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| Denver District Court<br>1437 Bannock Street, #256<br>Denver, CO 80202 | |
| **AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**ALVIN J. LaCABE, JR., in his official capacity as Manager of Safety, and**<br>**THE CITY AND COUNTY OF DENVER,**<br><br>**Defendants.** | **This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:**<br><br>**This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).** |
| *Attorneys for Plaintiff*<br>John A. Culver, Esq., #21811<br>Benezra & Culver, L.L.C.<br>274 Union Blvd., #220<br>Lakewood, CO 80228-1835<br>(303) 716-0254<br>(303) 716-0327 facsimile<br>jaculver@bc-law.com<br><br>Mark Silverstein, Esq., #26979<br>Taylor S. Pendergrass, Esq., #36008<br>ACLU Foundation of Colorado<br>400 Corona Street<br>Denver, CO 80218<br>(303) 777-5482<br>msilver@att.net | **Case Number:**<br><br>**Div.: Ctrm:** |

**COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE**

Plaintiff, American Civil Liberties Union of Colorado ("ACLU"), through its attorneys, John A. Culver of the law firm of Benezra & Culver, L.L.C., and Mark Silverstein and Taylor S. Pendergrass of the ACLU Foundation of Colorado, for its Complaint and Application for Order to Show Cause against the Defendants, Alvin J. LaCabe, Jr. and the City and County of Denver ("Denver"), alleges the following:

## I. INTRODUCTION

1. This lawsuit seeks disclosure of records regarding how public money is being spent or allocated, pursuant to the Colorado Open Records Act ("CORA"), C.R.S.§ 24-72-201, et seq., and the Colorado Criminal Justice Records Act ("CCJRA"), C.R.S. § 24-72-301, et seq. Relief from this Court is required because Defendants have refused to produce the information requested, despite the fact that such disclosure is clearly and unambiguously mandatory under Colorado law.

2. In anticipation of the Democratic National Convention ("DNC") to be held in Denver in August of this year, the City and County of Denver ("Denver") has been allocated $50 Million from the federal government for security and related costs. Denver has budgeted $18 Million of that money for purchases of security-related equipment. This lawsuit seeks disclosure of records on how this public money has been spent or allocated with regard to such equipment.

## II. JURISDICTION AND PARTIES

3. This Court has jurisdiction to consider Plaintiff's claims, pursuant to C.R.S. §§ 24-72-204(5) and 24-72-305(7).

4. Plaintiff ACLU is a not-for-profit public interest membership organization incorporated in Colorado and headquartered in Denver, Colorado. As such, it is a "person" as defined in the CORA, C.R.S. § 24-72-202(3) and the CCJRA, C.R.S. § 24-72-302(9).

5. Defendant Alvin J. LaCabe, Jr. is the Manager of Safety for the City and County of Denver, Colorado, and is both the "custodian" and the "official custodian" of the records at issue in this case. (See C.R.S. §§ 24-72-202(3) or 24-72-302(5) and (8).) He is sued in his official capacity only.

6. The City and County of Denver is a home-rule political subdivision of the State of Colorado and is also a "custodian" of the records at issue in this case pursuant to C.R.S. §§ 24-72-202(2) or 24-72-302(5).

## III. FACTUAL ALLEGATIONS

7. In an effort to understand how Denver is spending public money, on April 8, 2008, Taylor Pendergrass of the ACLU submitted a request for information regarding expenditures and allocations of public funds for security arrangements to both Denver's Department of Safety and Clerk and Recorder's Office. (Letters from Pendergrass, dated 04/08/08, attached as Exhibits A and B.)

8. On April 21, 2008, the Clerk's Office responded to the ACLU's request (attached as Exhibit C). In that response, the Clerk's Office directed the ACLU to submit its request directly to the Denver Police Department ("DPD"). (Id.)

9. On April 21, 2008, Mary Dulacki, Records Coordinator for Denver's Department of Safety, also responded to the ACLU's request. (attached as Exhibit D). Her letter acknowledged that Denver had purchased four vehicles, but refused to disclose any other responsive information on the grounds that disclosure would be "contrary to the public interest" because it could "potentially disclose tactical security information." (Id.)

10. On April 29, 2008, Mr. Pendergrass sent a letter to Denver's Deputy Clerk and Recorder, Helen Gonzales, regarding the ACLU's request. (attached as Exhibit E). In that letter, Mr. Pendergrass explained that in 2005, the legislature amended the CORA to add what is now codified as C.R.S. § 24-72-204(2)(a)(VIII)(B). (Id.) That section states that "[r]ecords of the expenditure of public moneys on security arrangements or investigations, including contracts for security arrangements and records related to the procurement of, budgeting for, or expenditures on security systems, shall be open for inspection." (Id., emphasis added)

11. In response, Denver Assistant City Attorney, Patrick Wheeler, stated that the requested documents would not be in the possession of the possession of the Clerk and Recorder's Office and that the request should be directed to the department that ordered the equipment, in this case, the Department of Safety. (attached as Exhibit F).

12. Because Denver contended that the requested documents were not in the office of the Clerk and Recorder, on May 6, 2008, Mr. Pendergrass sent another letter to Mary Dulacki explaining why disclosure of the requested information was mandatory under Colorado law. (attached as Exhibit G). Mr. Pendergrass then reframed his request for information as seeking the following:

> 1. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on any "less lethal" weapon including, but not limited to, any impact weapon, chemical agent, pepper ball, electronic restraint devices, shotgun less lethal round or any other weapon as defined in Denver Police Department Operations and Procedures Manual § 105.02(3) & (5), from January 11, 2007 until the present.
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> 2. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on any other weapons including, but not limited to, any firearms, weapons, heavy weapons, or ammunition as defined in

Denver Police Department Operations and Procedures Manual § 105.06, from January 11, 2007 until the present.

3. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on vehicles including, but not limited to, any heavy rescue vehicle, hazardous materials response vehicle, urban search and rescue unit, unified incident command post, from January 11, 2007 until the present.

4. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on personal body armor including, but not limited to, any vests, armor shirts, helmets, shields, or other body padding, from January 11, 2007 until the present.

5. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on restraint devices including, but not limited to, handcuffs, plastic tie handcuffs, shackles, restraint chairs, or four or five point restraints, from January 11, 2007 until the present.

6. All records kept by the Manager of Safety regarding the procurement of, budgeting for, or expenditures on barricades, fencing or netting including, but not limited to, any barbed wire, security fencing, gates, railings, chain link, plastic or vinyl fences, concrete or plastic barriers, or mesh netting, from January 11, 2007 until the present.

(Ex. G.)

13. On May 8, 2008, Ms. Dulacki again denied the ACLU's request, because such disclosure would be "contrary to the public interest." (attached as Exhibit H).

14. On May 15, 2008, the ACLU gave Defendants one last opportunity to comply with state law. In correspondence on that date, Mr. Pendergrass again reminded Ms. Dulacki that the ACLU's requests were expressly governed by C.R.S. § 24-72-204(2)(a)(VIII) under which disclosure was mandatory and not subject to exemption as potentially "contrary to the public interest." (attached as Exhibit I). He further provided her with notice that the ACLU intended to file an application for order to show cause with the District Court if the requested information was not provided. (Id.) The ACLU has yet to receive a response to that correspondence.

15. As of the date this Complaint was filed, Defendants have refused to permit inspection of the requested information pertaining to "the expenditure of public monies

on security arrangements or investigations, including contracts for security arrangements and records related to the procurement of, budgeting for, or expenditures on security systems . . ." (C.R.S. § 24-72-204(2)(a)(VIII). See also Ex. A.) Despite the fact that inspection of such information is mandatory under the CORA, except for certain information that is subject to redaction, Defendants have refused production of all portions of the requested documents. Relying on a provision of the CCJRA that is wholly inapplicable to this request, Defendants erroneously contend that disclosure would be "contrary to the public interest."

## IV. APPLICABLE LAW

16. The disclosure of the records at issue in this Complaint is governed by a specific and explicit provision of the CORA that addresses the disclosure of records regarding the budgeting for or expenditures of public funds on security-related equipment or systems:

> Records of the expenditure of public monies on security arrangements or investigations, including contracts for security arrangements and records related to the procurement of, budgeting for, or expenditures on security systems, **shall be open for inspection**, except to the extent that they contain specialized details of security arrangements or investigations. A custodian may deny the right of inspection of only the portions of a record described in this sub-subparagraph (B) that contain specialized details of security arrangements or investigations and shall allow inspection of the remaining portions of the record.

(C.R.S. § 24-72-204(2)(a)(VIII)(B), emphasis added.)

17. To the extent that the CCJRA applies, and to the extent that any of the requested records contain "specialized details of security arrangements or investigations," the CCJRA directs that disclosure is governed by the section of CORA quoted in the previous paragraph. In C.R.S. § 24-72-305(8), the CCJRA expressly provides: "The allowance or denial of the right to inspect criminal justice records that contain specialized details of security arrangements or investigations shall be governed by section 24-72-204(2)(a)(VIII) [of the CORA]."

18. The relevant provisions of the CORA and CCJRA, cited in paragraphs 16 and 17, do not permit withholding based on the ground that disclosure would be "contrary to the public interest." To the extent such an analysis is relevant, disclosure would not be "contrary to the public interest."

19. Under C.R.S. § 24-72-204(5):

> . . . [A]ny person denied the right to inspect any record covered by this part 2 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record . . . Hearing on such application shall be held at the earliest practical time. Unless the Court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the Court . . .

## V. CLAIM FOR RELIEF

### Order to Show Cause and Award of Reasonable Attorney Fees Pursuant to C.R.S. §§ 24-72-204(5) and 24-72-305(7)

20. Plaintiff hereby incorporates Paragraphs 1 through 19 above as if fully set forth herein.

21. The information requested by the Plaintiff as described herein has been made, maintained and kept by Defendants and constitutes public records under C.R.S. § 24-72-204(2)(a)(VIII) or, alternatively, criminal justice records under C.R.S. § 24-72-302.

22. Defendants have refused to provide access to public records or criminal justice records pursuant to Plaintiffs' request.

23. No statutory exception under the CORA or CCJRA warrants Defendants' decision to deny access to the public records requested by Plaintiff.

24. Defendants' denial of access to the records sought by Plaintiff violates the CORA and CCJRA.

25. There was no good faith basis or grounds to support Defendants' refusal to follow C.R.S. § 24-72-305(8) of the CCJRA and § 24-72-204(2)(a)(VIII) of the CORA, particularly in light of the clear, explicit, and unambiguous direction of those provisions. Accordingly, denial of the requested records was arbitrary and capricious, thereby entitling Plaintiff to an award of attorney fees and costs.

WHEREFORE, Plaintiff ACLU asks this Court to enter judgment in its favor and award the following relief:

(a) The Court enter an Order directing the Defendants to show cause why they should not permit inspection and copying of information regarding the expenditure of public moneys as described in the ACLU's May 6, 2008, request, as described in paragraph 12 of this Complaint. An Order to Show Cause has been filed separately from this Complaint;

(b) The Court conduct a hearing pursuant to such Order "at the earliest practical time," at which time the Court should make the Order to Show Cause absolute and order production of the requested documents;

(c) The Court enter an Order directing Defendants to pay Plaintiff's court costs and reasonable attorney fees; and

(d) The Court order any other and further relief that the Court deems just and proper.

Respectfully submitted this 28th day of May, 2008.

**BENEZRA & CULVER, L.L.C.**

**s/John A. Culver**

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