

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 97 CV 7170, Courtroom 19

COURT'S ORDER RE: COMPLAINT FOR RECORDS DISCLOSURE

THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, a Colorado corporation,

Plaintiff,

vs.

CITY AND COUNTY OF DENVER, COLORADO; FIDEL MONTOYA, Manager of Public Safety for City and County of Denver, and DAVID MICHAUD, Chief of Police for the Denver Police Department,

Defendants,

and

NICHOLAS GROVE and PHIL STANFORD, Denver Police Officers,

Intervenors.

THIS MATTER comes before the Court pursuant to Plaintiff's Complaint filed December 2, 1997. Plaintiff seeks disclosure of the Denver Police Department's internal investigation records arising out of events that occurred on March 26, 1997, when Denver police arrested Gil F. Webb II for auto theft and vehicular homicide. This incident was widely covered in the media. The Court, having reviewed the file, the pleadings and being fully advised, FINDS AND ORDERS as follows:

I. INTRODUCTION

1. Plaintiff brought this action under the Colorado Open Records Act, C.R.S. § 24-72-201, et seq. (hereinafter referred to as "CORA") and the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301, et seq. (hereinafter referred to as "CCJRA"). Plaintiff is seeking complete disclosure of the Denver Police Department's Internal Affairs Bureau file (hereinafter referred to as the "IAB File") relating to the investigation of Denver Police Officers Stanford and Grove in order to understand the basis for the Police Department's disciplinary action against them. Jurisdiction is not contested and the standing of the parties is not an issue.

2. On the evening of March 26, 1997, an automobile collision occurred in Denver involving a stolen Ford Mustang and a Denver police cruiser. Rookie Denver Police Officer Ronald DeHerrera was killed in the collision. Gil F. Webb II, a seventeen year old

African American, was arrested and subsequently convicted of causing the death of Officer DeHerrera. A KWGN TV (Channel 2) reporter videotaped events shortly after the crash. This videotape and other media reports raised concerns about the treatment of Mr. Webb by the Denver Police Department and paramedics.

3. A Special Prosecutor, Jefferson County District Attorney Dave Thomas, was appointed to investigate whether criminal charges should be brought against anyone involved in the arrest or care of Mr. Webb. Internal investigations were undertaken by the Denver Police Department and the Denver Health Medical Center. On or about May 27, 1997, the Special Prosecutor decided not to bring criminal charges. Notwithstanding this decision, two Denver Police Department disciplinary hearings were held and upon their conclusion in late July 1997, disciplinary action was taken against Denver Police Officer Phillip Stanford and Denver Police Officer Nicholas Grove. In early August 1997, the Manager of Public Safety, Fidel Montoya, accepted the recommendation of Police Chief Michaud and ordered five-day suspensions of the two officers. Officer Stanford accepted the discipline. Officer Grove has appealed to the Civil Service Commission. A hearing is set for April. Any matters disclosed in the hearing will become public.

4. Plaintiff asserts that since the present system allows the police to investigate themselves, disclosure of the requested information serves the public interest by establishing the credibility (or lack thereof) of the Police Department's investigation of its members. Defendants contend that disclosure of such information compromises the effectiveness of their self-investigation because confidentiality is promised to police officers in an effort to encourage them to come forward with information. Without such assurances, Defendants assert that their self-investigatory process would be undermined and that the public's confidence in the Police Department would be undermined as well. Intervenors contend that they have a right to confidentiality concerning the files.

II. CORA/CCJRA

5. Under CORA, the IAB file is not by definition a "public record." See, C.R.S. § 24-72-202 (6)(a) defining "public records" and exempting "criminal justice records" per § 24-72-202(6)(b). It is a "criminal justice record" as defined in the CCJRA at 24-72-302(4). It is therefore exempt from any CORA disclosure. In making this finding, the Court notes that both the Plaintiff and the Defendant argued principally under the CORA and not the CCJRA. The Court also notes the awkward interrelationship between the CORA and the CCJRA as demonstrated by C.R.S. 24-72-204(2)(a)(I) and 24-72-305(5).

1. City urges that "portions" of the IAB file are "personnel files" per 24-72-302(4.5) of CORA and are exempt from disclosure per 24-72-204(3). While "portions" of the IAB file relate to discipline, this argument is unpersuasive. The fact that a document may be filed in more than one place and that one such place may be protected from disclosure does not necessarily justify suppression of the document. This is particularly so here, where any IAB file document that may find its way into a "personnel file" was first generated elsewhere. In addition, the Court finds CORA inapplicable to its analysis and so the "personnel file" exception is not relevant.

6. The IAB file may be disclosed under the CCJRA unless Defendant establishes that such disclosure would be "contrary to the public interest." C.R.S. 24-72-305. The Court finds that the Defendant has failed to meet this burden. Indeed, as to this case, disclosure promotes the public interest in maintaining confidence in the honesty, integrity and good faith of Denver's Internal Affairs Bureau. The public has viewed the event leading to disciplinary action and is aware of the result. The only thing it does not know is how or why the disciplinary decision was made.

III. INTERVENOR'S PRIVACY RIGHTS

7. Intervenors allege that disclosure would violate their right to privacy or confidentiality. Under Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), a tripartite balancing inquiry must be undertaken by the Court. Consideration must be given to whether:

- 1) The party asserting confidentiality has a legitimate expectation of same;
- 2) disclosure would serve a compelling state interest; and
- 3) disclosure can occur in the least intrusive way.

In evaluating these factors, the Court notes that the Intervenors only have a limited expectation of privacy. Denver City Charter § C5.78-1 and the IAB "Advisement Pursuant to Internal Investigation" allow for disclosure in any appeal. Officer Grove is appealing his discipline. Officer Stanford is not. Intervenors note that C.R.S. 24-72-204(2)(a) and C.R.S. 13-90-107(e) create an expectation of privacy. However, these statutes allow for discretionary disclosure after review by the record's custodian and/or the Court. Moreover, 24-72-204(2)(a) is under CORA and so is inapplicable given the Court's earlier analysis. Also, the information sought to be protected is not "highly personal and sensitive" and its disclosure would not be offensive and objectionable to a reasonable person. Martinelli, supra at 1091. In short, Intervenors' confidentiality argument is unpersuasive in this case.] ✓

IV. OFFICIAL INFORMATION PRIVILEGE

8. The City argues that portions of the IAB file contain information that falls under the common law "official information" privilege which was recognized in Martinelli, supra at 1088. Such a privilege is separate and distinct from the statutory and confidentiality claims discussed above. Martinelli requires a multifaceted balancing test in evaluating documents claimed to be subject to the "official information" privilege. The documents in issue here are mainly the summary and recommendation parts of the IAB file. Without making specific findings as to each enumerated Martinelli factor (but after considering them); the Court concludes that disclosure of these portions of the IAB file (i.e., the

summaries and recommendations) is warranted in this case. The public knows what started the IAB investigation and it knows the results thereof. It is entitled to know what happened in between these two events. Indeed, such disclosure may serve the public interest by showing a conscientious and thorough effort by the IAB.

V. ITEMS REVIEWED

9. The files and documents reviewed by the Court consisted of the following:

- (1) Unedited Channel 2 VHS Videotape;
- (2) Channel 9 VHS Enhanced Videotape;
- (3) Cassette Audiotape of Police Radio Transmissions;
- (4) Cassette Audiotape of Civilian Witness Kevin Miller;
- (5) Cassette Audiotape of Telephone Interview Between IAB Investigator Lt. Murphy and Denver Police Officer J. Dennis;

IAB FILE

- (1) Cover Sheet
- (2) Disciplinary Badge No. 95030 (Stanford);
- (3) Additional Statements Badge No. 95030 (Stanford);
- (4) Disciplinary Badge No. 91042 (Grove);
- (5) Administrative Reports;
- (6) Civilian Statements;
- (7) Police Officer Statements;
- (8) Miscellaneous Supporting Documents.

In addition, the Police Department has a BETA version of the Channel 2 Video in its file. This tape has not been reviewed as the Court does not have the technical ability to view tape in this format.

VI. CONCLUSION

VIDEOTAPES

The Court orders the release of all videotapes that exist in connection with this matter. This information has already been broadcast to the public and there is no reasonable justification for withholding any videotapes from the Plaintiff.

CASSETTE AUDIOTAPES

All cassette audiotapes shall be released. There are no persuasive legal reasons why these items should not be disclosed.

THE IAB FILE

The IAB file shall be released in its entirety. There are no persuasive legal reasons why, in this case, these items should not be disclosed.

To the extent the Court is in the possession of original items to be disclosed, Defendants are instructed to promptly contact the Court and arrange their return (unless they need to be maintained in the file pending appeal).

DONE this 7th day of April, 1998.

BY THE COURT:

Herbert L. Stern III
Herbert L. Stern, III
District Court Judge

cc: Thomas B. Kelley, Esq.
Daniel B. Slattery, Esq.
David J. Bruno, Esq.