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May 18, 2009

CSPPA
559 E. Pikes Peak Ave.
Suite 102
Colorado Springs, CO 80903

RE: The Gazette Telegraph's request to release Internal Affairs records.

Dear Members:

In October of 2008, the Gazette Telegraph requested from the police department a copy of all Level II Internal Affairs summaries for 2007 and 2008 in cases where there was a sustained complaint, misconduct not based on complaint, or closed by mediation, against an officer or officers. It is also my understanding that the Gazette was not interested in cases where the officer or officers were exonerated. This request was a blanket request and not related to a specific case that was under litigation.

The City, as well as the police department administration, has in the past denied all requests for Internal Affairs records citing a privacy interest of the involved officers. The El Paso County Sheriff had a similar policy and until recently had also refused to release any Internal Affairs (IA) files.

In a recent case the Gazette sued the El Paso County Sheriff's office for one of its IA files. *Freedom Colorado Information v. El Paso County Sheriff's Department*, 196 P.3d 892 (Colo. 2008). The Gazette claimed that the IA file was a Criminal Justice Record and sought its release pursuant to the Colorado Criminal Justice Records Act, (CCJRA) *See C.R.S. 24-72-304 and 24-72-305*.

The Colorado Supreme Court determined that the IA record was not an "Official Action" as in C.R.S. 24-72-302(7) and that it was up to the discretion of the holder of records to release the file.

Pursuant to CCJRA [sections 24-72-304 and -305, C.R.S.](#) (2008), The Gazette newspaper of Colorado Springs sought to inspect the Sheriff's internal affairs investigation file pertaining to the discharged deputy sheriff. Because the file does not fall within the definition of an "official action" as defined by CCJRA [section](#)

24-72-302(7), C.R.S. (2008), inspection of this file is subject to the exercise of the Sheriff's sound discretion under sections 24-72-304 and -305 of the CCJRA. Harris v. Denver Post, 123 P.3d 1166, 1175 (Colo.2005). The Sheriff refused to allow inspection of the file. Id. 196 P.3d 892 at 895.

The Court found that while the Sheriff had the discretion to release the file he must perform a balancing test as laid out in the Harris v. Denver Post case.

Pursuant to sections 24-72-304 and -305, the Sheriff must balance the public and private interests involved in the inspection request and determine whether to allow full disclosure, redacted disclosure, or no disclosure of the record. Harris, 123 P.3d at 1174-75. Id. at 895.

The Court ruled that it was not up to the District Court to perform this balancing test but the Sheriff is to weigh all the factors and determine what should be released and what shouldn't be released. In this case, the Sheriff had turned down the request and released nothing. The Supreme Court held that the District Court should have ordered the Sheriff to perform the balancing test in Harris (The District Court, Judge Miller, had ordered the release of the entire file with no redactions).

Because the Sheriff did not properly perform his role in this CCJRA inspection request case, hindering the court's judicial review role, the district court should have ordered him to do so. Consequently, we make our rule absolute and order the El Paso County District Court to return this matter to the Sheriff for an inspection determination that complies with the CCJRA and our decision in Harris. Id at 895.

Based on this ruling the police department and the City Attorney's office have put together a committee that has reviewed the IA cases requested and developed different criteria for the classification and release of certain information contained in the IA files. The IA summaries (not including the disciplinary action taken) will be broken down into three separate categories.

The first category or "Category One" (The City will not release the IA summary): Under this category, the City will not release the summary based on the totality of circumstances, which may include the fact that the subject person is a civilian employee; the complaint involves off-duty conduct; the offense is very minor; the conduct has very little or nothing to do with CSPD's function as a criminal justice agency; or release is prohibited by the Colorado Open Records Act. In short, the public interest under these circumstances is minimal when weighed against the privacy interests of the subject employee and/or CSPD.

Category Two (Release the record with redaction of the subject employee's name and possible redaction of victim/witness name): Among the factors that may be considered under this category includes whether the incident may or may not have occurred on duty, was of a more serious nature than those cases in category one, but the public's interest is minimal. It is the City's position that redaction is appropriate as it balances the public's interest against the privacy interests of the individuals involved.

Category Three (Release of employee's name and possible redaction of victim/witness names): Among the factors that may be considered under this category, includes whether the incident generally occurred on duty; may have occurred in public; may be more serious in nature than the other categories; and/or is relevant to the functions of the criminal justice agency.

Officers affected by the release of their records will be notified by the Department within 72 hours of the request for the information. The reason for the short notice is that C.R.S. 24-72-305(6) requires that the Department provide a written statement to the applicant (Person seeking the record) stating the reasons why access is denied.

The affected officer will have a very short time period to protest the release of his IA file. If an officer wants to attempt to keep his/her IA file summary from public disclosure they will have to act immediately.

The City has no interest in releasing personal and confidential files. However, based on legal precedent the decision has been made that some disclosures of the requested records will be compelled.

When this issue first arose the City Attorney, Ginger Jeffrey, Lt. Kirk Wilson, D.C. Ron Gibson, and D.C. Pete Carey, met with myself to advise everyone that some type of criteria was going to be developed to sort out which cases were going to be released and which cases were not going to be released. At that meeting we were informed that the administration would draft a process that would disseminate the cases requested by the Gazette. On Monday, May 11, 2009, the staff met with, Robin Rogers, Colby Doolittle, and myself and advised us of the process (described earlier in this letter) which is now in place.

I have examined the relevant statutory law and case law and do not see where the City has any choice in producing this information. If the City refused to turn over this information then the Court would simply order them to do so. If the City still refused the court would hold the City in contempt and probably use its on judgment on what would be released and what would not.

The City is not going to release, what discipline was handed down, insights done by the chain of command, or transcripts of interviews. Also, of all the cases affected by the Gazette's request, there is only a handful that fall into category three.

Obviously, this is not a good situation. The City has put a lot of effort into creating a process that will maximize the affected officer's privacy interest and still comply with the Court's ruling regarding the Gazette's CORA request.

If you have any questions whether a case of yours (2007 and 2008) is subject to disclosure and what category it falls in I recommend that you contact Lt. Kirk Wilson at Internal Affairs.

This release will occur soon so you may want to contact Internal Affairs as soon as possible.

Sincerely,

A handwritten signature in blue ink that reads "Richard D. Radabaugh". The signature is written in a cursive style with a light blue highlight behind it.

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