IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-N-0740 (CBS)

AMERICAN FRIENDS SERVICE COMMITTEE, a Pennsylvania not-for-profit corporation;
ANTONIA ANTHONY;
END THE POLITICS OF CRUELTY, an unincorporated association;
CHIAPAS COALITION, an unincorporated association;
STEPHEN NASH; and
VICKI NASH,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Plaintiffs, American Friends Service Committee, a Pennsylvania not-for-profit corporation ("AFSC"); Antonia Anthony; End the Politics of Cruelty, an unincorporated association; Chiapas Coalition, an unincorporated association, Stephen Nash; and Vicki Nash (collectively, "Plaintiffs"), respectfully submit the following response to the Motion to Dismiss (the "Motion") of defendant, City and County of Denver (the "City").

INTRODUCTION

On March 11, 2002, the American Civil Liberties Union of Colorado ("ACLU") disclosed that the Intelligence Unit of the Denver Police Department (the "Department") is surveilling, monitoring, and keeping dossiers ("Spy Files") on the peaceful protest activities of individuals and the expressive activities of advocacy organizations. The Spy Files reveal that the Department smears the reputations of peaceful protesters by falsely labeling their organizations as "criminal extremist" and disseminating this false and derogatory information to third parties.

On March 11, 2002, the ACLU asked Denver Mayor Wellington Webb (the "Mayor") to take immediate steps to stop these practices. The Mayor's response was positive, but incomplete. At a news conference on March 13, he announced that he intended to: (1) consider improvements to the City's policies; (2) appoint an independent person to review the Spy Files and determine which ones should be purged; and (3) require the City Attorney "to conduct a regular audit of these files" in the future.

Based on the Mayor's press statement, the City now contends, erroneously, that the issues raised by the ACLU's disclosures are fully resolved. In a transparent attempt to preserve as much of the shroud of secrecy surrounding the Spy Files as possible, the City seeks dismissal of this action through distortions of Plaintiffs' allegations and an invitation to "trust us." The law, however, does not allow the City to escape judicial scrutiny of its Spy Files program through vague and unenforceable statements of future intent. No amount of political posturing can substitute for meaningful judicial review. This action is the only vehicle by which Plaintiffs can obtain redress for the Department's lawless practices, and the resulting injury and threatened injury to Plaintiffs' reputations and to their constitutionally protected freedoms of expression and political association.

PLAINTIFFS' ALLEGATIONS

Plaintiffs challenge the Department's custom and practice of monitoring the peaceful protest activities of Denver-area residents; maintaining Spy Files on the expressive activities of law-abiding individuals and advocacy organizations, many of which the Department has falsely branded with the label of "criminal extremist"; and providing copies of certain Spy Files to third parties. Complaint ¶ 1. In violation of federal law and the City's written policy, the Department has systematically compiled and maintained information about the political opinions, political

associations, and peaceful expressive activities of as many as 3,200 individuals and 208 organizations. Id. ¶ 2.

Plaintiffs attached pages from the Spy Files as Exhibit A to their Complaint. These documents show that the Department has recorded the following kinds of information about specific individuals:

a. Organizing and speaking at events sponsored by Amnesty International;

b. Attendance in 2000 at demonstrations sponsored by the Justice for Mena Committee, which sought to hold Denver police accountable for the killing of Ismael Mena in a botched no-knock raid in 1999;

c. Membership in or association with the AFSC, the Chiapas Coalition, or End the Politics of Cruelty, all of which are falsely labeled as "criminal extremist";

d. Participation in protests against the International Monetary Fund and the World Bank in Washington, D.C.;

e. The purported opinion of a member of the Chiapas Coalition that "global financial policies are responsible for the uprisings in Chiapas, Mexico";

f. Being "seen" at a demonstration in 2000 protesting the celebration of Columbus Day;

g. License numbers and descriptions of vehicles used by individuals identified as participants in peaceful protest activities;

h. Home addresses and personal descriptions of individuals engaged in lawful expressive activity; and

i. The address of a private residence that an individual reportedly "frequents."

Id. ¶ 3.

Plaintiffs are three organizations falsely labeled as "criminal extremist" and three individuals whose peaceful protest activities resulted in a police file:

- AFSC, a pacifist organization whose efforts to advance social justice, humanitarian service, and peace are based on a Quaker belief in the dignity and worth of every person and a faith in the power of love and nonviolence to bring about change;

- Sister Antonia Anthony, a member of the Sisters of Saint Francis of Penance and Christian Charity since 1956, who has spent twenty-five years working in ministry with indigenous persons in the United States and Mexico, including three years living and working in Chiapas, Mexico's poorest state;

- The Chiapas Coalition, a Denver-based organization that conducts education and advocacy activities in support of the human rights struggle of indigenous persons in the Mexican state of Chiapas;

- End the Politics of Cruelty, a Denver-based human rights organization that conducts rallies, educational programs, demonstrations, and other activities to promote its views on issues such as police accountability; and

- Stephen Nash and Vicki Nash, a Denver married couple who frequently participate in peaceful educational and advocacy activities to express their views on political and social issues.

Id. ¶¶ 5-9.

In addition to identifying information, Plaintiffs' Spy Files contain nothing but facts that show only that they are engaged in peaceful and legitimate educational activities, political expression, petitioning the government, and political association. The files contain no facts that suggest that any of the named plaintiffs are involved in criminal activity. Id. ¶ 22. Pursuant to the custom and practice of the Department, the City has recorded false and derogatory information about Plaintiffs; mischaracterized the goals and purposes of Plaintiffs' expressive activity; and smeared Plaintiffs' personal, political, and professional reputations, in part by disseminating the false and derogatory information to third parties, both within and outside of law enforcement. Id. ¶¶ 23, 36, 40-45.

There is no legitimate law enforcement purpose for compiling, maintaining, or disseminating the information in these files, nor is there any statute or ordinance authorizing such activities. Id. ¶ 17. The Department singled out and selected Plaintiffs and the plaintiff class for surveillance and monitoring based upon their advocacy of controversial or unpopular political positions and opinions. Id. ¶ 46. In addition, the Department gathers information for

the Spy Files using methods that have the objective effect of chilling or deterring reasonable persons from the exercise of their rights of expression and association. Id. ¶ 47. Individuals are less likely to join a rally or to participate in other expressive activities when they reasonably fear that they will be photographed by police or that their names will appear in police criminal intelligence files. Id. ¶ 49. This is especially true when they reasonably fear being listed as associates or members of an organization labeled by police, although falsely, as "criminal extremist." Id.

The challenged practices have injured and threaten to continue injuring Plaintiffs in their ability to attract others to join them in rallies, protests, petitions, and other expressive activities. Id. ¶ 50. The practices of the City chill and threaten to continue chilling the exercise of constitutionally protected rights of expression and association. Id. ¶ 51. These practices, including the creation, maintenance, and dissemination of the Spy Files, have caused and threaten to continue causing injury to the personal, political, and professional reputations of the Plaintiffs. Id. ¶ 52.

In response to the ACLU's disclosure of the Spy Files, the Mayor called a press conference. See id., Exhibit D (the Mayor's press statement). The Mayor stated that the City's written policy on intelligence gathering, see id., Exhibit C, was a good one, but that police had acted on an "overly broad interpretation" that had resulted in files that were not justifiable. Id. ¶ 15 & Exhibit D. Plaintiffs allege that, contrary to the Mayor's characterization, the Spy Files did not result from a mere misinterpretation of the City's written policy. Rather, the Department created and maintained the Spy Files pursuant to an informal custom and practice of blatantly violating the clear directives of the written policy. Id. ¶ 16.

In his press statement, the Mayor indicated that he intended to consider improvements to the City's written policy; appoint an independent person to review the Spy Files and determine which ones should be purged; and require the City Attorney to conduct "a regular audit of these files" in the future. See id., Exhibit D.

Exhibit D is noteworthy for memorializing what the Mayor did not say. He did not announce, for example, that he had ordered a full investigation into or a full public accounting of the Spy Files. Nor did he call for discipline of the officers responsible for the Spy Files. The Mayor did not announce that he had ordered strict adherence to the text of the City's written policy. Nor did he announce a clarification to prevent continued "overly broad" interpretations. He did not prohibit continued dissemination of the false and derogatory information in the Spy Files to third parties. He did not agree to permit the targets of admittedly illegitimate dossiers to see their files. Although he said that inappropriate files would be purged, he did not announce any procedures, nor did he reveal the standard the City would use to distinguish legitimate criminal intelligence files from the ones that would be destroyed. Similarly, the Mayor did not say when the City Attorney would be required to conduct audits, the standards that would be applied, or what would be done with Spy Files that the City Attorney deemed improper. See id.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS MUST BE ACCEPTED AS TRUE FOR PURPOSES OF THE CITY'S MOTION TO DISMISS, AND ALL REASONABLE INFERENCES MUST BE DRAWN IN PLAINTIFFS' FAVOR.

Because the Motion takes the form of a Rule 12(b)(1) facial attack on the sufficiency of Plaintiffs' Complaint, and does not rest on affidavits or exhibits, this Court must apply the standards of Rule 12(b)(6). See United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1203 (10th Cir. 2001). Thus, this Court must accept Plaintiffs' factual allegations as true and must construe the Complaint in Plaintiffs' favor. See id. Plaintiffs' claims may not be dismissed unless it

appears "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The City ignores these bedrock principles of civil procedure by inventing supposed facts that are nowhere to be found in Plaintiffs' Complaint nor in the Mayor's press statement attached as Exhibit D to the Complaint. The City's fictions include the following:

- The Mayor "announced new procedures and administrative regulations." Motion at 2. To the contrary, the Mayor announced a general intent to investigate whether the City should change its written domestic surveillance regulation. See Complaint, Exhibit D.

- The Mayor issued an "executive order" that "grants Plaintiffs all of the relief that they would be entitled to." Motion at 2. To the contrary, the Mayor issued no "executive order," and the Plaintiffs have obtained no relief.

- The Mayor issued an "executive directive that would insure . . . that the City's policy would be followed by the Police Department." Motion at 2. To the contrary, the Mayor issued no "directive." Although he acknowledged that the Department had followed an "overly-broad interpretation" of the written policy, he did not order the Department to comply with the clearly written text. See Complaint, Exhibit D.

- According to the City, the Complaint alleges that "all the information in the police files" resulted from "public observations or otherwise lawfully collected data." Motion at 2. To the contrary, the Complaint makes no such statement.

- According to the City, the police disseminate the spy files only "privately" and only "with other law enforcement agencies." Motion at 11. To the contrary, the Complaint specifically alleges that police share the files with individuals outside law enforcement. See Complaint ¶¶ 42-43.

- According to the City, the practices Plaintiffs seek to enjoin "have been completely changed." Motion at 7. To the contrary, the Complaint alleges that the practices are ongoing. See, e.g., id. ¶¶ 61, 64, 67-68 & 71-72.

In considering the Motion, this Court must focus on the Plaintiffs' claims as alleged and must ignore the City's fabrications.

II. PLAINTIFFS HAVE STANDING TO SEEK REDRESS FOR THE CITY'S SURVEILLANCE OF PEACEFUL PROTESTERS, CREATION OF SPY FILES SMEARING THEM AS "CRIMINAL EXTREMISTS," AND DISSEMINATION OF SUCH FILES TO THIRD PARTIES.

Contrary to the City's argument, Plaintiffs have standing to seek redress for the practices alleged in the Complaint, including the monitoring and creation of Spy Files on their peaceful expressive activities, the false branding of Plaintiffs as "criminal extremists," and dissemination of false and derogatory information to third parties. The City relies on Laird v. Tatum, 408 U.S. 1 (1972), which, unlike this case, did not involve allegations of specific harm to specific parties. In Laird, the Court rejected, on standing grounds, a challenge to the Army's surveillance of civilian political activity. The plaintiffs, however, did not complain of any specific actions directed against them. See id. at 9.

The question posed in Laird was "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." Id. at 10. In answering that question in the negative, the Court stated that the only alleged injury to the plaintiffs was a mere "subjective chill," which, the Court held, was "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Id. at 13-14.

The City fails to cite the controlling Tenth Circuit case, Riggs v. City of Albuquerque, 916 F.2d 582 (10th Cir. 1990), which holds unequivocally that the targets of a program of police spying strikingly similar to that of the Department have standing to seek redress in federal court. See id. at 584-87. Like this case, Riggs involved a challenge to a police department's pattern and

practice of monitoring and keeping files on individuals with controversial political views. The claims in Riggs were nearly identical to those presented here:

> [P]laintiffs initiated a class action for declaratory and injunctive relief . . . . Plaintiffs are lawyers, political activists, and politically active organizations who, it was alleged, have often taken controversial and unpopular positions. Because of the positions they have taken, they allegedly have been and are targets of unconstitutional surveillance by the Albuquerque Police Department and subjects of unconstitutionally developed and maintained files. Plaintiffs alleged that this surveillance and the maintenance of such files caused a chilling effect on their First Amendment rights . . . .

Id. at 583-84; cf. Complaint ¶¶ 1-9, 20-27.

In Riggs, the Tenth Circuit squarely rejected challenges to the plaintiffs' standing that are substantially similar to the argument the City makes in the Motion. As here, the municipal defendant claimed that Laird required dismissal of the political activists' challenge to its spy files program. See Riggs, 916 F.2d at 584-85. The Tenth Circuit held that Laird was "easily distinguishable" for two reasons. Id. at 585. First, the plaintiffs in Laird "alleged only that they experienced a generalized chilling effect by their mere knowledge of the existence of the Army's data-gathering system." Id. In contrast, the plaintiffs in Riggs "allege more than a chilling of their First Amendment rights; they also allege harm to their personal, political, and professional reputations in the community." Id.

Second, and what the Tenth Circuit regarded as more important, the plaintiffs in Laird had not alleged any specific governmental action against them. In contrast, the plaintiffs in Riggs "allege that they were the actual targets of the illegal investigations." Id. Furthermore, Riggs, like this case, involved more than mere showings of past harm or speculative future harm. Id. at 586. Plaintiffs, like the successful plaintiffs in Riggs, have alleged that the challenged practices continue. Thus, as the court concluded in Riggs, the Complaint in this case alleges "a

cognizable, continuing injury which presents a case or controversy for the court to consider." Id. at 586. Under this binding Tenth Circuit law, Plaintiffs have standing in this case.

Moreover, individuals who are the subjects of specific government files containing derogatory or stigmatizing information about them clearly have standing to ask federal courts to order that their files be expunged. As the D.C. Circuit explained in a case involving the FBI, "federal courts are empowered to order the expungement of Government records where necessary to vindicate rights secured by the Constitution or statute." Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975). The court enumerated three scenarios, any one of which may trigger an individual's "right not to be adversely affected by the information in the future." Id. at 1236: first, when the information "is inaccurate"; second, when the information "was acquired by fatally flawed procedures"; and third, when the information "is prejudicial without serving any proper [government] purpose." Id. at 1236. Plaintiffs' Complaint clearly alleges that the Spy Files contain false information that is prejudicial without serving any legitimate law enforcement purpose. They have standing to seek expungement, one of the remedies pleaded in this action.

In expungement cases, the plaintiff's standing arises from the threat of future injury posed by the government's maintenance of files containing potentially damaging information. See, e.g., Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (arrest records); Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) (same); Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975) (FBI file); cf. Davidson v. Dill, 180 Colo. 123, 129-31, 503 P.2d 157, 160-61 (Colo. 1972) (expungement of arrest records). The plaintiffs in Laird could not rely on the principles of these expungement cases because they knew of no files kept on them personally and they were not the

specific targets of the challenged intelligence gathering. See Riggs, 916 F.2d at 585-86 (distinguishing Laird). Plaintiffs, however, can and do rely on such principles.

The Third Circuit's decision in Paton provides an example. In Paton, a high school student became the subject of an FBI file labeled "Subversive Material" because of a letter she had written to the Socialist Workers Party for a homework assignment. Paton, 524 F.2d at 865-66. The court noted that "the history of a not too distant era" established that future misuse of a file with the pejorative label "Subversive Material" could be extremely damaging. Id. at 868. Relying on prior cases holding that individuals had standing to seek expungement of their arrest records, the court held that the target of the "Subversive Material" file had alleged a sufficient threat of future injury to ask for expungement. There is no legal distinction between labeling the file of an innocent student as "Subversive Material" and smearing innocent political activists as "criminal extremists." In both cases, the targets of the files have standing to ask a federal court to order expungement.

The Tenth Circuit's discussion of standing in Riggs focused on the injury-in-fact prong of the analysis. Discussion of the causation and redressability prongs of standing was unnecessary, because it was obvious that the defendants' challenged practices were the cause of the present and threatened injuries, see Riggs, 916 F.2d at 585-87, and it was equally obvious that a favorable court decision could provide redress. See id. It is obvious in this case too. It is the City's agents who falsely label Plaintiffs as "criminal extremist" and who disseminate that false information to third parties. They are the cause of the harm to Plaintiffs' political, personal, and professional reputations. In addition, a favorable decision would provide redress for Plaintiffs'

injuries. This Court can order the City to stop the challenged practices, it can order the files expunged, and it can order further remedial relief.[1]

Although plaintiffs have clearly alleged sufficient facts to satisfy the governing standard of the Riggs decision, the City seems to want more detailed allegations. The answer to the City's carping is also found in Riggs, which emphasizes "the importance of permitting discovery when crucial information is in the exclusive control of the defendant." Id. at 586.

For example, the City contends that the Complaint supplies insufficient facts about the individuals who have been deterred from joining Plaintiffs' expressive activities. Motion at 10-11. Yet, as the Mayor himself acknowledged, he can confirm that the practices challenged in this lawsuit deter individuals from joining the named Plaintiffs and the class members in protests, meetings, or other gatherings. See Complaint, Exhibit D ("I have received calls from

[1] The City contends it is not clear how the challenged practices could cause injury to Plaintiffs' reputations or deter expressive activities. Both Congress and the courts have recognized, however, that, even when government agents acquire information lawfully, the prospect of government-maintained dossiers on individuals' unpopular political views creates a chilling effect that undermines the values of the First Amendment and may justify judicial intervention. See, e.g., 5 U.S.C. § 552a(e)(7) (forbidding federal agencies to maintain any records "describing how any individual exercises rights guaranteed by the First Amendment"); Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984) ("[t]he mere compilation by the government of records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise"); Clarkson v. IRS, 678 F.2d 1368, 1374 (11th Cir. 1982) (government maintenance of files on persons who are merely exercising their constitutional rights would "dilute the guarantees of the First Amendment"); White v. Davis, 533 P.2d 222, 224 (Cal. 1975) (complaint states "a prima facie violation" of the First Amendment by alleging that plainclothes police officers attended college classes and meetings of student organizations for purpose of taking notes and filing reports on the content of discussions that had no connection to criminal activity).

average, law-abiding citizens who are concerned that if they are at a legitimate protest, event, meeting or gathering that the DPD will collect information based on their activities").[2]

In Riggs, the court explained that, on a motion to dismiss, the plaintiffs should not be held to an impossible standard of alleging facts to which they cannot gain access:

> The defendants cannot argue on one hand that the plaintiffs have failed to prove injury and, on the other hand, that the plaintiffs are not entitled to the very evidence that is essential in proving that injury. Given the unique situation presented in this case, where the plaintiffs' evidence is in the exclusive possession of the defendants, [the plaintiffs], at best, can only allege injury resulting from the defendants' conduct.

Riggs, 916 F.2d at 586-87, quoting Palmer v. Chicago, 755 F.2d 560, 573 (7th Cir. 1985). In a conclusion that applies just as easily to this case, the Riggs court held that the solution to any lack of specificity in the complaint is discovery, not dismissal:

> [T]he lack of access to the investigative files in this case prevented plaintiffs from alleging with more specificity that they were targets of the alleged illegal investigations. Dismissal prior to discovery would be inequitable under these facts because plaintiffs have alleged a direct harm caused by defendants' actions.

Id. at 587. The Riggs analysis applies here. Plaintiffs' allegations are sufficient. The Motion should be denied.

III. THE CITY'S MANTRA OF "TRUST US" DOES NOT RENDER THIS CASE MOOT.

Because the City has attached no affidavits or exhibits to its Motion, its mootness argument rests solely on the allegations of the Complaint and the statements of the Mayor

[2] The City argues that the police are not responsible for the chilling effect on expression to which the Mayor referred. Instead, it contends that the ACLU caused the chill on March 11 when it publicized the existence of the Spy Files. Motion at 11. The City's efforts to blame the messenger must be rejected. The deterrence of expression is caused by the police actions, not by those who criticize them.

attached as exhibits to the Complaint. Motion at 5 ("Plaintiffs' Complaint on its face demonstrates that this controversy is moot"). The City falsely asserts that, before this lawsuit was filed, it had already voluntarily ceased the challenged practices and provided all the relief that Plaintiffs seek. Motion at 3, 7. To the contrary, the City has not ceased the challenged practices, nor has it provided Plaintiffs with any relief.

At the most, the Mayor acknowledged that at least some intelligence files had been compiled inappropriately. He expressed an intention of conducting a review of the more than 3,400 intelligence files, pursuant to an unspecified standard. The Mayor indicated that at least some Spy Files would be purged, but he did not reveal which ones. He certainly did not say that the named Plaintiffs' Spy Files would be purged. The Mayor stated that the City would consider whether improvements to its written surveillance policy were necessary. See Complaint, Exhibit D. These types of vague statements about future intent are insufficient to moot this case.

A. Even If the City Did Stop the Challenged Practices, and It Has Not, Voluntary Cessation Does Not Make the Case Moot.

Even if the City did halt the challenged practices, and it has not, it is well settled that a defendant's voluntary cessation of a challenged practice does not moot a case. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000); Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000). One reason for this doctrine is "the public interest in having the legality of the practices settled." DeFunis v. Odegaard, 416 U.S. 312, 318 (1974), quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). As the Supreme Court later explained, a defendant's assurance that he will not resume the challenged practice "could not operate to deprive the successful plaintiffs, and indeed the public, of a final and binding

determination of the legality of the old practice." Quern v. Mandley, 436 U.S. 725, 733 n.7 (1978).

If voluntary cessation of challenged activity was sufficient to moot a case, then a defendant would simply be "free to return to his old ways," W.T. Grant Co., 345 U.S. at 632, an outcome that courts seek to avoid. For example, in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), the plaintiff challenged a licensing ordinance that instructed the Chief of Police to consider whether an applicant had "connections with criminal elements." The District Court and the Court of Appeals had held that the quoted provision was unconstitutionally vague. Id. at 288. While the case was pending on appeal, the City of Mesquite amended the ordinance and removed the challenged phrase. The Supreme Court held that the case was not moot:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated. . . . We therefore must confront the merits of the vagueness holding.

Id. at 289.

In cases of voluntary cessation, the case is not moot unless the defendant carries a "heavy burden" and satisfies a "stringent" standard. Laidlaw, 528 U.S. at 189. First, it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id., quoting United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968). Second, the defendant must demonstrate that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (internal quotations and citations omitted). As the following sections demonstrate, this case would not be moot under the stringent two-part test, even if the Mayor's vague statements of future intention were actually converted into action.

1. The City Cannot Carry Its Heavy Burden of Demonstrating That It Is Absolutely Clear That The Challenged Practices Will Not Resume.

At most, the Mayor's press statement expresses his desire that the Department comply with the already existing written policy. That policy forbids the police from collecting information on how an individual exercises his or her First Amendment rights, unless the information is directly relevant to criminal activity and there is reasonable suspicion that the individual is involved in that criminal activity. Complaint, Exhibit C (written policy).

As the Complaint alleges, the challenged practices represent a flagrant breach of the already-existing writing policy. See Complaint ¶ 16. The Mayor's publicly expressed desire that the Department follow the policy it has already been violating does not make it "absolutely clear" that there is no reasonable chance that the challenged conduct will continue. See Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1355 (10th Cir. 1987) ("every expectation" that the wrong will be repeated where agency followed same practices as at time alleged in complaint).

Even if the City were eventually to adopt a stronger written policy, as the Mayor indicated it might, this case is not moot. In light of the Department's informal custom of flagrantly violating the existing written policy, the adoption of a stronger one, without more, still leaves the City "free to return to its old ways." W.T. Grant Co., 345 U.S. at 632.

2. The City Cannot Carry Its Heavy Burden Of Demonstrating That It Has Completely And Irrevocably Eradicated the Effects of the Challenged Practices.

The Mayor's statement that "inappropriate" files will be purged at some point in the future does not, as the City contends, moot Plaintiffs' claims.[3] The City has not explained what standard will be applied to distinguish the Spy Files it intends to keep from the ones that it intends to purge. The City has neither purged nor agreed to purge the files of the named Plaintiffs nor the files of the class members. Moreover, even if the City were to carry out every action to which the Mayor alluded in his press statement, that will not "completely and irrevocably eradicate" the continuing present adverse effects of the City's dissemination of the false and derogatory information to third parties, or the harm resulting from the provision of such information to third parties.

B. Vague Statements of Intent to Take Future Action Do Not Entitle the City to Dismissal under the Prudential Mootness Doctrine.

The City fundamentally misapprehends the doctrine of prudential mootness. A case may not be dismissed on grounds of prudential mootness based on an agency's invitation to "trust us." Were this the case, any challenge to governmental action could be dismissed as moot as long as the public entity vaguely stated some unenforceable intention to contemplate future changes. Prudential mootness applies only where changes in statutes or regulations make "any repeat of

[3] Although the Mayor stated that an independent auditor would conduct the review, see Complaint, Exhibit D, subsequent events demonstrate the risk of accepting a vague statement of future intent as though it were an accomplished fact. The City eventually decided on three individuals, not one, and they are neither independent nor are they auditors. Instead, they are contract attorneys hired to advise the City Attorney, who, presumably, retains the power to reject, ignore, or amend the advisors' recommendations. See the City's contract with the Honorable Jean Dubofsky, a copy of which is attached as Exhibit A.

the actions in question . . . highly unlikely." Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1492 (10th Cir. 1993).

In the cases the City cites, the dispute was mooted by legislation that resolved the controversy. See New Mexico ex rel. New Mexico St. Highway Dep't v. Goldschmidt, 629 F.2d 665, 667-69 (10th Cir. 1980) (Act of Congress that resolved outstanding impoundment disputes); Goichman v. City of Aspen, 590 F. Supp. 1170, 1172-73 (D. Colo. 1984), aff'd, 859 F.2d 1466 (10th Cir. 1988) (revised City Code mooted dispute over right to hearing over towing and impoundment). In this case, there is no Congressional legislation and no new state statute. Nor has the City enacted an ordinance. Indeed, the City has failed to produce any new regulation or even an internal memorandum that even addresses the issues raised by this lawsuit. The Mayor's statements of future intent are insufficiently formal, final, or enforceable to merit this Court's consideration of dismissal on grounds of prudential mootness.

IV. THE SPY FILES DISPUTE IS RIPE FOR ADJUDICATION.

The City states that when a plaintiff's complaint is challenged on grounds of ripeness, a court "may consider evidence not contained in the pleadings." Motion at 8. Because the City offers no evidence or exhibits, however, the Motion must rely on the Complaint and the exhibits attached thereto. As noted in Section I above, the City's argument rests on wholesale fabrication of the Complaint and of the facts.

Because Plaintiffs have standing to seek relief for the harm they suffered as a result of the Spy Files, as noted above, "the constitutional requirements of the ripeness doctrine will necessarily be satisfied." See ACLU v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999). In any event, there are no pending administrative or legislative actions with which this Court's decision could interfere. As noted above, the "panel of independent auditors" whose praises the City sings in the Motion are working under contract as advisors to the City Attorney. See note 3

supra. Therefore, even if this Court's did "overrule the actions of the panel of auditors and the City Attorney," Motion at 9, the City Attorney and his advisors are not the type of decision-makers whose pending deliberations could trigger the ripeness doctrine. Representations that the City's lawyers will consider recommending some action at an unspecified date in the future cannot defeat this lawsuit.

The City in effect concedes that there is no "further administrative development" from which "the Court can benefit" by admitting that "it is not known what new procedures to ensure enforcement will be implemented." Id. The ripeness doctrine requires some established process that has not yet come to fruition. See Roe v. Ogden, 253 F.3d 1225, 1231 (10th Cir. 2001) (courts should not prematurely adjudicate "disputes involving administrative policies or decisions not yet formalized and felt in a concrete way by the challenging parties"). No judicial doctrine denies a remedy to injured parties while the defendant government entity invents, on its own timetable, the procedures to address the rights violation and decides how the problem will be addressed, if ever. No further action by any party is necessary to make judicial relief appropriate.

CONCLUSION

The City has not met its heavy burden of proving that Plaintiffs lack standing to prosecute their Spy Files claims, or that such claims are moot or unripe. Accordingly, the Motion should be denied.

Dated: June 11, 2002

Respectfully submitted,

LINO LIPINSKY de ORLOV
GREGORY W. JOHNSON
SANDRA B. WICK

McKENNA LONG & ALDRIDGE LLP
370 Seventeenth Street, Suite 4800
Denver, Colorado 80202
(303) 634-4000

(IN COOPERATION WITH THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO)

MARK SILVERSTEIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, CO 80218
(303) 777-5482

ATTORNEYS FOR PLAINTIFFS, AMERICAN FRIENDS SERVICE COMMITTEE, ANTONIA ANTHONY, END THE POLITICS OF CRUELTY, CHIAPAS COALITION, STEPHEN NASH, and VICKI NASH

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2002, a true and correct copy of PLAINTIFFS' RESPONSE TO MOTION TO DISMISS was deposited in the United States mail, postage prepaid, addressed to the following:

Thomas S. Rice, Esq.
Brian K. Matise, Esq.
Senter Goldfarb & Rice, LLC
P.O. Box 22833
400 S. Colorado Blvd., Ste. 700
Denver, Colorado 80222-0833

Stan Sharoff, Esq.
Assistant City Attorney for the City and County of Denver
1437 Bannock Street, Suite 353
Denver, Colorado 80202

_____