged by the plaintiffs, "the DPD refuses to disclose records similar to those requested by Mr. Johnson unless and until an action was filed in court." *Id.*

Consequently, in addition to requesting that DPD "show cause" why inspection of the Terrill Johnson internal affairs file should not be permitted (count 3), plaintiffs asked the District Court to issue two declaratory judgments that, as a matter of law: (1) police officers in the DPD have no reasonable expectation of non-disclosure under "the Garrity Advisement" that is given to all police officers prior to their providing a statement to internal affairs investigators (count 1), and (2) police officers in the DPD have no reasonable expectation of privacy in the portions of IAB files concerning only their official conduct as police officers (count 2). R. at 8 ¶ 43 and R. at 10 ¶ 55. On February 4, 2004, appellant filed a

First Amended Complaint adding the City and County of Denver as a defendant. R. at 45-85. The four officers who were the subject of Mr. Johnson's complaint to DPD moved, R. at 183-85, and were granted leave to intervene. R. at 444.

A show cause hearing was held on February 27, 2004. *See* Tr. of Hr'g of Feb. 27, 2004. At that hearing, the District Court refused to apply collateral estoppel to preclude the defendants from raising certain defenses to disclosure. (Tr. 2/27/04 at 26:24 – 27:16). Commander John W. Lamb of the DPD testified that the DPD had a policy of treating the entirety of its internal affairs files as "confidential" (not permitting public disclosure), (Tr. 2/27/04 at 37:12-15), but that the IAB file concerning Mr. Johnson's complaint contained no information of a personal nature with respect to any of the police officers involved. *Id.* at 44:9-14;[2] *see also id*. at 36:2-11 & 82:22 – 83:8 (counsel for City conceding there was no information in the file constituting personal or private information about the officers, despite the City's having previously asserted there was such a basis for withholding records).

[2] Commander Lamb also testified that that DPD officers are aware, at the time they give statements to internal affairs investigators, that the records could be publicly released (*Id*. at 40:15-18), and may also be reviewed by the officer(s) being investigated (*Id.* at 42:17-23).

On March 30, 2004, the District Court entered its Ruling on Order to Show Cause. R. at 343-49. In that Order, the District Court directed the defendants to produce the entirety (with only two pages withheld) of the IAB files concerning the investigation into the arrest of Mr. Johnson. R. at 348-49. The District Court also found that the City defendants' withholding of certain of the requested records was "arbitrary and capricious," R. at 348 & 443, and therefore subsequently awarded the plaintiffs $23,995.02 as their reasonable attorneys' fees and costs, pursuant to § 24-72-305(7), C.R.S. R. at 446-47.

On June 25, 2004, the District Court granted the defendants' motion to dismiss the remaining counts 1 and 2 of the First Amended Complaint on the grounds that plaintiffs lacked standing to seek the injunctive or declaratory relief of those claims. R. at 442-44. The Court ruled that (1) plaintiffs had not sufficiently set forth facts to establish the likelihood of being subjected to any conduct by the defendants in the future that would create a justiciable case or controversy and therefore lacked standing, R. at 444, and (2) the Court's interpretation of the relevant statute did not provide for a judicial declaration that police officers do not enjoy a reasonable expectation of privacy in reports concerning only their official conduct. R. at 444.

On July 9, 2004, plaintiff ACLU filed a Motion for Leave to File Second Amended Complaint and For Reconsideration of certain of the District Court's holdings in its Order entered June 25, 2004. R. at 448-61. ACLU asked the District Court to reconsider the portion of its June 25, 2004 Order in which the Court found that balancing of interests under *Martinelli* must be conducted in *every* case, including where the only records sought are those reflecting exclusively the official conduct of police officers,[3] thereby "preclud[ing] issuing a broad declaration concerning the privacy interests of all police officers in IAB files." R. at 444, 451 ¶ 8. Plaintiff tendered a proposed Second Amended Complaint seeking two revised judicial declarations under the Declaratory Judgment Act: (1) police officers do not have a constitutionally-protected privacy interest in the portion of IAB files that "relate simply to the officers' work as police officers," and (2) the "deliberative process privilege" is not applicable to post-investigation documents reflecting the outcome of the investigation, and the imposition of any disciplinary sanctions. R. at 462-547. On July 13, 2004, the District Court vacated its Order of June 25, 2004 that dismissed counts 1 and 2

[3] *See infra* n.4.

with prejudice, and converted it to an order dismissing the claims without prejudice. R at 548.

In its Motion for Leave to Amend, ACLU argued that the facts as alleged in the proposed Second Amended Complaint clearly established a routine and uniform policy of the DPD (based on its responses to numerous such requests) to refuse to disclose any portion of IAB files on asserted grounds of officer privacy and the deliberative process privilege and that the ACLU had therefore sufficiently set forth facts establishing its standing to seek the declaratory relief requested. R. at 449-50. Appended to the Second Amended Complaint were denials by DPD to four separate requests for access to IAB files by ACLU on grounds that disclosure of such records would violate the privacy rights of the officers involved, R. at 466-68, 480, 483, 486, 495, despite the fact that in each of the separate requests for access, the ACLU had expressly disclaimed any interest in inspecting or copying any portion of the IAB files that pertained to the private (off-duty) conduct by or information about the officers involved. R. at 481, 484, 488, 503, and 506.[4]

[4] Each of the four subsequent requests for access to internal affairs files (that were categorically denied by DPD) stated: **"My clients have no interest in reviewing any portion of these records that contain personal and private information about any police officers' off-duty conduct that does not bear**

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On January 12, 2005, the District Court entered an Order Denying Motion for Leave to File Second Amended Complaint, holding that declaratory relief is inappropriate, even under the circumstances described in the proposed Second Amended Complaint. R. at 605-06. The District Court ruled that the proposed amendments would be futile and expressly premised its ruling on its interpretation of the Colorado Supreme Court's ruling in *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980). R. at 606. The Court construed that decision as requiring a case-by-case determination by a judicial officer of privacy expectations and a balancing of interests irrespective of the *nature* of the information in the government's hands. *Id.* The Court also premised its ruling on the grounds that the proposed amendments sought asserted facts and circumstances concerning different files and parties from those asserted in the original complaint. *Id*. Notably, the District Court did not find that the ACLU lacked standing to bring these claims.

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directly on their discharge of their official duties. Accordingly, my clients hereby request that you redact any such information (*e.g.*, Social Security numbers, home address and phone numbers, personal medical and financial information, etc.) from the records before producing them for inspection and copying."

The District Court entered its Order as a final judgment, from which this appeal is taken. R. at 607-16.

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The particular facts of Terrill Johnson's arrest and, thereafter, his year-long struggle to obtain access to DPD records concerning the internal affairs investigation his complaint prompted, are not particularly relevant to the issues presented by this appeal. Nor are the facts of the actual events that gave rise to the four other IAB files requested by the ACLU that were summarily and categorically denied by the DPD. What *is* centrally relevant to this appeal is the ACLU's experience in having to re-litigate the same legal issues against the City and County of Denver in order to avail themselves of statutory rights of public access under the CCJRA.

The following are the undisputed facts surrounding this litigation: Prior to filing the original Complaint alongside Mr. Johnson, the ACLU had previously, on three separate occasions, sought access to internal affairs records from the DPD. R. at 470 ¶ 38. On each such occasion, the DPD had demonstrated by its actions a policy and practice of refusing to provide any access to such records, asserting that disclosure of such records would violate the constitutional privacy interests of the officers involved in and/or who were the subject of the investigation. *Id.* In two of

the previous cases, the ACLU filed suit in District Court under the CCJRA to gain access to those internal affairs records. And in both previous cases, the trial judges ordered DPD to disclose those files to the ACLU. *See* R. at 27-35 & 36-40. In one of those cases, the two officers who were the subject of the internal affairs investigation appealed to this Court, which (like the trial court) held that those officers enjoyed no constitutional right of privacy in any portion of the internal affairs file that focused on their conduct as police officers. *See* R. at 143-44. Accordingly, this Court held, there was no reason to balance, under the *Martinelli* test, the officers' (non-existent) rights of privacy in the records against the public interest in obtaining access to those records. *See* R. at 144.[5]

In the third case mentioned above, when the ACLU announced its intention to file a lawsuit seeking access to the withheld internal affairs file, the DPD reconsidered its position and disclosed the files. *See* R. at 26.

In a fourth case, handled by the same attorneys representing the appellant herein, a northern Colorado newspaper sought access to an internal affairs file of the Loveland Police Department. *See* R. at 147-154. In that case, too, the police

[5] The entire IAB file in that case, involving DPD officers Nicholas Grove and Phil Stanford, was admitted as Plaintiff's Hearing Exhibit 10. *See* Tr. 2/27/04 at 59:14 – 61:16 (*see* Notebook of Pls.' Exhibits in Record on Appeal). The IAB file (Ex. 10) is an instructive exemplar of such files.

officer who was the subject of the internal affairs investigation (and was represented by counsel for intervening officers herein) contended that disclosure of the internal affairs file records would violate the officer's constitutional right to privacy. R. at 150. The Larimer County District Court unequivocally rejected this contention with respect to the portion of the file that related to the officer's discharge of his official duties, holding that "police officers have no privacy interest in records concerning their conduct while on duty, so long as these records do not contain personal, intimate information." R. at 151.

Despite this chain of judicial determinations that police officers enjoy no legitimate expectation of privacy in the portion of criminal justice records that "relate simply to the officers' work as police officers," **the DPD (and the police officers' union) have forced the ACLU, newspapers, Mr. Johnson, and other common citizens to bear the burden of protracted, costly, and *completely unnecessary litigation* in order to obtain access to the portions of records in which the officers can claim no legitimate right of privacy.** *See* R. at 26, 27-35, 36-40, 143-44, 147-154, 466-68, 480, 483, 486, 495.

III. ARGUMENT

A. SUMMARY OF ARGUMENT

The District Court erred in denying the plaintiff's Motion for Leave to File a Second Amended Complaint asserting claims for declaratory relief pursuant to C.R.C.P. 57. Specifically, the District Court misconstrued the holding of *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), as precluding the availability of the declaratory relief sought. Because the District Court's denial of the plaintiff's Motion for Leave to Amend was premised on an erroneous view that the amendment would be futile – *i.e.*, the plaintiff would not be entitled to the relief requested as a matter of law – the District Court's ruling is subject to *de novo* review. As demonstrated below, the District Court's fundamental misunderstanding and misapplication of *Martinelli*, which served as the basis for its ruling, compels this Court to reverse the District Court's order.

B. STANDARD OF REVIEW

Ordinarily, this Court reviews a district court's decision to grant or deny a motion for leave to amend a complaint for an abuse of discretion. *Polk v. Denver Dist. Ct.*, 849 P.2d 23, 25 (Colo. 1993). However, "when a trial court denies leave to amend on the grounds that the amendment would be futile . . . we review that

question *de novo* as a matter of law." *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002).

C. ARGUMENT

1. The District Court Erred in Denying Leave to Amend the Complaint to Include a Claim for a Judicial Declaration That Denver Police Officers Do Not Enjoy a Constitutional Right of Privacy in Criminal Justice Records That Focus Exclusively on the Official Conduct of Such Officers

a. Declaratory Relief is Appropriate to Resolve Efficiently a Recurring and Actual Controversy Between the Parties, and Thereby Obviate the Need for Protracted Litigation

As demonstrated by the Course of Proceedings and Statement of Relevant Facts sections above, the reason why the ACLU, from the outset of this case, *see* R. at 9-10, sought a declaratory judgment – that Denver Police officers do not enjoy a constitutionally protected privacy interest in police records that reflect how they discharge their official duties – was to avoid having to endure the same protracted, costly,[6] and unnecessary litigation over this issue that Mr. Johnson was forced to endure. Without the declaration sought in the Second Amended Complaint, the ACLU (and citizens of Colorado) will have to repeat the same

[6] Although the ACLU was awarded a portion of it attorneys' fees for successfully gaining access to the IAB file of Mr. Johnson's arrest, such attorneys' fees awards are the rarest of exceptions in cases decided under the Criminal Justice

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process again and again. It is precisely for this reason that Colorado's General Assembly enacted the Uniform Declaratory Judgment Act. *See Toncray v. Dolan*, 197 Colo. 382, 384, 593 P.2d 956, 957 (1979) ("[t]he primary purpose of the declaratory judgment procedure is to provide a ***speedy, inexpensive and readily accessible means*** of determining actual controversies which depend on the validity or ***interpretation*** of some written instrument or law") (emphasis added). As the Court has repeatedly recognized, the declaratory judgment "rule and statute are remedial in nature and should be liberally construed." *Id.*; *see also Board of Cty. Comm'rs v. Park County*, 45 P.3d 693, 698 (Colo. 2002) (holding that Uniform Declaratory Judgment law "is to be liberally construed and administered") (quoting §13-51-102, C.R.S.).

Indeed, "one of the essential purposes of our Uniform Declaratory Judgment law . . . is to enable proper parties, in a proper case, to obtain such a determination of rights and duties ***in advance of the time when litigation might arise*** with respect to ***a specific transaction***." *McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99, 102 (1937) (emphasis added); *see also Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303, 307 (Colo. App. 1998) (finding

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Records Act. Moreover, the fees awarded below did not cover the entirety of the fees and costs expended in pursuit of Mr. Johnson's case.

district court abused its discretion in dismissing claims for declaratory relief that challenged the validity of town's land use ordinance: "We conclude there is a controversy and that plaintiff need not apply for a use permit before asking for declaratory relief."), *aff'd on other grounds*, 3 P.3d 30 (Colo. 2000). Foreclosing the defendants from chilling the public from exercising statutory rights of access to public records is precisely the type of case where an "anticipatory declaratory judgment" (*id.*) is appropriate. Otherwise, every records requester would be forced to fully litigate each and every records request in order to vindicate those rights.

b. The Proposed Amendment Would Not Be "Futile" Because the *Martinelli* Test Does *Not* Preclude the Court From Declaring the Parties' Respective Rights as a Matter of Law

The District Court grounded its denial of the ACLU's Motion for Leave to Amend on its "finding" that the requested amendment would be "futile." R. at 605. In the District Court's view, *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980), precluded the Court from declaring the rights of the parties with respect to a discrete issue upon which the parties were in dispute[7] – whether DPD

[7] The District Court did not premise its denial of leave to amend on the ACLU's lack of standing, as it had done in its June 25, 2004 Order. *See* R. at 444. This is because the proposed Second Amended Complaint made abundantly clear in its allegations of numerous denials of ACLU's records requests by the City defendants, that there was a justiciable case and controversy between the parties,

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police officers enjoy a constitutionally protected right of privacy in the portions of criminal justice records that "**relate[] simply to the officers' work as police officers."**

As demonstrated below, the District Court misconstrued *Martinelli*, and, as a result, committed legal error in denying ACLU's leave to amend. *See Benton v. Adams*, 56 P.3d 81, 87 (Colo. 2002) (proposed amendment is "futile" if "it fails to cure defects in previous pleadings [such as standing], fails to state a legal theory, or would not withstand a motion to dismiss") (citation omitted). The fundamental error of the District Court's analysis was its mistaken belief that *any* information turned over to the government under a promise of confidentiality – no matter how innocuous or impersonal (*e.g.*, one's gender) – gives rise to a constitutionally protected right of privacy in that information, albeit a "limited" or, in some cases, a "minimal" one, that must nevertheless, in *every* case, be balanced against the right of public disclosure. R. at 347.[8] This is a fallacy, and a fundamental misreading of *Martinelli* and its progeny.

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which a judicial declaration would fully resolve, with respect to that disputed issue. *See* R. at 466-72.

[8] The Court stated that "I read *Martinelli* to hold that materials of a highly personal and sensitive nature are at the top of a ranking of a descending order of sensitivity and constitutional interest. Materials in the 'lower tiers' of this ranking

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In *Martinelli*, Colorado's Supreme Court addressed whether police officers (from DPD) have a constitutional right of privacy – also denominated as the "right to confidentiality" – in the information contained in the file of an internal investigation of alleged misconduct. In the context of a dispute over discovery of records in a civil lawsuit, the Court adopted the test set forth by the Florida Court of Appeals in *Byron, Harless, Schaffer, Reid and Assocs., Inc. v. State ex rel. Schellenberg*, 360 So. 2d 83, 92 (Fla. App. 1978) [hereinafter "*Schellenberg*"], and held that a person may have a *constitutional* right to prevent the government's disclosure of "personal materials or information" in the government's possession if the person can overcome a "tri-partite balancing inquiry":

> (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?

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are entitled to decreasing degrees of protection." R. at 347. The District Court's error was in failing to recognize that *Martinelli* expressly states that materials at the low[est] tiers" of the spectrum do not "come within the zone of protection of the right of confidentiality," that would necessitate a balancing. *Martinelli* 612 P.2d at 1092; *see infra* n.10.

Martinelli, 612 P.2d at 1091. Only if the proponent of non-disclosure can satisfy the first, "threshold prong," *id.* at 1092, demonstrating that he possesses a "*legitimate* expectation of non-disclosure," does the court need to proceed to the consider whether disclosure is nonetheless warranted. If this first prong is not satisfied, there is no constitutional impediment to disclosure.

In order to satisfy *Martinelli*'s threshold requirement – that the party have a "*legitimate* expectation" of non-disclosure – the proponent of non-disclosure must establish that he had "an actual or subjective explanation that the information would not be disclosed; and second, that his expectation was one that society recognizes as 'legitimate' or reasonable." *Schellenberg*, 360 So. 2d at 94 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also People v. Haley*, 41 P.3d 666, 677 (Colo. 2001). This standard, borrowed from Fourth Amendment jurisprudence, contains both a subjective and objective component. In order for a claimant's expectation to be *legitimate*, it must not only be subjectively held, but it must be one that, as an objective matter, society deems reasonable. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (observing that the Fourth Amendment "does not protect all *subjective* expectations of privacy, but only those that society recognizes as 'legitimate'"); *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998); *Martinelli*, 612 P.2d at 1091. Thus, to establish *Martinelli*'s

threshold requirement of a *legitimate* expectation of privacy, the proponent must satisfy three discrete and mutually exclusive sub-requirements. **First**, he must show "'an actual or subjective expectation that the information . . . not be disclosed.'" 612 P.2d at 1091.[9] **Second**, the proponent of non-disclosure must show that the requested material is "highly personal and sensitive." 612 P.2d at 1091.[10] **Third**, the proponent of non-disclosure must establish that disclosure would be "offensive and objectionable to a reasonable person of ordinary

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[9] For the purposes of streamlining this appeal, the ACLU chooses not to contest that police officers who are given a limited assurance of confidentiality under the City of Denver's "Garrity Advisement" and City Charter, might satisfy the first sub-requirement of this test, despite the fact that *this Court has previously held to the contrary*, *see* R. at 143 (holding that officers' awareness of Department's policy of publicly disclosing materials in Civil Service Commission appeals and as the result of previous open records cases negated a subjective expectation of non-disclosure).

[10] The *Martinelli* court adopted *Schellenberg*'s spectrum of "a descending order of sensitivity and constitutional interests, and its view that "at the top of this ranking are those materials and information which reflect the intimate relationships of the claimant with other persons" and that "the progressively lower tiers would include . . . (the claimant's) beliefs and self-insights; his personal habits; routine autobiographical material; and finally, his name, address, marital status, and present employment." *Id*. Notably, and overlooked by the Denver District Court in this case, the Court expressly rejected the notion that *all* information turned over to the government under a promise of confidentiality is to be accorded some *de minimus* constitutional protection; instead, the Court made clear that "it is less likely that information or materials in the lower tiers of this ranking *will come within the zone of protection* of the right to confidentiality." 612 P.2d at 1092 (emphasis added).

sensibilities." *Martinelli*, 612 P.2d at 1091 (quoting *Schellenberg*, 360 So. 2d at 94-95).

Both the Colorado Supreme Court and this Court have previously held that only if *all three* of preconditions to satisfy *Martinelli's* first prong are met does the information at issue become subject to a constitutionally based right of confidentiality or privacy, against which other rights may then be balanced. *Martinelli*, 612 P.2d at 1092 (describing the first prong as a "threshold"); *Freedom Communications, Inc. v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998) (only information "so intimate, personal or sensitive that disclosure of such information would be offensive and objectionable to a reasonable person," is subject to a legitimate expectation of right of privacy); *ACLU of Colo. v. Grove*, Case No. 98CA981, at 3-4 (Colo. App. Oct. 21, 1999) (not selected for publication) [R. at 143-44] (where information at issue is not shown to be "highly personal and sensitive," the court need not engage in balancing of competing interests).

Other courts, applying the *Martinelli* test, have similarly held (several in cases involving police internal affairs files) that unless the information at issue is of a "highly personal and sensitive" nature, such that its public disclosure "would be offensive and objectionable to a reasonable person," the disclosure of such information cannot, as a matter of law, constitute a violation of a person's

constitutional right to privacy. Furthermore, the Court need not, under such circumstances, proceed to balance the individual's rights against those of the party requesting access. *See, e.g., Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) ("The plaintiffs' right to privacy claim can be disposed of under the first prong of the *Martinelli* test . . . Only highly personal information is protected," and, therefore, information in "documents related simply to the officers' work as police officers" is not entitled to any such protection, so no balancing needed); *Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (applying *Martinelli* tripartite test, and concluding "we need not address the second and third factors if the first is not met"; because the files at issue concerned allegations that "castigate [a police officer's] on-the-job performance" there was no need to go beyond the first, unsatisfied, prong of *Martinelli*).

Accordingly, unless information in the government's hands is of a "highly personal and sensitive" nature, such that its public disclosure "would be offensive and objectionable to a reasonable person," the disclosure of such information cannot, as a matter of law, violate an individual's right to privacy. *See Flanagan*, 890 F.2d at 1570 (applying the first prong of *Martinelli* to internal affairs file and concluding that "data in files 'which is not of a highly personal or sensitive nature may not fall within the zone of confidentiality.'"); *Mangels v. Pena*, 789 F.2d 836,

839 (10th Cir. 1986) (rejecting a claim of privacy in case involving an internal affairs investigation file where City of Denver had given same assurance of confidentiality to officers as it does in *all* Department of Safety investigations: "The legitimacy of an individual's expectations [of privacy] depends . . . upon the *intimate* or *otherwise personal nature* of the material which the state possesses"); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (same with respect to police officer's suspension and reprimand: the "disclosed matters were not of a highly personal and sensitive nature sufficient to be accorded constitutional protection . . . Accordingly, the court concludes, as a matter of law, Worden did not have a legitimate expectation of privacy that rose to the level of constitutional protection").

Mangels, supra, is particularly instructive because it directly confronted whether information contained in an internal affairs file of the DPD was subject to claim of constitutional privacy by the Fire Department officers who were the subject of the investigation. Applying *Martinelli*, the Tenth Circuit Court of Appeals expressly rejected the position of the Denver District Court in the present case – that a mere promise of limited confidentiality, as required under the Denver City Charter, was itself a sufficient basis to create a "legitimate expectation" of non-disclosure:

> Any limited assurances of confidentiality offered by Denver officials to the Mangels do not make a difference in this case . . . *The legitimacy of individual expectations of confidentiality must arise from the personal quality of any materials which the state possesses.* . . . Any disclosed information must itself warrant protection under constitutional standards.

Mangels, 789 F.2d at 839-40. The Court concluded that such information contained in an internal affairs file concerning the discharge of public officials' duties to the public did not possess the type of "personal quality" that gives rise to a legitimate expectation of privacy. *Id.*

This Court reached the same conclusion in a previously litigated case between these same parties or their privies. *See* R. at 143-44, *American Civil Liberties Union of Colo. v. Grove*, Case No. 98CA981, at 3-4 (Colo. App. Oct. 21, 1999) (not selected for publication) (expressly rejecting the Denver police officers' argument "that disclosure of the IAB file would be offensive and objectionable to any reasonable person of ordinary sensibilities," and therefore 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)") (emphasis added) (copy attached in addendum).

Indeed, courts in Colorado and elsewhere have repeatedly found that information regarding only the official conduct of a police officer, acting while on

duty, is not "highly personal and sensitive," and thus is not protected from disclosure under the first prong of the *Martinelli* test.[11] *See, e.g., Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (**"[P]olice internal investigation files [are] *not protected by the right to privacy* when the**

[11] The ACLU has not found, and the defendants have not yet cited, a single authority that actually addresses the issue presented here and, applying *Martinelli*'s first prong, has held to the contrary – that police officers actually *do* enjoy a legitimate expectation of non-disclosure in the portions of internal affairs files that relate exclusively to their discharge of public duties. The police union representing the intervening officers, both in the case below and repeatedly throughout the state, has inexplicably pointed to this Court's decision in *People v. Blackmon*, 20 P.3d 1215 (Colo. App. 2000), but that case has absolutely nothing to say about the first prong of *Martinelli*. *Blackmon* holds only that the criminal defendant in that drug possession prosecution had not demonstrated any potential *relevancy*, in a discovery dispute within the litigation context, to warrant even the application of the *Martinelli* test to the internal affairs files that had been demanded in discovery. *See Blackmon*, 20 P.3d at 1220 ("a trial court is not required to conduct an *in camera* review of police files and reports if the defendant fails to show how the information requested is relevant to the case at issue."). Thus, *Blackmon* has no bearing whatsoever on the issues presented in the present litigation which arises from Colorado's Criminal Justice Records Act and that statute's declaration that *all* such records are presumptively available for inspection, without any additional "relevancy" requirement. *See, e.g., People in the Interest of A.A.T.*, 759 P.2d 853, 855 (Colo. App. 1988) (holding that discovery rules applicable to litigation context are irrelevant to question whether documents may be obtained under CORA); *Denver Publ'g Co. v. Dreyfus*, 184 Colo. 288, 292, 520 P.2d 104, 106 (1974) (holding that the legislature's declaration of the open records act's purpose "clearly eliminates any requirement that a person seeking access to public records show a special interest in those records"); *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996) (same).

'documents relate[] simply to the officers' work as police officers")[12] (emphasis added); *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992) (a police officer who was subject to suspension and reprimand for on-duty conduct did not have a "legitimate expectation of privacy" because the disclosed information was "not of a highly personal and sensitive nature"); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) ("[I]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life"); *State of Haw. Org. of Police Officers v. Society of Prof'l Journalists*, 927 P.2d 386, 407 (Haw. 1996) ("[I]nformation regarding charges of misconduct by police officers in their capacities as such . . . is not 'highly personal and intimate information'").[13]

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[12] *Stidham* cites two earlier Tenth Circuit decisions which held that police officers do not have a legitimate expectation of privacy in documents "related simply to the officers' work as police officers." *See Flanagan*, 890 F.2d at 1570; *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981).

[13] Another reason why police officers do not enjoy a legitimate expectation of privacy in such records is because their conduct, in public, does not give rise to such expectation. *See, e.g.*, C.J.I.-Civ. 4th 28:8; *see also Cassidy v. American Broad. Cos., Inc.*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978) ("The conduct of a policeman on-duty is legitimately and necessarily an area upon which public interest may and should be focused . . . the very status of the policeman as a public official, as above pointed out, is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his

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Moreover, in Colorado, as elsewhere, police officers are "public officials," *see Willis v. Perry*, 677 P.2d 961 (Colo. App. 1983), and "a public official . . . has no right of privacy as to the manner in which he conducts himself in office. . . . Hence, a truthful account of *charges of misconduct in office* cannot form the basis for an action for invasion of privacy." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (emphasis added); *Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) (same). Indeed, numerous courts throughout the country have held that public officials – *other than* police officers – enjoy no legitimate or reasonable expectation of privacy with respect to information concerning how they discharge their official duties. *See e.g., Citizens to Recall Mayor James Whitlock v. Whitlock*, 844 P.2d 74, 77-78 (Mont. 1992) (rejecting as "unreasonable as a

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public duties."); *cf. Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2294 (2005) (police officer has no legitimate expectation of privacy in his conduct "while he was on duty performing an official function in a public place"); *Hornberger v. American Broad. Cos.*, 799 A.2d 566, 594 (N.J. Ct. App. 2002) (police officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties); *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) ("Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny . . . Performance of police duties and investigations of their performance is a matter of great public importance."); RESTATEMENT (SECOND) TORTS § 652D at 386 (1977) ("nor is [a person's] privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public").

matter of law" a public officer holder's expectation of privacy "in performance of his public duties"); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (because "public officials are properly subject to public scrutiny in the performance of their duties," public employees' performance evaluations must be disclosed and observing that "the performance evaluation did not in any way deal with personal, intimate, or otherwise private life of [the librarian]."); *Herald Co., Inc., v. Ann Arbor Pub. Sch.*, 568 N.W.2d 411, 414-15 (Mich. Ct. App. 1997) (requiring disclosure of a memorandum of work performance: "The memorandum discussed Gillum's professional performance as a teacher and in the classroom, an issue of legitimate concern to the public, not . . . a 'clearly unwarranted' invasion of privacy."); *see also* RESTATEMENT (SECOND) TORTS § 652D cmt. e (1977) ("a public officer has no cause of action [for invasion of privacy] when his . . . activities in that capacity are recorded, pictured, or commented on in the press"); 37A AM. JUR. 2D *Freedom of Information Act* § 254 at 262-63 (1994 & Supp. 2005) (explaining that "disclosure of materials relating to investigations of alleged misconduct . . . of public officials is frequently not considered to be an unreasonable invasion of the official's privacy because investigation into official misconduct is a legitimate public concern, and incidents relating to public employment are frequently found not to be private").

The wellspring of the body of case law – both federal and in Colorado state courts – concerning a government official's right to privacy in records that are in government's hands, is the United States Supreme Court's landmark case *Nixon v. Administrator of Gen'l Servs*., 433 U.S. 425 (1977). In that case, former President Richard Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act, which provided for the historical archiving of and public access to recordings and materials made by the President during his tenure in public office. In addressing Nixon's claim that providing public access to his White House recordings and papers would violate his right to privacy, the Court recognized and reaffirmed that "one element of privacy had been characterized as the 'individual interest in avoiding disclosure of personal matters. . . ." *Nixon*, 433 U.S. at 457 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). The Court continued, recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights *in matters of personal life unrelated to any acts done by them in their public capacity*." *Nixon*, 433 U.S. at 457 (emphasis added). The Court concluded that the "tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency," and that "the overwhelming bulk of the [records at issue] pertain, not to appellant's *private* communications, but to the *official conduct* of the Presidency." *Nixon*, 433

U.S. at 459. Therefore, the Court concluded "only a minute portion of the materials *implicates appellant's privacy interests*," precisely because "of his *lack of any expectation of privacy* in the overwhelming majority of the materials" – those that reflected on his official conduct. *Nixon*, 433 U.S. at 461-64. Tellingly, *Nixon* was cited with approval by Colorado's Supreme Court, and served as the very foundation for its holding, in *Martinelli*. *See Martinelli*, 612 P.2d at 1091.

Consistent with all of the authorities set forth above, what the ACLU has sought and continues to seek in this case is a judicial declaration (from the trial court, in the first instance, and the appellate courts of this State thereafter), that would be binding on the Denver Police Department and its officers, henceforth and in perpetuity, that:

> Police internal investigation files of the Denver Police Department are not protected by the right to privacy when the "documents relate simply to the officers' work as police officers."[14]

The declaratory relief sought by the Second Amended Complaint is well founded on existing precedents; indeed, there are no precedents that hold to the

[14] *Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (quoting *Flanagan*, 890 F.2d at 1570 (quoting *Lichtenstein*, 660 F.2d at 435)).

contrary. Accordingly, the District Court erred, as a matter of law, in finding that the proposed amendments would be futile.

2. The District Court Erred in Denying the Plaintiff's Motion for Leave to File a Second Amended Complaint on the Grounds That the New Factual Allegations Pleaded Did Not Sufficiently Relate to the Original Claims Asserted by the Plaintiffs

In its Order denying ACLU's motion to file a second amended complaint the District Court stated that it was also premised on the Court's finding that

> "the ACLU's proposed second amended complaint asserts facts and circumstances unrelated to the case decided by this Court. It involves requests for different files and claims of privacy made by different officers. Plaintiff has the option of filing a new case *to pursue its claims* regarding new files and different people. However, it is inappropriate to amend a complaint that has already been dismissed in an effort to revive the case on new facts and new circumstances."

R. at 606 (emphasis added).

The Second Amendment Complaint added only *factual allegations* concerning additional blanket denials by DPD of records requests (made subsequent to the filing of the First Amended Complaint) that were categorically denied by DPD. R. at 522-47. The Second Amended Complaint did not add any ***claims*** seeking access under the CCJRA to those additional files. R. at 462-547. Thus, the District Court was in error when it concluded that the ACLU was asserting "claims" regarding new files and different people. Instead, the Second Amended Complaint set forth a solid factual basis to address the Court's finding in

its June 25, 2004 Order, that ACLU had not alleged a sufficient factual basis to establish a likelihood of being subjected to the same conduct by the defendants in the future, and therefore lacked standing to pursue its claims for declaratory relief. R. at 444. The additional *factual allegations* corrected that earlier apparent deficiency, but did *not* add any new "claims" for access to any records.[15]

Rather, the additional records requests and City denials that were incorporated by reference into the Second Amended Complaint demonstrated only the ACLU's standing to seek, and the factual basis for its entitlement to, the declaratory judgments sought in *both* the original and amended complaints. Indeed, the original complaint sought virtually the *identical* judicial declaration sought in the Second Amended Complaint:

> The defendants are entitled to a declaratory judgment stating that police officers do not enjoy a reasonable expectation of privacy with respect to statements or other information contained in an Internal Affairs Bureau file that pertains to those officers' conduct of their official duties while acting as police officers. [R. 10 ¶ 55.]

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[15] Moreover, C.R.C.P. 15(d) authorizes the filing of a "supplemental pleadings," upon leave of court, to "set[] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." This rule further states that "permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense." *See Thomas v. Mahin*, 76 Colo. 200, 205, 230 P.793, 794-95 (1924) (approving of supplemental petition after judgment has been set aside).

Nor is there any merit to the District Court's finding that the "facts and circumstances" pleaded in the Second Amended Complaint necessarily involved "different parties" than the claims asserted in the First Amended Complaint. Indeed, one of the ACLU's additional requests for access to DPD's files was for the previous IAB files of the *same officers* who were involved in the arrest of Terrill Johnson (including the four intervenors herein). R. at 487-96. In fact, these records requests were expressly premised upon documents that were disclosed by defendants in response to the District Court's Ruling on Order to Show Cause in this case. R. at 509-16. Under these circumstances, the additional factual allegations "arose out of the and [were] connected with the same occurrence pleaded in the original complaint." *Espinoza v. Gurule*, 144 Colo. 381, 383-84, 356 P.2d 891, 893 (1960) (holding that trial court abused its discretion, after dismissing original complaint, in denying leave to file amended complaint that asserted different theory of recovery from that asserted in original complaint). And, in *each* case, the DPD[16] was the custodian of the records at issue who, consistent with its policy that formed the basis of the declaratory judgment action, refused to disclose

[16] Because it considers itself not "*sui juris*," *see* R. at 161-69, the DPD is represented in all litigation by the City and County of Denver. *But see Martinelli v. District Court*, 612 P.2d 1083, 1087 (Colo. 1980) ("petitioners are . . . the Denver Police Department").

the records on the stated grounds of officer privacy and deliberative process privilege.

Furthermore, Colorado law recognizes that leave to amend pleadings under C.R.C.P. 15 should be "freely given" and that even new theories of recovery may be added by amendment so long as the defendant is not prejudiced thereby. *E.g.*, *Varner v. District Ct.*, 618 P.2d 1388, 1390 (Colo. 1980) (finding abuse of discretion to deny leave to amend in the absence of prejudice); *Continental Sale Corp. v. Stookesberry*, 170 Colo. 16, 24, 459 P.2d 566, 570 (1969) (approving of amendment to complaint mid-trial to add new theory of recovery not previously asserted: "the primary function of the complaint is to give notice, and theories of action are no longer significant"); *Espinoza*, 144 Colo. at 383-84, 356 P.2d at 893.

Moreover, this Court has authorized the filing of amended pleadings that add new parties under Rule 15(c) where, as here, there is an identity of interest between the old and new parties such that "the institution of an action against one serves to provide notice of litigation to the other." *Spiker v. Hoogeboom*, 628 P.2d 177, 179 (Colo. App. 1981). Here, the DPD and all of its officers share such an identity of interest. Indeed, the DPD is the same party that has litigated each of the previous internal affairs access cases against the ACLU (as well as several of the Colorado and federal court precedents cited in this brief, beginning with *Martinelli* itself).

See also Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 438 n. 3 (10th Cir. 1981) (recognizing "an identity of parties" between the Denver Police Department, as plaintiff in *Martinelli*, representing all of its officers, and the Denver Policemen's Protective Association, the plaintiff in *Lichtenstein*). Finally, counsel for the intervening officers serves as retained counsel for the Denver Police Protective Association, as well as for the other police unions throughout the state of Colorado. In sum, the *claims asserted* in the Second Amended Complaint,[17] as well as the additional factual allegations underlying those claims, are not so far removed from the facts and circumstances of the *claims pleaded* in the initial Complaint to justify the denial of leave to amend.

Accordingly, this Court should conclude that the District Court's refusal to grant ACLU leave to file the Second Amended Complaint on the basis that it set forth new and different "facts and circumstances" constituted an abuse of discretion.

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[17] Although not mentioned in the District Court's Order denying leave to amend, the Second Amended Complaint asserted a claim for a declaratory judgment against the City and County of Denver precluding it from asserting that the "deliberate process privilege" applied to post-decision documents. R. at 471-72. Although this particular relief was not sought in the original complaint, the parties had extensively briefed the "deliberative process privilege" during the show cause proceeding, and would therefore not be prejudiced by that amendment. *See* R. at 173-75, 133-37, 569, 584-85; *see also* Tr. 2/27/04 at 76-80, 80-82 & 90.

IV. CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's Order of January 12, 2005, denying the plaintiff's Motion for Leave to File a Second Amended Complaint.

Respectfully submitted this ___ day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of August, 2005 a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was placed in the United States Mail, first-class postage prepaid, properly addressed as follows:

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