DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO. 80202,	
Stephen Nash, et al., Plaintiffs, vs. **Gerald Whitman, et al.,** Defendants, **Adolph Chavez, et al.,** Intervenors.	▲ **COURT USE ONLY** ▲ Case Number: **05CV4500** Ctrm: 5

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

THIS MATTER is before the Court upon Plaintiffs' request for judicial review of Defendants' refusal to disclose to Plaintiffs the documents contained in two files that were generated by the Internal Affairs Bureau ("IAB") of the Denver Police Department ("DPD") during investigations of alleged police misconduct related to the "Spy Files" controversy. Plaintiffs sought disclosure of the files pursuant to the Criminal Justice Records Act ("CJRA"), § 24-72-301, et seq., C.R.S., and the Colorado Open records Act ("CORA"), § 24-72-201, et seq., C.R.S. Plaintiffs have not requested a declaration that all IAB files should be available upon demand. Defendants refused to disclose the files, with the exception of a handful of documents that had been received from the Plaintiffs. Defendants provided a "Vaughn Index," in which they set forth their asserted grounds for nondisclosure of each document in the files. Both sides have substantially complied with the procedural requirements of the applicable statutes.

At the inception of the case, the documents sought by Plaintiffs included a large volume of emails exchanged within DPD that were alleged to be inappropriate in a variety of ways. The Plaintiffs dropped their request for disclosure of the emails after the Colorado Supreme Court's decision in Denver Publishing Co. v. Board of County Commissioners of the County of Arapahoe, Colorado, 121 P.3d 190 (Colo. 2005).

FINDINGS OF FACT

Plaintiffs Stephen Nash and Vickie Nash are community activists who are involved with an organization known as CopWatch. They were among the people who learned that the Intelligence Unit of the DPD had monitored their peaceful protest activities and kept files on them.

On or about July 1, 2002, during the pendency of litigation regarding the larger "Spy Files" controversy, the Nashes filed a written complaint alleging improper monitoring by DPD of their legal expressive activities. By letter from Chief Gerald Whitman dated March 16, 2004, the Nashes were informed by DPD that their complaint had been investigated by the IAB and that "there was a preponderance of evidence to support the sustaining of violations." The letter further stated that the investigation of the Nashes' complaint had resulted in changes to DPD policy and procedures. The letter did not identify the officers found to have violated rules or regulations, or the rules or regulations that were violated, or the policies or procedures that were changed.

By letter from Mark Silverstein dated April 14, 2004, Plaintiffs requested disclosure of the entire record of the investigation of the Nashes' complaint and the entire records of two other related investigations described in the letter. Further communications between the parties revealed that there were only two IAB files, not three, containing all of the documents sought by Plaintiffs. Plaintiffs' letter stated that it "should not be construed as a request for any portions of any documents that contain highly personal and private information about any officers' off-duty activities that are not directly related to the discharge of their official duties. Accordingly, this is not a request for, and you may redact, such information as social security numbers, home addresses, home phone numbers, personal medical and financial information, and similar information."

Plaintiffs' request was denied in its entirety in a letter from Assistant City Attorney Richard A. Stubbs on June 10, 2005. This was later followed by a Vaughn Index and an amended Vaughn Index. Defendants' primary basis for refusing to disclose the requested files is the assertion that disclosure of these or any other IAB files would be contrary to the public interest because disclosure would have a chilling effect on DPD's ability to obtain information in investigations and its ability to properly discipline its employees. They also asserted the deliberative process privilege and the attorney/client privilege as to some of the documents. Seven present and former DPD officers intervened in the case to argue that their privacy rights would be violated by disclosure of the files at issue.

The investigations embodied in both IAB files resulted in sustained violations and the imposition of discipline.

Three of Defendants' witnesses testified that civilians would likely be reluctant to make complaints or give statements or interviews in IAB investigations if they knew their involvement would be disclosed publicly. However, in this case, there were no civilian witnesses, except the Nashes. Civilians participating in IAB investigations are not given the same Garrity Advisement as officers receive (see below), but they are told that their statements are confidential.

DPD officers are required to cooperate with IAB investigations, to give statements and to answer questions truthfully and completely, without omitting any material facts. They are also forbidden to retaliate against any officer or civilian for making complaints or cooperating in IAB investigations. Officers are subject to discipline for failure to comply with these requirements. Although the potential for retaliation against cooperating officers and civilians was argued in Defendants' briefs as a significant reason for refusing to disclose IAB files, Commander Lamb, the head of IAB and the main witness for Defendants at the hearing in this matter, testified that he is not concerned about retaliatory conduct and that he is confident that officers would continue to cooperate and tell the truth in IAB investigations, as they are required to do, whether or not their statements might be disclosed.

Before giving a statement in an IAB investigation, officers are given a written "Advisement Pursuant to Internal Investigation" ("Garrity Advisement"), which they and the investigator sign. It informs the officers that they may be subject to discipline for failure to give a statement or answer questions, but only under the circumstances enumerated in the Advisement. These circumstances include that the questions be reasonably related to work performance or fitness of an officer; that neither the statement nor answers to questions be considered a waiver of his or her right against self-incrimination; that the statement or answers will not be used in any criminal proceeding against him or her and the Department will resist every effort to produce the statement or answers in any civil or criminal case; that the statement or answers will be kept confidential except that they may be disclosed to people at DPD on a need-to-know basis, they may be disclosed to the District Attorney or the City Attorney on a need-to-know basis, and they may be offered in evidence (and become part of the public record) in the event of an appeal of disciplinary action; and he or she is given the Advisement prior to giving the statement or answering any questions. Thus, officers are promised limited confidentiality before giving statements or answering questions in IAB investigations.

There have been at least three district court decisions in recent years ruling in favor of parties who, like Plaintiffs, requested IAB files from the DPD pursuant to the CJRA and the CORA. In addition, IAB files or portions thereof are ordered to be produced in discovery in criminal and civil cases approximately 18 times each year. The decisions, and the fact that disclosure may be ordered by courts, are known within the Department, but according to Commander Lamb, have not had a chilling effect on DPD's ability to obtain information in IAB investigations or to discipline officers because the number of such cases is few in comparison to the large number of IAB investigations conducted each year.

Once an IAB investigation is completed, a summary report is prepared and sent through the subject officer's chain of command (Lieutenant, Captain, Division Chief, Deputy Chief and Chief). Commander Lamb described this summary as a summary of the facts, though it may contain "limited" impressions or opinions; summaries do not contain recommendations. The disciplinary decision is made in the chain of command, not by the IAB. An officer who is subject to discipline has a variety of appeal avenues. The officer and his or her representative are permitted to review the entire IAB file after the investigation is completed, although not before. If the officer pursues an administrative appeal, the IAB file, including witness statements made pursuant to the Garrity Advisement, may be admitted into

evidence, at which point it becomes publicly available. This happens about a dozen times each year.

DPD makes serious and substantial efforts to maintain the confidentiality of IAB files within the Department. Except for the Chief of Police, the Manager of Safety and an officer who is the subject of a sustained complaint, all employees with access to IAB files are required to sign confidentiality agreements. The physical files are kept in a locked area, separate from other police files, and computer files are protected by a firewall.

IAB files do not contain personnel files.

DPD resists each and every request for disclosure of IAB files, whether the request is made pursuant to the CJRA or the CORA, or is made in discovery in a civil or criminal case. Each and every request is denied by DPD, without exception, and documents from IAB files are never disclosed except upon court order. Production of IAB files in criminal and civil discovery is usually accompanied by a protective order, limiting use of the materials to the particular case. IAB documents become part of the public record if they are admitted into evidence at trial, which happens occasionally.

Commander Lamb, whose candor and credibility were very helpful to the court, testified that civilians' and police officers' willingness to come forward would be chilled if IAB files were routinely open for inspection by the public, and that it is "amazing how forthcoming they are" now. He further testified that cooperation of civilians and officers is crucial to IAB's ability to conduct thorough investigations. If IAB files were available to the public upon demand, officers' interviews would be more difficult, with officers volunteering less and the interviewer more frequently having to follow a Q & A format. Commander Lamb was clear, however, that he was not concerned about officers not telling the truth in interviews, and that retaliation, harassment and ostracizing of cooperating officers were not significant concerns. He essentially debunked the stereotypes about police officers that were raised as justification for secrecy.

Mr. Williams, the defense expert, opined that, if IAB files were open to the public, civilians would be less likely to come forward and officers would be less forthcoming, making them "harder interviews" for IAB investigators. He testified that the public needs to be assured "in all cases" that the IAB process is fair and that resulting discipline is right. He opined that this public need can be satisfied by civilian oversight mechanisms and that public access to IAB documents is not necessary. However, Mr. Williams was not familiar with the experience of states such as Florida, Ohio, Montana and Arizona, which permit open public access to internal affairs files.

Plaintiffs' expert on police internal affairs policies and procedures was Lou Reiter. The court found his testimony more persuasive than Mr. Williams', primarily because it was more grounded in specific experience, including auditing of internal affairs files and processes around the country, and because he has had extensive experience in states, such as Florida, Ohio, Montana and Arizona, that allow open access to internal affairs files and states that do not. The court also found his analysis more logically sound and internally consistent. Accordingly, the court finds the following facts based upon Mr. Reiter's testimony. There are

several key factors that lead police officers to be frank and open in internal affairs investigations, and promises of confidentiality are not among them. Internal affairs secrecy contributes to the "code of silence" or "blue wall", by creating the expectation that things will be kept in house and away from objective outsiders. Open access to internal affairs files enhances the effectiveness of internal affairs investigations, rather than impairing them. Knowing that they will be scrutinized makes investigators do a better job and makes them and the department more accountable to the public. Transparency also enhances public confidence in the police department and is consistent with community policing concepts and represents the more modern and enlightened view of the relationship between police departments and the communities they serve. Civilian review boards are not an effective substitute for transparency.

Marcy Kaufman, a civilian member of the Disciplinary Review Board, testified that civilians might not come forward if they knew their complaints or statements might be made public, because people fear police harassment, even though it rarely if ever happens, and do not understand law enforcement. These are problems that could be ameliorated by greater transparency.

The Nashes were signatories of the May 2003 settlement agreement in the federal "Spy Files" case, which contained language by which plaintiffs released all claims against Denver, its Departments and agents "which might exist with regard to any and all claims in any way related to or arising from the matters that are the subject matter of the Lawsuit…." Defendants argue that the settlement agreement released the Nashes' claims in the instant case. The Court does not agree. This release language does not apply to the Nashes' CJRA claim, which did not accrue until 2005, when their request for records was denied. By settling the earlier lawsuit, and all related claims, they did not give up their rights under the CJRA to request documents and to seek judicial review if their request was denied.

CONCLUSIONS OF LAW

Section 24-72-305(5), C.R.S. provides that access to records of police investigations, such as those at issue here, may be denied "[o]n the ground that disclosure would be contrary to the public interest…." Section 24-72-305(7), C.R.S. provides that any person denied access may apply to the district court for an order directing the custodian "to show cause why said custodian should not permit the inspection of such record." The court must hold a hearing and "[u]nless the court finds that the denial of inspection was proper, it shall order the custodian to permit such inspection…" This statutory language casts the burden of proof upon the custodian to show that denial of access was proper. The question then becomes, what is the nature and extent of that burden? The statutory language could be construed to support the conclusion that the custodian's burden is to satisfy the court by a preponderance of the evidence that disclosure of the records would, in fact, be contrary to the public interest. This appears to have been the burden imposed in past cases. See, e.g., Johnson v. Colorado Department of Corrections, 972 P.2d 692 (Colo. App. 1998).

However, after the hearing in this case, the Colorado Supreme Court issued its opinion in Harris v. The Denver Post Corp., No. 04SC133, slip. op. (Colo. Nov. 15, 2005), which provides that the custodian's burden is to satisfy the court that his decision that disclosure of

the records would be contrary to the public interest was not an abuse of discretion. Harris involved the Denver Post's effort to obtain videotapes that were made by Harris and Klebold as they prepared for their 1999 attack on Columbine High School. The tapes were later seized pursuant to a valid search warrant of the Harris home. The primary issue in the case was whether the tapes were "criminal justice records", subject to the CJRA, or "public records", subject to the CORA, or whether they were, as found by the district court, private property not subject to either act. The Court concluded that the tapes were "criminal justice records", and went on to discuss the implications of that conclusion. In the instant case, the parties are all in agreement that the IAB files at issue are "criminal justice records" and subject to the CJRA.

In Harris, the Court held that, pursuant to the CJRA, the tapes "are subject to the sheriff's exercise of sound discretion to allow the requested inspection or not, utilizing a balancing test taking into account the relevant public and private interests." Id., slip op. at 4. The competing interests recognized by the Court in Harris were the privacy interests of the Harris and Klebold parents and the public purpose to be served in allowing inspection. The Court held that the sheriff's decision to allow or not allow inspection of the record "is subject to judicial review under an abuse of discretion standard." Id., slip op. at 24. In so holding, the Court emphasized the differences between the CJRA and the CORA, calling into question arguments based on earlier cases that often appeared to treat the two acts as interchangeable. Because the Sheriff had incorrectly determined that the tapes were private property and not subject to the CJRA and did not, therefore, attempt to exercise any discretion, the Court in Harris remanded the case to the Sheriff to decide whether to allow inspection of the tapes.

In the instant case, the court pressed counsel for Defendants at the hearing on the question of whether there had been an exercise of discretion under the CJRA and was assured that DPD's refusal to allow inspection, as it does in every case, was an exercise of its discretion under the CJRA, which Defendants acknowledged governs this case. This is not the situation facing the Harris court, where the decision maker did not recognize that the CJRA applied and, therefore, made no decision under it. Accordingly, the court will proceed to review the refusal decision under an abuse of discretion standard, rather than remand the matter to DPD for reconsideration.

It should also be noted that, although defense witnesses and counsel made mention of a City Charter provision and ordinance requiring confidentiality, Defendants have not argued that these provisions govern the case or in any way excuse compliance with the CJRA. The Legislative Declaration to the CJRA states, "The general assembly hereby finds and declares that the maintenance, access and dissemination…of criminal justice records are matters of statewide concern and that, in defining and regulating those areas, only statewide standards in a state statute are workable." § 24-72-301(1), C.R.S.

Defendants make two primary arguments: that their blanket denial of all requests for IAB files constitutes a proper exercise of the discretion conferred by the CJRA because allowing inspection of any part of any IAB file would be "contrary to the public interest"; and that certain individual documents contained in the subject IAB files are protected by the attorney/client privilege and the deliberative process privilege.

Abuse of Discretion.

The court concludes that Defendants' blanket policy of denying every request for disclosure of IAB files is an abuse of the discretion conferred by the CJRA, rather than a proper exercise of it. The statutory scheme contemplates a balancing of competing interests and the exercise of judgment on a case by case basis. "In making this statutory determination, the custodian takes into account and balances the pertinent factors, which include the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." Harris, slip. op. at 24. The exercise of discretion contemplated by Harris can only be done on a case by case basis, taking into account every "pertinent consideration relevant to the *circumstances of the particular request.*" [Emphasis added.]

Here, although Defendants prepared a lengthy Vaughn Index purporting to set forth on a document by document basis their reasons for nondisclosure, this was admittedly a *post hoc* effort to justify a foregone conclusion rather than a genuine consideration of whether disclosure of these particular records would be contrary to the public interest. Review of the voluminous submission from Defendants to the court reveals that most of the documents submitted for *in camera* review are devoid of sensitive content and some are devoid of any substantive content at all. Moreover, the descriptions of the documents and the asserted grounds for not disclosing them in the Vaughn index often bear little resemblance to the documents themselves. One example is Document #9 in the first IAB file, which was the subject of the following entry:

> Document number 9 is a three-page comparative discipline document. It provides information regarding discipline imposed upon officers involved in incidents other than the instant one but who were found to have violated the same Police Department rules that the involved officers in the instant matter were alleged to have violated. It contains information regarding the complainants, the substance of their complaint, and the names of officers who were possibly involved in the incident that was the subject of the complaint. It is unknown who prepared the document, with recipients being the command staff who will review the IAB file and the members of the Disciplinary Review Board. (1) The documents qualify for the deliberative process privilege because they contain information that will be used to determine the appropriate level of discipline, if any, to impose upon the subject officers. (2) Disclosure would be contrary to the public interest because in many instances disclosure would identify officers who had been disciplined by the Department, thereby chilling the Department's desire to discipline its officers. (3) Disclosure would also implicate officer privacy interests because in many instances disclosure would identify specific officers who had been disciplined by the Department.

Document #9 is a blank form document titled, "Main Comparative Discipline Report." It contains no information about the subject investigations or any other investigations. It contains no information about any officers. Assuming that a blank or redacted

document had been submitted by mistake, the court inquired of defendants and was informed that it is, indeed, the complete document that is the subject of the above-quoted description.

The court further concludes that a decision that disclosure of these particular IAB files would be contrary to the public interest, even if such a decision had been made, would be an abuse of discretion. Defendants' primary argument, that cooperation of civilian and officer witnesses in IAB investigations would be "chilled" by fears of embarrassment, harassment, retaliation, and the like, did not find significant support in the evidence. On the contrary, there are no civilian witnesses involved in this case, the witness statements do not contain highly sensitive information about anyone, and the evidence was clear that harassment, retaliation, and the like are not significant concerns within DPD. The promise of confidentiality given to officers in the Garrity Advisement is limited and conditional, and officers understand that their statements might be disclosed in any of several circumstances. Disclosure of similar information in other cases has not had a chilling effect on the cooperation of DPD officers or the public in IAB investigations. As the Supreme Court of Colorado pointed out in Martinelli v. District Court, 612 P.2d 1083, 1090 (Colo. 1980), disclosure of IAB files in cases such as this is unlikely to have the chilling effects argued by Defendants.

Weighing in favor of disclosure is the public's strong interest in knowing how DPD handles IAB investigations of citizen complaints in general and how it handled these investigations in particular. There was a great deal of public and media attention paid to the "Spy Files" controversy and these investigations relate to that larger controversy. The Nashes are well-known community activists and there is significant public interest in knowing that DPD handled the investigation of their complaint thoroughly and fairly, and that the resulting discipline was fair and appropriate. The complaint was sustained and resulted both in officer discipline and in changes to DPD policies. The evidence presented at the hearing of this matter overwhelmingly supported the conclusion that disclosure of nonprivileged documents contained in these two IAB files would serve the public interest.

Privileges.

Defendants have asserted two privileges as applicable to specific documents, the attorney/client privilege and the deliberative process privilege.

Two of the documents for which the attorney/client privilege was asserted are protected by that privilege and need not be disclosed. They are Document #8 in the first IAB file, and Document #16 in the second IAB file. The third document for which the attorney/client privilege was asserted (Document # 6 in the second IAB file) is not protected by the privilege because it does not contain confidential communication to or from counsel relating to the giving of legal advice.

The Colorado Supreme Court recognized the "deliberative process privilege" in City of Colorado Springs v. White, 967 P.2d 1042 (1998), and held that it is synonymous with the "official information," "governmental," and "executive" privileges previously

recognized in Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980). "The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decision making process where disclosure would discourage such discussion in the future." City of Colorado Springs, 967 P.2d at 1051. Consequently, the privilege "protects only material that is both pre-decisional (i.e., generated before adoption of an agency policy or decision) and deliberative (i.e., reflective of the give and take of the consultative process)." Id. at 1051. Post-decisional documents are not protected from disclosure for two reasons. "First, the quality of a decision will not be affected by the forced disclosure of communications occurring after the decision is finally reached. [Citation omitted.] Second, the public has a strong interest in the disclosure of reasons that do supply the basis for an agency policy actually adopted." Id. In contrast, "the public has only a marginal interest in the disclosure of 'reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground.'" Id. In order to be found to be "deliberative," the material "must reflect the 'give-and-take of the consultative process.'" Id. at 1052. Purely factual or investigative material is not "deliberative." In determining whether a document is "deliberative," a "key question…is whether disclosure of the material would expose an agency's decision making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." Id. at 1051.

In the discovery context, the deliberative process privilege is a qualified one, and "may be overcome upon a showing that the discoverant's interests in disclosure of the materials is greater than the government's interests in their confidentiality." Id. at 1054. "In contrast to the discovery context, however, the need of the party requesting disclosure is not relevant to a request for public records…because the open records laws only require disclosure of materials which would be routinely disclosed in discovery….Therefore, once the government has met its burden of proof by satisfying the procedural requirements, the privileged material is beyond public inspection." Id. at 1056. The court understands this portion of the Supreme Court's opinion to mean that the privilege is not a qualified one when the case is a CORA or CJRA case.

Defendants assert the deliberative process privilege with respect to so many documents for which the claim is plainly inappropriate that the court will not set forth a document by document explanation of the issue, except for a few instances where the question was a close one or the court agrees that the privilege applies.

Document #10 in the first IAB file is an Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration to Gerald R. Whitman, Chief of Police, dated January 19, 2004. Its subject is the investigation of the Nashes' complaint. It contains a factual summary description of the complaint, the investigation and the conclusions reached in the investigation. It sets forth the outcome of the investigation, including the decision to sustain some alleged violations and not sustain others and the reasons for those decisions. It is not deliberative; it is not part of the give and take of the deliberative process while a decision is under consideration and disclosure of internal discussions might undermine the Department's ability to function. It also appears to be

post-decisional because it was prepared after the decision to sustain and not sustain violations was made. While it may have predated the decision regarding specific disciplinary penalties for the violations, it does not address or make recommendations with respect to the imposition of disciplinary penalties. This document is not protected by the deliberative process privilege.

Document #13 in the first IAB file is an Inter-Department Correspondence from David Quinones, Lieutenant in the Internal Affairs Bureau to Marco Vasquez, Commander of the Internal Affairs Bureau, dated September 30, 2003, regarding the Nashes' complaint. It is not protected by the deliberative process privilege because it is a factual summary of the investigation and is not deliberative.

Several documents in both IAB files are witness statements. They are factual and not deliberative and, therefore, not protected from disclosure by the deliberative process privilege.

Document #6 in the second IAB file is an Inter-Department Correspondence from Lt. D.K. Dilley, Lt. Dave Quinones and Lt. Judy Will to Commander Vasquez, dated July 7, 2003. It sets forth an extensive factual summary of the history of the Intelligence Bureau and its activities under various commanders and a list of rules and regulations that might have been violated. It does not discuss whether violations occurred or make recommendations. It is not deliberative and is not, therefore, protected from disclosure by the deliberative process privilege.

Documents #46 and 47 in the second IAB file are Inter-Department Correspondence from Marco Vasquez, Deputy Chief Administration, to Gerald R. Whitman, Chief of Police, dated January 19, 2004 and May 27, 2004. They are protected by the deliberative process privilege. They are pre-decisional and predominantly deliberative, with extensive recommendations for policy changes and accompanying opinion and analysis.

Document #51 in the second IAB file is an Intelligence Bureau Assessment Report for the Denver Police Department by the Rocky Mountain Information Network, dated September 10, 2002. It is a pre-decisional consultant's report on the Intelligence Bureau that is predominantly deliberative, including evaluative analysis of problems and recommendations for policy changes. Thus, it is protected by the deliberative process privilege.

Document #52 in the second IAB file is a draft policy for the Intelligence Bureau. It is pre-decisional and deliberative and, therefore, protected by the deliberative process privilege.

Documents #55, 59, 81 and 82 of the second IAB file are all protected by the deliberative process privilege because they are pre-decisional and deliberative. They contain and reveal the process, both substantive and procedural, by which the Department evaluated the problems of the Intelligence Bureau and developed policy changes.

Privacy Interests of the Officers

In Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), the Colorado Supreme Court addressed the question of the privacy interests of police officers in IAB files. The Court recognized a right to confidentiality, which it characterized as an "aspect of the right to privacy which protects 'the individual interest in avoiding disclosure of personal matters.'" The Court stated that, "this right to confidentiality encompasses the 'power to control what we shall reveal about our intimate selves, to whom, and for what purpose.'" Id. at 1092. Thus, the threshold question in the analysis of whether the right of confidentiality prevents disclosure is whether the information is the sort of "highly personal and sensitive" information with respect to which one may have a "legitimate expectation of privacy." In this regard, the person claiming protection "must show that the material or information which he or she seeks to protect against disclosure is 'highly personal and sensitive' and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities." Id. Such documents were expressly excluded from Plaintiffs' request for disclosure and review of the *in camera* submission of the first IAB file makes clear that no highly personal and sensitive information about any person is included in it. However, there are several documents in the *in camera* submission of the second IAB file that contain highly personal and sensitive information that would be embarrassing to individual officers if it were disclosed. These documents all concern the inappropriate emails that were found on the computers of the officers. The emails themselves are not criminal justice records and the documents that talk about them and identify the officers who sent and received them should be redacted to delete the names, badge numbers and other identifying information of the individuals involved. This conclusion is the result of the balancing of factors called for by Martinelli that must be undertaken with respect to documents that are found, as a threshold matter, to contain "highly personal and sensitive" information. Disclosure of the individuals' identities would serve no purpose but to embarrass the individuals; it would not serve the public interest. These are Documents # 45 and 64 – 80 in the second IAB file. In addition, if the documents to be disclosed contain any references to individuals' home addresses, home telephone numbers or social security number, Defendants may redact them before disclosure.

Attorney fees

Section 24-72-305, C.R.S. provides for the custodian to pay the applicant's court costs and attorney fees "upon a finding that the denial was arbitrary or capricious." The court finds that the Defendants' blanket denial of every request for IAB files, without any case-by-case consideration, and their inappropriate invocation of the deliberative process privilege for most of the documents in the files, including documents with no substantive content at all, constitute arbitrary and capricious denial of Plaintiffs' rights under the CJRA. There is no legal justification for these actions. Furthermore, one apparent purpose for this conduct, and the inevitable effect of it, is to impose upon every citizen who seeks to exercise his or her rights under the CJRA the many burdens of bringing suit against the government, including the cost of litigating. The fact that the court has agreed with Defendants' withholding of ten of the documents out of the

voluminous files does not argue against the finding that Defendants' blanket denial of Plaintiffs' request and their wholesale assertion of privilege were arbitrary and capricious. If Defendants exercised their discretion as required by law and if their Vaughn index asserted only colorable grounds for withholding, Plaintiffs might have been able to discern which documents were fairly protected by the privilege and not requested them. Because of Defendants' conduct, however, such an exercise of judgment was not reasonably possible. Accordingly, Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs.

ORDER

In light of the foregoing, Defendants shall disclose to Plaintiffs all of the documents submitted for *in camera* inspection, except the following documents:

First IAB file, document #8; and

Second IAB file, documents #16, 46, 47, 51, 52, 55, 59, 81 and 82.

Defendants may redact from all documents to be disclosed the home addresses, home telephone numbers and social security numbers of any individuals.

Defendants shall pay the reasonable court costs and attorney fees of Plaintiffs in this matter. Plaintiffs shall file their affidavit and supporting documentation regarding costs and fees within 30 days of the date of this order. Defendants shall file any opposition to the amounts claimed within 20 days of service of Plaintiffs' affidavit and, if the amount is contested, shall set the matter promptly for a hearing on the reasonableness of the amounts claimed.

Defendants shall pick up from Courtroom 5 the documents submitted for *in camera* inspection and shall maintain them intact until the time for appeal has expired or any appeal is finally concluded.

Done this_____ day of December, 2005.

BY THE COURT:

_____
CATHERINE A. LEMON
District Court Judge