DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St.
Denver, CO 80202

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

v.

Defendants: GERALD WHITMAN, in his official capacity as the Chief of Police for the City and County of Denver, ALVIN LaCABE, in his official capacity as the Manager of Safety of the City and County of Denver, 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: 04-CV-700

Division: 18

This case is NOT subject to the simplified procedures for court actions under Rule 16.1

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff, the American Civil Liberties Union of Colorado ("ACLU"), by and through its undersigned counsel, hereby replies, pursuant to § 1-15 of the Statewide Practice Standards promulgated under Rule 121 of the Colorado Rules of Civil Procedure, in support of its motion for leave to file a second amended complaint, pursuant to C.R.C.P. Rule 15, and for reconsideration, pursuant to C.R.C.P. Rules 59 & 60, of certain of the Court's holdings in its Order entered June 25, 2004.

Because the defendants and the intervenors raised different arguments in their separate responses to the Motion, this Reply addresses the two Responses separately:

Reply to the Defendants' Response to Plaintiff's Motion

In their Response, defendants Gerald Whitman, Alvin LaCabe, and the City and County of Denver ("City Defendants") argue that the plaintiff's well-pleaded amended complaint – alleging a pattern and practice on the part of the Denver Police Department in refusing to provide access to post-investigation documents reflecting the outcome of an Internal Affairs investigation and the imposition of any disciplinary sanctions, *see* Second Am. Compl. ¶¶ 47 & 51 – is not an accurate statement of the Department's policy. *See* Defs.' Resp. ¶¶ 4 & 5.

In essence, the defendants contend that as a result of certain isolated statements made by the City Attorney in his letter to plaintiff's counsel (*see* Ex. L to Second Am. Compl.), they can establish that, in fact, there is no "controversy" between the parties over whether the City has asserted, does assert, and will continue in the future to assert that the deliberative process privilege applies to all or practically all of an IAB file and will thereby require, in ***every*** case, a member of the public (and, in particular, the ACLU) to seek judicial review of that assertion by the City. *See* Defs.' Resp. ¶¶ 6 & 7 (asserting that "there is no dispute between the parties that the deliberative process privilege protects only material that is both predecisional and deliberative").

What the City has neglected to mention is that following the letter to plaintiff's counsel dated June 21, 2004, in which the City states categorically that "we acknowledge our obligation to provide your clients with a 'Vaughn' index describing those documents" that are withheld upon assertion of the deliberative process privilege, ***as of this date*** (a full four months after the plaintiff's requests for access to Internal Affairs files concerning allegations of racial profiling, Steve and Vicki Nash's complaints and other investigations into improper police monitoring of First Amendment-protected activities and all of the prior closed Internal Affairs investigations for Officers Estrada, Ortega, Eberharter, Speelman, Yoder, and Perez (*see* Exs. E & I to Second Am. Compl.)), the City has yet to produce a Vaughn index with

respect to ***any*** of the aforementioned IAB files.[1] Thus, by its own actions, continuing even up to the present, the City has demonstrated conclusively that an actual case and controversy exists between the plaintiff and the defendants concerning the propriety of the City's policy and practice of withholding the entirety of closed IAB files, having asserted, in a blanket fashion, the deliberative process privilege and without producing any Vaughn index.

Moreover, as the City demonstrated at the Show Cause Hearing with respect to the IAB file concerning the officers involved in the arrest of Terrill Johnson, the City has in this very litigation asserted that the deliberative process privilege applies to records within the IAB file that discuss the ***results*** of the investigation (*e.g.*, findings that departmental policies have been violated or have not been violated, that a complaint has been sustained or not sustained, and that any disciplinary sanction has been imposed).

Accordingly, the single isolated statement in the City Attorney's letter dated June 21, 2004 (Ex. L to Second Am. Compl.) in which the City Attorney states that "some of the material in the IAB files is both pre-decisional and deliberative," does not negate the fact that the City Defendants have, through their actions in this litigation and in responding to the additional records requests tendered by the plaintiff (as demonstrated by the exhibits to the Second Amended Complaint), made clear that there is indeed a live case or controversy concerning the City's pattern and routine practice of asserting the "deliberative process" privilege with respect to the entirety of IAB files, including portions of the file that discuss the department's decisions on whether a complaint is sustained and whether to impose sanctions. As a result of the City's policy and practice, as set forth in the Second Amended Complaint, the plaintiff is forced to engage in costly, protracted, and unnecessary litigation in order to obtain access to portions of IAB files for which the assertion of the deliberative process privilege is groundless, baseless, and possibly vexatious.

It is precisely for this reason that a declaratory judgment should enter declaring that the defendants' continued invocation of the deliberative process privilege with respect to those portions of the IAB files that discuss the Department's findings and decisions is improper and contrary to existing law. *See McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99, 102 (1937) (holding that a central purpose of the declaratory judgment statute is to afford parties a judicial declaration of rights and duties "in advance of the time" that specific litigation might arise).

[1] Attached hereto as Exhibits O & P are two letters received by plaintiff's counsel from The City defendants in which they committed to producing Vaughn indexes for these requested files "no later than Tuesday, May 18, 2004." As of the date of this Reply, the City had produced no Vaughn index for any of these files, which arguably number in the dozens.

Notably absent from the City Defendants' Response is any position with respect to Count 1 of the Second Amended Complaint, which seeks a declaration that police officers enjoy no constitutionally-protected expectation of privacy in the portions of IAB files that concern only the discharge of their official duties. It must therefore be concluded that the City Defendants do not object to the Second Amended Complaint with respect to that claim.

Reply to the Intervening Officers' Response

In their Response, the intervenor police officers strain to convince this Court it should not grant the plaintiff's motion for leave to file a second amended complaint. In doing so, the intervenors seek to rewrite this Court's earlier opinion granting their motion to strike the first two claims for relief in the original complaint. The intervening officers assert, ***correctly***, that "the ACLU concedes that officers in fact have a constitutional right to privacy as to any highly personal and sensitive information contained in an IAB file." Intervenors' Resp. at 3. Indeed, nowhere in this litigation can the Court find any assertion by the ACLU to the contrary.

Instead, throughout this litigation and elsewhere, the ACLU has consistently maintained that police officers enjoy a reasonable expectation of privacy ***only*** with respect to such "highly personal and sensitive information" in IAB files which does not reflect upon their discharge of their official duties. Thus, the intervening officers are incorrect when they state that "the ACLU further concedes that officers in the City were entitled to assert a constitutionally-protected privacy interest as to the first two claims in the First Amended Complaint because such information was clearly sought by the records demand in the Johnson case." Intervenors' Resp. at 3. To the contrary, the ACLU disclaimed any interest in inspecting any portion of the Terrill Johnson IAB file that contained personal and private information about the officers; however, Commander Lamb testified at the Show Cause Hearing that there was ***no*** personal and private information contained ***anywhere*** in the subject IAB file. Indeed, this Court credited that testimony and found in its ruling that the entirety of the IAB files concerned only the officers' discharge of their official duties. Accordingly, the officers' assertion of any privacy interest with respect to any portion of the Terrill Johnson IAB files was not only unwarranted, but groundless and frivolous. *See* authorities cited in ¶¶ 12 & 13 of Mot. for Leave to File Second Am. Compl.

Reconsideration of the Court's Order is Warranted

According to the officer intervenors, the ACLU is not truly seeking reconsideration of the portion of this Court's ruling dismissing the First and Second Claims for Relief in the original Complaint because "the ACLU [now for the first time] injects the words 'constitutional' into the analysis" of the *Martinelli* balancing test, whereas, in the intervening officers' view, this Court's earlier order granting the Motion to Dismiss Counts 1 and 2 did not involve any constitutional privacy claim. *See* Intervenors' Resp. at 5-6 &14-15 . Quite

plainly, counsel for intervening officers do not comprehend the basis for this Court's order and for the tripartite test applied therein under *Martinelli v. District Ct.*, 199 Colo. 163, 612 P.2d 1083 (1980). The *Martinelli* test is expressly premised upon the assertion of a ***constitutional*** right of privacy. *See Martinelli*, 612 P.2d at 1091 (discussing *Whalen v. Roe*, 429 U.S. 589 (1977) and its progeny, under the heading "The Claimed Violation of the Officers' ***Constitutional*** Rights to Privacy") (emphasis added).

The *Martinelli* test is the standard promulgated by the Colorado Supreme Court to determine whether information in ***government's hands*** may be disclosed (and, if so, under what conditions) without violating an individual's ***constitutional*** right of privacy. *Id.* It is for this very reason that all of the authorities cited in ¶ 12 of the Motion for Leave to File Second Amended Complaint apply *Martinelli* and find that police officers, ***as a matter of law***, enjoy no ***constitutional*** right of privacy (under the first threshold prong of the *Martinelli* test) with respect to records that "relate simply to the officers' work as police officers."

Plaintiff respectfully submits that in the Court's Ruling on Order to Show Cause, entered March 30, 2004, this Court erroneously interpreted *Martinelli* as requiring a balancing of the police officers' diminished but cognizable expectation of privacy in records concerning only the discharge of their official duties against the compelling interest in the public's ability to assess the propriety of the IAB investigation. *See* Order of Mar. 30, 2004 at 5.[2] Indeed, intervenor officers pointed to this ruling as a grounds for granting their Motion to Dismiss Claims 1 and 2 of the original Complaint. Moreover, the Court acknowledged in its Order granting the Motion to Dismiss Claims 1 and 2 of the original complaint that the plaintiffs "seek a declaration that all police officers have no reasonable expectation of privacy in IAB files concerning [only] their official conduct," Order (June 25, 2004) at 2, and the Court reaffirmed its earlier holding – that *Martinelli* requires a judicial balancing of interests with respect to ***all*** portions of IAB files, in every case, in its Order granting dismissal of Claims 1 and 2. *See id.* at 3 ("As stated in my March 30, 2004 ruling, the *Martinelli* balancing test must be done on a case-by-case basis.").

Because the plaintiff respectfully submits that this Court's interpretation and application of *Martinelli* in the June 25, 2004 order is erroneous as a matter of law, *see* authorities cited in ¶ 12 of Mot. for Leave to File Second Am. Compl., the plaintiff has properly moved for reconsideration of that portion of the order under Rules 59 and 60 of Colorado Rules of Civil Procedure. Accordingly, the Court should grant the motion for reconsideration and should further grant Plaintiff leave to file the Second Amended

[2] In its ruling of March 30, 2004, this Court expressly rejected the plaintiff's claim that police officers do not enjoy any constitutionally-protected expectation of privacy with respect to Internal Affairs Bureau files or records that concern only the officers' discharge of their official duties. *See* Order (Mar. 30, 2004) at 5.

Complaint that accompanies the motion for reconsideration. *See Wilcox v. Reconditioned Office Sys. of Colo., Inc.*, 881 P.2d 398, 400 (Colo. App. 1994); *Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2003).

A Declaratory Judgment is Properly Entered on the Plaintiff's First Claim

The officer intervenors also assert that the declaratory judgment sought in the Second Amended Complaint is unavailable because the Criminal Justice Records Act provides a complete remedy for plaintiff, if only the ACLU (and the Court) will bear the burden of adjudicating in a series of show cause hearings access to each individual IAB file they have requested or will request in the future. *See* Intervenors' Resp. at 8-9. However, the mere fact that the Criminal Justice Records Act provides a procedure for vindicating rights of access to individual files through show cause hearings does not preclude the plaintiff from obtaining a judicial declaration that it need not be put to the unnecessary burden of repetitious, costly and protracted litigation ***in every case*** in order to vindicate its statutorily mandated rights.

Indeed, the law is well-settled in Colorado that a party's right to seek declaratory or equitable relief to overcome an established, and unlawful, administrative practice cannot be forestalled by an exhaustion requirement where the outcome of individual adjudications is a foregone conclusion. *Cf. Anderson v. Board of Adjustment for Zoning Appeals*, 931 P.2d 517, 521 (Colo. App. 1996) ("[I]nasmuch as plaintiffs had notice of the zoning administrator's interpretation of the pertinent law, for them to have awaited another and different answer on the same question would have been an exercise in futility and would not have served the purposes underlying the exhaustion doctrine."); *Kuhn v. State Dep't of Revenue*, 817 P.2d 101, 104 (Colo. 1991) (holding that plaintiffs are not required to obtain denial of refund claims since Department of Revenue had publicly stated position that it would not rule until a court had decided the issue); *Colorado v. Veterans Admin.*, 430 F. Supp. 551, 558 (D. Colo. 1977) (holding that exhaustion of administrative remedies is not required where the agency's position is already known). The same rule has been applied by federal courts around the country. *See, e.g., Ellis v. Blum*, 643 F.2d 68, 78 (2^{d} Cir. 1981) (holding that no exhaustion through individual adjudications is required where a plaintiff seeks declaratory or injunctive relief ***to achieve a systemic change in unlawful agency practice***); *Jones v. Califano*, 576 F.2d 12, 17 and 20 (2^{d} Cir. 1978) (holding that an agency's actions in forcing claimants to proceed to individual adjudication of claims constituted a waiver of any exhaustion requirement, and refusing to insist upon the "sterile gesture of individual exhaustion when the result appears to be a foregone conclusion").

The essence of the contention by the intervenor officers here seems to be that individual adjudications of records requests under the CCJRA will always result in complete relief to a requester because the requester will receive (as was the case ultimately with the request for records of the Terrill Johnson investigation), the requested records themselves

and an award of attorney's fees. The intervening officers have ignored, however, what a victory in a judicial action under the CCJRA will never provide, *i.e.*, timeliness.[3] Indeed, both the policy and the rule under the CCJRA establish that the public is entitled to easy and ***quick*** access to records of the activities of law enforcement. *See* § 24-72-303(3), C.R.S. (requiring production of requested record within three business days); § 24-72-305(6), C.R.S. (requiring a written statement explaining a denial of access within 72 hours of a request); § 24-72-305(7), C.R.S. (requiring judicial review of a denial of access to be heard by a court "at the earliest practical time"). In requiring such speedy relief under the CCJRA, the Legislature has clearly established its intention and policy that time is of the essence in any records request.[4]

In contrast, the contention by the intervening officers that the plaintiff and the public at large must engage in individualized judicial review of every single IAB records request subverts this legislative policy of speedy access. Indeed, the insistence by the intervening officers that the ACLU must engage in prolonged, seriatim judicial battles for access to records that ought to be produced immediately upon request conclusively demonstrates that the real goal of the intervening officers is to stall the release of such information and to dissuade requesters from even seeking access to the information because the delays inherent in the judicial process will render the information less significant or newsworthy and because of the apparent risk that the Court will not fully compensate a requester for the significant financial burdens of bringing such a judicial action.

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[3] The intervenors also ignore the fact that the Court declined to award all of the plaintiff's attorney's fees for the Show Cause Hearing, concluding that although the City's position on the deliberative process privilege was ultimately unsuccessful, it was not "arbitrary and capricious." *See* Order (Mar. 30, 2004), at 7. Only a clear and plain judicial declaration of the parties' rights and duties will render future such denials "arbitrary and capricious" and afford plaintiff a full remedy, including recovery of their reasonable attorney's fees.

[4] For this reason, the two tax cases cited by the intervenor officers (*Hays v. City & Cty of Denver*, and *Palmer v. Perkins*), Intervenor's Resp. at 13, are not only completely inapposite, but actually ***support*** the plaintiff's position that resort to a statutory remedy – or a case-by-case basis – will not adequately vindicate plaintiff's rights under the CCJRA. *See e.g., Palmer v. Perkins*, 119 Colo. 533, 536, 205 P.2d 785, 787 (1949) (noting that the only reason resort to statutory remedies are required in unique context of tax assessment challenges is "[t]he avoidance of ***delay*** in the collection of public revenue"). Here, the ***delay*** in the public obtaining access to public records as provided for by the CCJRA demonstrates precisely why resort to statutorily provided show cause hearings is ***not*** "a plain, speedy and adequate remedy." *Id.*

Moreover, this argument that individualized judicial review under the CCJRA already provides complete relief is contradicted by the express declaration of C.R.C.P. 57, which states that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." This is precisely the type of case where a declaratory judgment is appropriate – to foreclose the Defendants from chilling the public from exercising statutory rights of access to public records by requiring every records requester to fully litigate each and every records request in order to vindicate those rights. As Colorado's Supreme Court has made clear, "[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." *Toneray v. Dolan*, 197 Colo. 382, 384, 593 P.2d 956, 957 (1979) (emphasis added). Indeed, 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 Commr's 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, and dispositively here, "one of the essential purposes of our Uniform Declaratory Judgment law, *supra.*, 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*, 74 P.2d at 102 (emphasis added).

Finally, equitable and prudential principles also counsel strongly in favor of issuance of the declaratory relief sought in the Second Amended Complaint. The declaration sought therein would relieve this Court of a tremendous and unnecessary burden on its limited judicial resources.[5] In the Second Amended Complaint, the ACLU has announced its commitment and intention to continue to seek access to Internal Affairs Bureau files of the Denver Police Department in the immediate future. Recent events in this city, including the shooting and death of Frank Lobato, and other incidents (*see* Exs. Q & R to this Reply) only serve to underscore the need for, and strength of, that commitment. Judicial declarations that (a) police officers enjoy no constitutionally-based right of confidentiality in police records that "relate simply to the officers' work as police officers," and (b) the deliberative process privilege does not apply to records that reflect the results/outcomes of IAB investigations, would substantially alleviate what will otherwise become a deluge of unnecessary litigation that will quickly overwhelm this Court's limited resources.

[5] Indeed, it is for this very reason of avoiding a waste of judicial resources that the plaintiff has not, as it otherwise could under the CCJRA, included with the Second Amended Complaint a request for the ***scores*** of show cause hearings that would be necessary to resolve the plaintiff's access requests under the intervenors' view of the law. Rather, by entering the requested declaratory relief, the Court would necessarily avoid the dozens upon dozens of show cause hearings (and *in camera* reviews) that the plaintiff is prepared to demand if the City and the intervenors continue to deny access to the requested records.

Leave to Amend Should be Granted Pursuant to C.R.C.P. Rule 15

The intervening officers urge the Court to deny the Motion for Leave to File a Second Amended Complaint because the plaintiff did not earlier apprise the Court of the additional records requests it had made for IAB files from the City and County of Denver. *See* Intervenors' Resp. at 11-12 (citing *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 605 (Colo. App. 2000) (stating that plaintiff must demonstrate "lack of knowledge, mistake, inadvertence, or other reason for having not stated the amended claims earlier"). *But see Lutz v. District Court*, 716 P.2d 129, 131 (Colo. 1986) ("[L]eave to amend pleadings shall be freely given when justice so requires.").

As the exhibits attached to the Second Amended Complaint indicate, counsel for plaintiff wrote to the Denver City Attorney on June 2, 2004, asking the defendants respectfully to reconsider their position – in light of this Court's ruling on March 30, 2004 – refusing to produce myriad records that had been requested, beginning in April 2004, in the hopes of avoiding the necessity for bringing these additional claims before this Court. *See* Second Am. Compl. ¶ 31 & Ex. K. It was not until June 21, 2004, that the defendants, through the City Attorney, responded to the request for reconsideration. *See* Second Am. Compl. ¶ 32 & Ex. L. And, because it was sent via U.S. mail, the City Attorney's letter, dated June 21, 2004, was not received by plaintiff's counsel until June 23, 2004. Only two days later, on June 25, 2004, this Court issued its ruling dismissing the first and second claims of the original Complaint.[6]

Thus, the plaintiff has not been dilatory in its efforts to resolve its ongoing disputes concerning access to IAB records with the City and County of Denver without further involvement of the Court. *See Benton v. Adams*, 56 P.3d 81, 85-86 (Colo. 2002) ("Reflecting a liberal policy toward timely amendments to pleadings, C.R.C.P. 15(a) encourages trial courts to look favorably upon motions to amend. . . . A trial court should not impose

[6] These circumstances also demonstrate why the intervening officers' reliance on the *Sandoval* decision is inapposite. In *Sandoval*, the plaintiff had sought to leave to amend a complaint against the Archdiocese of Denver to add claims against other individuals who were not previously named less than ninety days before trial, when those potential claims had accrued long before, and were disclosed, during discovery in the underlying action. *See Sandoval*, 8 P.3d at 606. In this case, of course, no trial date has been set, and the circumstances set out in the proposed Second Amended Complaint occurred just days or weeks before the plaintiff sought leave to amend. Moreover, no discovery in this case has even commenced, let alone been completed, and the proposed Second Amended Complaint does not add any new defendants who were not previously before the Court. Thus, there is no comparison between the situation in this case and the one in *Sandoval*. *See id.*

arbitrary restrictions on making timely amendments.") (citations omitted); *Allen v. American Family Mut. Ins. Co.*, 80 P.3d 799, 804 (Colo. App. 204) ("Delay alone, without any specific resulting prejudice or any obvious design to harass, is generally not a sufficient basis for precluding a party from amending its complaint."). In the wake of this Court's ruling, and subsequent developments, including the City's continued refusal to disclose any portion of requested IAB files, or to produce a Vaughn index when it asserts the deliberative process privilege, the plaintiff has been compelled to raise these matters at this time. *See Eagle River Mobile Home Park v. District Court*, 647 P.2d 660, 663-64 (Colo. 1982) (holding that a plaintiff was not "dilatory" in bringing an amended complaint where the new damages alleged in the amended complaint occurred after the initial complaint and where the damages arose from the same course of conduct as alleged in the initial complaint).

In any case, the additional records requests made by the plaintiff, and the defendants' consistent and uniform practice of categorically denying access to any portions of any IAB files (*see* Second Am. Compl. ¶¶ 22-38), makes clear that the Second Amended Complaint corrects the pleading deficiencies that served as the basis for the Court's order dismissing the First and Second Claims of the original Complaint. *See* Order, June 25, 2004, at 3 (finding "that plaintiffs [had] ***fail[ed] to allege sufficient facts*** to establish an injury that satisfies the constitutional prong of the test for standing. Plaintiffs seek declaratory relief to deter ***future conduct*** by defendants. They ***speculate*** that defendants' ***past*** refusals to disclose IAB documents in violation of CORA and CCJRA presage ***future violations*** that will injure the public . . . Counts 1 and 2 seek a remedy to prevent ***future wrongs*** that plaintiffs ***assume*** will occur.") (emphases added). As the newly pleaded claims make clear, the plaintiffs can no longer be found to have "failed to allege sufficient facts" to establish an actual ongoing injury within the zone of interests protected by state statutes. The well-pleaded allegations of the Second Amended Complaint establish an ongoing pattern and practice, not "speculat[ion]" about "future violations" that "plaintiffs assume will occur." Accordingly, leave to amend the Second Amended Complaint, that cures the pleading deficiencies the Court found in the First Amended Complaint should be granted. *See Passe v. Mitchell*, 161 Colo. 501, 502, 423 P.2d 17, 18 (1967); *see also Doe v. Heitler*, 26 P.3d 539, 544-45 (Colo. App. 2001).

The Plaintiff's Newly-Pleaded Causes of Action Do State Claims Upon Which Relief Can be Granted

The intervenor defendants assert that the First Claim for Relief in the Second Amended Complaint, seeking a judicial declaration that police officers enjoy no constitutional right of privacy with respect to the portions of IAB files that "relate simply to the officers' work as police officers" fails to state a claim upon which relief can be granted. Intervenor's Resp. at 14. The intervening officers mistakenly believe that the *Martinelli* balancing test applies even with respect to records in which an individual enjoys no ***constitutionally-based*** right of privacy. *But see Martinelli*, 612 P.2d at 1091-92; *see also*

supra at 4-5. The intervening officers are also demonstrably mistaken in their assertion that the federal cases cited by the plaintiff apply only ***federal*** standards, and not Colorado state law; all of those authorities apply the Colorado Supreme Court's formulation of constitutional privacy interests set forth in *Martinelli*.

Moreover, in the Motion for Leave to File the Second Amended Complaint ¶ 12, the plaintiff has cited the Colorado Court of Appeals' decision in *American Civil Liberties Union of Colo. v. Grove*, Case No. 98CA981 (Colo. App. Oct. 21, 1999) (not selected for publication) at 3-4. Indeed, a courtesy copy of that decision was attached to the Motion for Leave to File the Second Amended Complaint. In that state appellate court ruling, the unanimous Court of Appeals held that the disclosure of an entire IAB file would not be "highly offensive and objectionable to a reasonable person of ordinary sensibilities" and that therefore the intervening police officers "do not have a legitimate expectation of privacy in the IAB file and, therefore, we do not address the intervenors' remaining arguments concerning the balancing test set forth in *Martinelli v. District Ct.*, 199 Colo. 163, 612 P.2d 1083 (Colo. 1990)." A similar result was obtained in the case of *City of Loveland v. Loveland Publ'g Co.*, Case No. 03CV513 (Colo. Dist. Ct., Larimer Cty., June 16, 2003) which was attached to the ACLU's Hearing Brief in this case as Ex. J and admitted as Ex. 18. In that case, the Larimer County District Court expressly held that information in a internal affairs report concerning police officers' discharge of their official duties does not constitute "personal and intimate" information that gives rise to any constitutionally protected privacy interest under the first prong of *Martinelli*'s balancing test: "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." *Id*. at 5. Thus, it is clear that the plaintiffs have stated a claim not only under federal authorities applying Colorado law, but under Colorado state court rulings applying Colorado law.

<u>The Claims Asserted in the Second Amended Complaint are Ripe for Adjudication</u>

The intervenor officers contend that the first claim set forth in the Second Amended Complaint is not ripe for adjudication because the ACLU has not sought, and the custodian has not denied, access to ***all*** IAB records of all Denver police officers "and thus there is no actual controversy which would permit the Court to rule that every officer has no constitutional right of privacy" in portions of IAB files that "relate simply to the officers' work as police officers." *See* Intervenors' Resp. at 16. To the contrary, as the United States Court of Appeals for the Tenth Circuit has stated on numerous occasions, "we have held that police internal investigation files were not protected by the right to privacy when the 'documents related simply to the officers' work as police officers.'" *Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (citations omitted); *see also* numerous authorities cited in ¶ 12 of the Motion for Leave to File Second Amended Complaint.

WHEREFORE, the plaintiff ACLU respectfully asks the Court to grant its Motion for Leave to File the Second Amended Complaint.

Respectfully submitted this 19th day of August, 2004.

FAEGRE & BENSON LLP

/s/ Steven D. Zansberg
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