

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street Colorado Springs, Colorado 80903	FILED Document CO El Paso County District Court 4th JD Filing Date: May 28 2009 10:11AM MDT Filing ID: 25382239 Review Clerk: Sharon Robinson
Plaintiff: John Doe v. Defendants: The Colorado Springs Police Department and Colorado Springs Police Chief Richard Myers	▲ COURT USE ONLY ▲
Attorneys for Plaintiff: Richard D. Radabaugh, #33655 Mark H. Barker, #34798 Richard Callison, #32658 David G. Berry, #39865 Radabaugh, Barker & Callison, Ltd. 309 East St. Vrain Street Colorado Springs, CO 80903 Phone: (719) 632-9909 Fax: (719) 632-1478	Case No.: Div.: Ctrm:
COMPLAINT AND PETITION FOR JUDICIAL REVIEW PURSUANT TO COLORADO RULE OF CIVIL PROCEDURE 106 (a) (4)	

The Plaintiff, John Doe (hereinafter sometimes referred to as "Plaintiff"), by and through his counsel, Radabaugh, Barker & Callison, Ltd., complains against the Defendants, the Colorado Springs Police Department (hereinafter sometimes referred to as "the Department") and Colorado Springs Police Chief Richard Myers (hereinafter sometimes referred to as "Chief Myers"), as follows:

I. JURISDICTION, VENUE AND GENERAL ALLEGATIONS

1. Plaintiff, John Doe, has resided in El Paso County, Colorado at all times relevant to this Complaint.
2. Defendant Colorado Springs Police Department is a governmental body as described in Colorado Rule of Civil Procedure 106 (a) (4). Chief Myers is an officer of such body.
3. Plaintiff was employed as a Police Officer at the Colorado Springs Police Department for 4 years and 9 months. An issue arose regarding administrative discipline against Plaintiff stemming from an incident that occurred while on duty (Personnel Investigation #07-044). Plaintiff resigned from the Department in early 2008. A copy of the resignation letter is attached hereto as "Exhibit A".

4. When Plaintiff resigned from the Department Plaintiff was told by Department Officers that if he did not resign, that he would likely be fired. Plaintiff was also told by Department Officers that his record would remain confidential. The Plaintiff further relied upon this promise of confidentiality to preserve future employment opportunities that would likely become unavailable should the record become public.

5. Thereafter, on May 19, 2009, Plaintiff was notified that his personnel investigation record was being released to the Colorado Springs Gazette, pursuant to a Colorado Open Records Act request. Plaintiff was provided with a letter advising of the decision and the decision-making process, a copy of which is attached hereto as Exhibit "B".

6. The decision to release the record, as evidenced by the notification letter, constituted a final decision of the body or officer pursuant to C.R.C.P. 106(b). The Court's review of the applicable law is de novo. *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008).

7. For the purpose of this petition, the City's intention to release John Doe's personnel investigation record is the final administrative decision.

II. FIRST CLAIM FOR RELIEF

(Appeal of Colorado Springs Police Department
Decision to Release Personnel Investigation Record)

8. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 6 above as if fully set forth here.

9. This Complaint is an appeal and request for judicial review of the decision by the Department and Chief Myers, pursuant to C.R.C.P. 106 (a) (4). Such statute allows a plaintiff to request District Court review "Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law..."

10. The decision of the Defendants to release the record of an internal personnel investigation involving Plaintiff was an abuse of discretion and contrary to the procedures created to determine whether such records shall be released. The categories were created to comport with C.R.S. § 24-72-305 and the holding in *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, 196 P.3d 892 (Colo. 2008). The Court, referencing *Harris v. Denver Post*, 123 P.3d 1166, 1174 (Colo. 2005), wrote, "Specifically, a custodian should consider 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 interest to be served in allowing inspection; and any other pertinent consideration." *Id.* at 903.

11. The decision to release of the record of Plaintiff's personnel investigation would have severe consequences for the Plaintiff and his family and is an abuse of discretion. Plaintiff is no longer employed by any government agency, having resigned on early 2008. Plaintiff works in a managerial position in private industry; termination would certainly result from release of the record. Plaintiff also owns and operates a side business which contracts with radio stations and would likely result in loss of contracts. Plaintiff's long-term marriage would be severely affected by the release of this record, as would their seven year old son. The City failed to balance the Plaintiffs, promised and relied upon, privacy in his "past employment" record with the citizen's right to know. There would be no benefit to the public interest by virtue of the release of the records.

III. SECOND CLAIM FOR RELIEF (Promissory Estoppel)

12. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 10 above as if fully set forth herein.

13. Plaintiff, in reaching the decision to resign rather than continue the internal disciplinary process, was assured that his record would remain confidential and never available for inspection by anyone other than Colorado Springs Police Department or others unless such confidentiality is waived by Plaintiff. The Colorado Court of Appeals addressed the issue of "Equitable Estoppel" or "Promissory Estoppel" in *Marquardt v. Perry* 200 P.3d 1126 (2008) writing:

Colorado courts have adopted the definition of promissory estoppel found in the Restatement (Second) of Contracts § 90 (1981). *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 905 (Colo.1982). Promissory estoppel is an extension of the basic contract principle that one who makes a promise must be required to keep it. *Patzer v. City of Loveland*, 80 P.3d 908, 912 (Colo.App.2003). The elements of a promissory estoppel claim are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. See *Nelson v. Elway*, 908 P.2d 102, 110 (Colo.1995); Restatement § 90. Reliance can be shown where a party alters his or her position as a consequence of another's conduct. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 77 n. 72 (Colo.1996). Reasonable reliance is generally conduct or action that would be reasonable for a prudent person to do or take under the circumstances. See *Field v. Mans*, 516 U.S. 59, 63, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). Whether a plaintiff has justifiably relied on a defendant's promise is an issue of law for the trial court. *Nelson*, 908 P.2d at 110; see also *Atsepoyi v. Tandy Corp.*, 51 F.Supp.2d 1120, 1126 (D.Colo.1999).

14. Plaintiff relied on this confidentiality to prevent his family from suffering public censure, humiliation and stigmatization. As stated before, the Plaintiff further relied upon this promise of confidentiality to preserve future employment opportunities that would likely become unavailable should the record become public. Any such release of this record would be detrimental to the Plaintiff, his family and the complainant.

15. Plaintiff is not seeking to re-enter the law enforcement profession or run for public office.

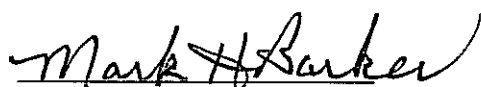
16. The only purpose served by the release of such private information would be for commercial advantage. The Gazette Telegraph is seeking release of internal personnel investigations for the purpose of increasing circulation with sensational stories. No public interest will be served by the release of such records and great private harm will result to Plaintiff and his family.

17. Plaintiff asserts that this record should be reviewed by the Court *in camera* and any arguments be made in chambers, as any discussion in open court would have the effect of release of the records.

WHEREFORE, Plaintiff prays for judgment in his favor and against Defendants requiring Defendants to refrain from releasing said record of internal investigation and such other and further relief that the Court deems just and proper.

RESPECTFULLY SUBMITTED this 26 day of May, 2009.

Respectfully submitted,



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