



**ACCESS DENIED**

Colorado law enforcement refuses public access

to records of police misconduct



UNIVERSITY of DENVER

STURM COLLEGE OF LAW

*“To fulfill the promise of Colorado’s open records laws – to ensure transparency and accountability in government actions – the Colorado legislature should pass legislation requiring law enforcement agencies to disclose completed internal affairs files in response to CCJRA requests.”*

# **Access Denied:**

Colorado law enforcement refuses public access to records of police misconduct

## **Authors and Researchers:**

Bridget DuPey, J.D. Candidate, 2019

Margaret B. Kwoka, Associate Professor of Law

Christopher McMichael, J.D. Candidate, 2019

## **Additional Researchers:**

Monica Kretzchmar, J.D., 2017

Darren Kaplan, J.D. Candidate, 2018

**University of Denver Sturm College of Law**

## TABLE OF CONTENTS

I.	Executive Summary . . . . .	4
II.	Introduction . . . . .	5
III.	Research Study Methodology . . . . .	5
	A. Requests for Logs of IA Files . . . . .	6
	B. Requests for Specific IA Files . . . . .	7
	1. Naturally Occurring Categories . . . . .	7
	2. Media Coverage . . . . .	8
IV.	Findings . . . . .	8
	A. Access is Extremely Limited . . . . .	9
	B. Categorical Denials. . . . .	9
	C. Research Study Conclusion. . . . .	10
V.	Recommendation. . . . .	10



# I. EXECUTIVE SUMMARY

Despite the Colorado state law permitting discretionary release of law enforcement investigation files of alleged police misconduct under the Colorado Criminal Justice Records Act (CCJRA), most jurisdictions routinely deny public records requests for such files. Although the Colorado Supreme Court has mandated that law enforcement records custodians perform a balancing test on a case-by-case basis to decide whether to release these files, custodians generally deny all requests for files irrespective of the nature of alleged misconduct or the outcome of the investigation.

This report details the independent research study conducted as a student-faculty collaboration at the University of Denver Sturm College of Law to assess the willingness of law enforcement agencies to release internal affairs files. The study includes two “waves” of requests. The first wave of the study sought logs of internal affairs files during the 2015 and 2016 calendar years from various law enforcement agencies across Colorado. The second wave sought specific internal affairs files from those agencies that provided a sufficient list or log during the first wave of requests, as well as requests for a few additional targeted files of particular public interest. The researchers were ultimately unable to obtain a single complete internal affairs file from any jurisdiction included in the study. The vast majority of agencies denied outright the request or failed to respond. Furthermore, the two isolated jurisdictions that offered to process the request assessed cost-prohibitive fees for processing.

Despite state open records laws explicitly intended to promote public transparency and accountability among government actors, this study illustrates that Coloradans remain largely in the dark with regard to allegations and investigations of police misconduct. Indeed, most law enforcement agencies are categorically unwilling to allow public access to internal affairs files. To achieve the intent behind state open records law, the Colorado General Assembly should amend the CCJRA to require public release upon request of completed internal affairs investigations, a policy in line with at least a dozen other states.

## KEY FACTS AND FINDINGS

1. After requesting a list or log of internal affairs files from forty-three law enforcement agencies across Colorado:
  - Twenty-four agencies provided no responsive records.
  - Seven agencies provided a list or log with such little detail to be deemed “minimally transparent.”
  - Five agencies provided a list or log with the amount of detail to be deemed “moderately transparent.”
  - Five agencies provided a list or log with enough detail to be categorized as “substantially transparent.”
2. After requesting sixty-one particular internal affairs files from seventeen agencies across the state, nearly all agencies were unwilling to release a complete file, regardless of the situation or outcome.
3. Although law enforcement agencies have acknowledged that when courts compel them to release internal affairs files for the purposes of discovery it does not have an adverse effect on the integrity of an investigation, they continue to deny citizen requests for such files made under the CCJRA.
4. At least twelve states across the nation have statutory schemes that require the release of law enforcement internal affairs files.
- Seven agencies did not respond to the requests.
- Seven agencies flatly denied the requests.
- One agency provided a duplicate report to the one it sent in the first round of requests.
- Two agencies provided four-figure cost prohibitive figures for releasing the requested files.

## RECOMMENDATION

The Colorado legislature should pass legislation requiring law enforcement agencies to provide completed internal affairs files, with appropriate limited redactions, to the public in response to requests under the CCJRA.

## II. INTRODUCTION

There is a strong public interest in accessing law enforcement agency internal affairs (IA) investigations. IA investigations are inquiries and inspections of criminal justice records related to a law enforcement officer's alleged misconduct, which may include violations of the law and/or department policy. The intent of Colorado's open records laws is to promote the public's interest in holding government accountable by requiring transparency.<sup>1</sup> Files documenting internal affairs investigations into citizen complaints about police misconduct are at the core of the public interest in government transparency and accountability. As one Colorado court described, "the



### ALEXIS ACKER

**Slammed to the floor, face-first, while handcuffed;  
\$100,000 settlement; unable to obtain IA file**

The city of Colorado Springs paid Alexis Acker \$100,000 in May 2016 to settle her claims against a police officer who slammed her to the floor, face-first, while she was handcuffed behind her back in a hospital waiting area. Ms. Acker, then 18, had been detained on suspicion of underage drinking and interfering with an officer. According to news accounts, a video from the 2013 incident shows the officer pushing her into a chair. "When her leg flew up toward his groin area he grabbed her, swung her around and slammed her ... to the floor. The impact broke a tooth and bloodied her face."<sup>44</sup>

An internal investigation by the Colorado Springs Police Department took more than a year and resulted in some type of discipline of the officer that the department has not disclosed. The *Colorado Springs Independent* made several requests for records on the investigation, but they were denied. We also requested the investigation file in this case, and after a month of follow-up, were unable to obtain a response from the agency.

public has a compelling interest in seeing that credible allegations of police officer misconduct are investigated thoroughly, fairly, and diligently, and that the Department's conclusions . . . are well supported."<sup>22</sup> Another Colorado court underscored, "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."<sup>23</sup>

The public interest in IA files is self-evident. Every year, hundreds of IA files across the state involve credible citizen complaints about officer abuse of power, unlawful arrests, harassment, and other on-the-job mistreatment of civilians by law enforcement. It is only through costly and time-consuming litigation that a few members of the public have been able to secure access to IA files.<sup>4</sup> Some law enforcement officials and experts have openly recognized that producing these files for discovery does not innately hinder the integrity of an IA investigation and properly promotes transparency and public accountability for law enforcement.<sup>5</sup> Yet, as this paper shows, Colorado law enforcement agencies routinely deny public records requests for IA records regarding alleged officer misconduct. As will be seen below, even when the alleged misconduct has been widely publicized, public outrage over the incident is high, and law enforcement agrees to a substantial payout of the alleged victim, public access to these files is often denied. This is particularly concerning because obtaining meaningful court review of rejected requests is difficult due to the increasing deference Colorado courts provide toward law enforcement records custodians.<sup>6</sup>

The research described below documents the study methods we employed to obtain IA investigation files from Colorado law enforcement agencies through open records requests. Additionally, this report summarizes our findings related to our research objectives, and concludes with a legislative recommendation that promotes transparency in government and access to public records.

## III. RESEARCH STUDY METHODOLOGY: Requesting Internal Affairs Files from Law Enforcement Agencies Across Colorado

While many state open records requests are governed by the Colorado Open Records Act (CORA), the disclosure of internal affairs files from law enforcement agencies is governed by the Colorado Criminal Justice Records Act (CCJRA). Differences between these two acts are stark. Most importantly, under CORA there is a presumption of access to public records.<sup>7</sup> In contrast, the CCJRA allows for the release of many

categories of files only at the discretion of the department.<sup>8</sup> To assess law enforcement agencies' responses to public records requests for IA information, we made requests under the CCJRA across the state in two distinct waves. In the first wave, we identified law enforcement agencies covering jurisdictions with the greatest population, and we requested lists or logs of all internal affairs investigations that occurred in the 2015 and 2016 calendar years. In the second wave, we targeted those agencies that provided some records identifying their IA investigations for a second CCJRA request, this time for specific IA files. A more in-depth examination of each wave of the process is discussed below.

### A. First Wave of Requests: Lists, Logs, Summaries, or Synopses of Internal Affairs Investigations

To begin an inquiry about the state of access to IA files in Colorado, we submitted a preliminary round of requests to law enforcement agencies asking for any "lists, logs, summaries, synopses, or similar accounts" of all internal affairs investigations conducted during 2015 and 2016. The CCJRA governs approximately 180 different law enforcement agencies. Of those, we targeted forty-three agencies<sup>9</sup> that represent the twenty most populous cities and counties, plus state universities, the Colorado State Patrol and the Colorado Bureau of Investigation. Combined, these agencies cover approximately 80 percent of Colorado's population.

Of the forty-three agencies, more than half either rejected our requests (thirteen agencies)<sup>10</sup> or did not respond in any way (eleven agencies).<sup>11</sup> Only five of the forty-three agencies provided us with what we deemed "substantially transparent" responses.<sup>12</sup> These five "substantially transparent" agencies provided sufficient detail to appreciate the nature of the investigation and how it was resolved. Another five law enforcement agencies provided us with what we deemed to be "moderately transparent," that is, responses that provided some detail, but not enough to appreciate the nature of the investigated matter, and minimal summaries as to the resolution of the investigation.<sup>13</sup> The remaining seven agencies provided us with "minimally transparent" responses.<sup>14</sup> This means the agency provided us with a general list of investigations, but did not include information reflecting the nature of the investigation.

To be clear, these first requests did not target the actual IA files, but just a summary list or log of such investigations. Even as to this basic information, only fourteen agencies provided information useful to the public in assessing the performance of law enforcement agencies and their handling of citizen complaints. We gave the agencies thirty days to respond to these requests, and we made multiple attempts to contact the records custodian at non-responsive agencies.



### **MICHAEL & SUSAN CARDELLA**

#### **Innocent bystanders' car shot by police, access to IA file denied**

Michael and Susan Cardella were sitting inside their parked car just a few blocks from their suburban home when their car was hit by a Castle Rock police officer's stray bullet in February 2013. The officer hit the Cardella's car when firing multiple shots from a semi-automatic AR-15 rifle at the vehicle of an unarmed fleeing burglary suspect. According to Mr. Cardella, a veteran of 35 years of police work, the Castle Rock officer fired at the suspect's approaching SUV, then blindly turned while still discharging his rifle and continued firing at the rear of the vehicle as it drove away. The officer fired four to seven rounds without checking for innocent bystanders in his line of fire, which included not only the Cardellas' vehicle, but also a nearby school, a shopping center, offices, and parking lots.<sup>45</sup> As the Cardellas watched the officer spin and fire, Mr. Cardella covered his wife's body with his own, at which point they both felt the impact of the gunfire "slam" into their vehicle.

The Castle Rock police found the officer's actions were "in conformance with Department policy."<sup>46</sup>

Mr. Cardella sought the IA file related to the shooting of his car. When Castle Rock denied the records request, Mr. Cardella sued for the records and lost.<sup>47</sup> Even years after the underlying criminal case was resolved and the IA investigation was closed, the Castle Rock police department did not even respond to our CCJRA request. In fact, the Castle Rock Police Department did not even respond to our initial request for a log of all IA investigations.



## B. Second Wave of Requests: Specific Files Regarding Internal Affairs Investigations

The second wave of the study targeted agencies that provided sufficiently detailed responses in the first round. Because some of the “minimally transparent” responses did not provide sufficient information to identify particular IA files, we were only able to rely on responses from the first wave to submit requests for specific records to a total of seventeen law enforcement agencies. We utilized two criteria to determine which particular files to request from these seventeen agencies. First, we requested files based on different naturally occurring categories of investigations within the logs, such as files concerning a certain type of incident or the outcome of the investigation. Second, where media accounts of law enforcement behavior matched specific files in the logs, we targeted those files for their heightened public interest.

### 1. Naturally Occurring Categories

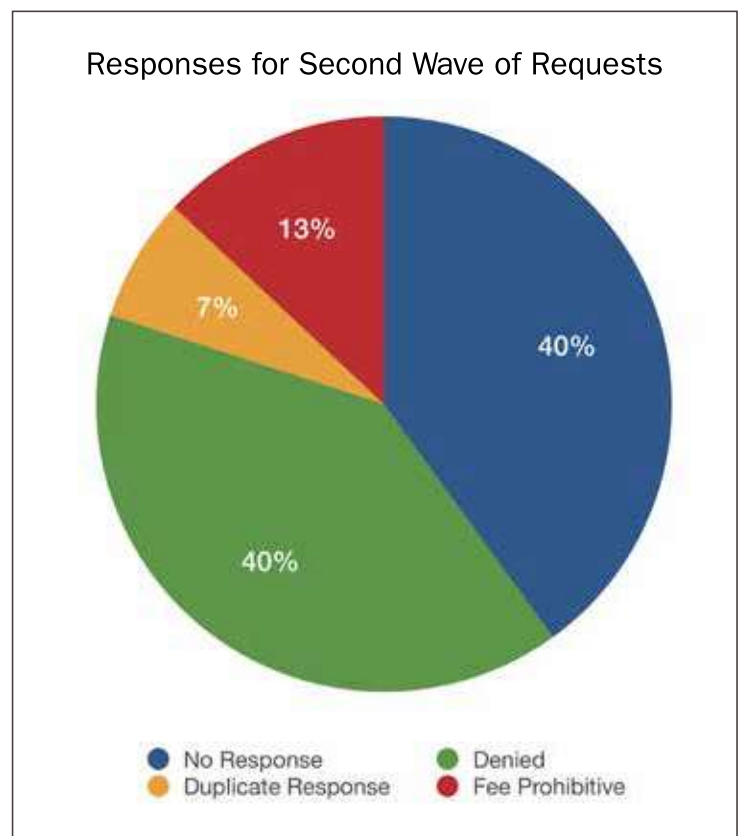
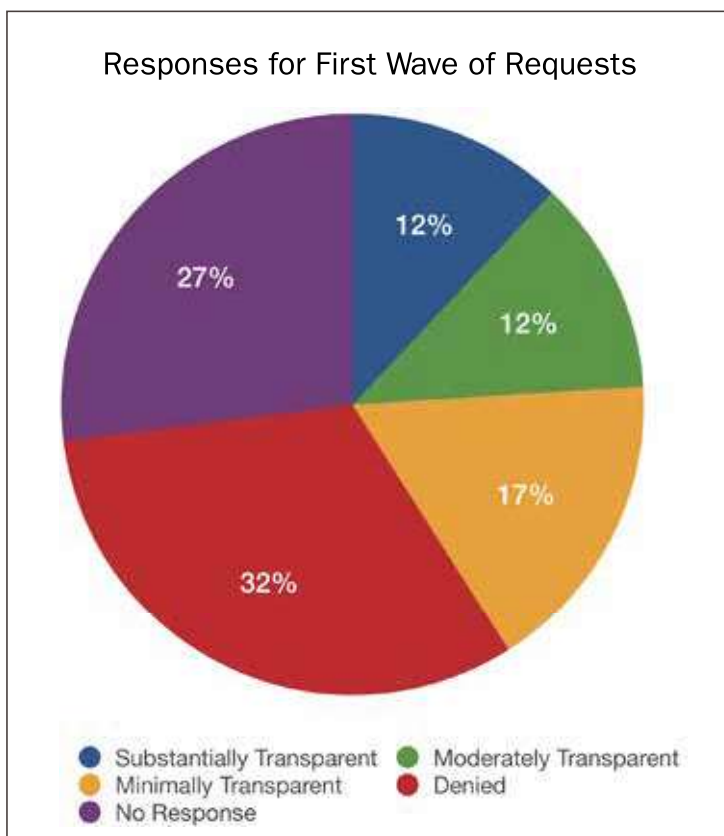
We found three dominant naturally occurring categories of IA investigations from the logs provided by law enforcement agencies: (1) type of incident under investigation; (2) outcome of the investigation; and (3) party bringing the claim against the law enforcement employee. Each of these categorizations are explained in turn.

First, many of the logs revealed the type of incident that purportedly occurred. Law enforcement officers may be investigated for myriad reasons, ranging from officer deviations

from personnel policies to serious incidents in which officer behavior could result in criminal or civil charges. When such incidents include allegations of excessive force, discrimination, theft, or unlawful detention, they raise questions about abuse of police power against a civilian. As such, there is often a strong public interest in obtaining investigatory files related to those cases. Conversely, minor transgressions can involve policy violations, misuse of department property, traffic accidents, and incidents of “conduct unbecoming” of an officer. We requested both minor and serious incidents to test whether law enforcement agencies are more willing to release certain files depending on the seriousness of a particular incident.

Second, some investigations were categorized based on the outcome of the incident. The investigation logs we received generally listed one of two outcomes: unfounded/exonerated and sustained. Investigations considered unfounded/exonerated occur when the department deems the incident giving rise to the complaint to be meritless. In contrast, a sustained investigation indicates that the department investigated the incident and determined that the officer deserved a reprimand for his or her conduct. We hypothesized that an agency may be more willing to release files based on whether a complaint was sustained or unfounded.

Finally, some investigations were categorized by the type of party bringing the complaint. Members of the public might complain about an officer’s conduct while they are questioned, detained, or arrested, and inmates might complain about their treatment in an agency-run facility. The type of party raising the complaint may indicate public interest in holding the agen-



cy accountable for its actions. Investigations may also begin as a matter of agency policy. Those investigations initiated by the agency itself are important because the agency is ostensibly acting to hold itself accountable for situations where an officer abused police authority or infringed on the rights of citizens.

## 2. Media Coverage Regarding Police Misconduct

After researching the law enforcement agencies that provided us with a list or log of internal affairs investigations, we found several incidents that received some sort of media coverage. We found several stories of alleged officer misconduct by members of the Denver Sheriff's Department and the University of Colorado – Boulder Police Unit. We requested the specific internal affairs files that garnered media attention because press coverage is a strong indicator of public interest in the incident being investigated.

For instance, on November 11, 2015, six deputies restrained a homeless pre-trial detainee, Michael Marshall, at the Downtown Denver Detention Center. The deputies' actions caused Mr. Marshall to choke on his own vomit, resulting in his death. An autopsy report revealed that Mr. Marshall sustained multiple blunt force traumas to his chest, face, and back. The coroner subsequently ruled Mr. Marshall's death a homicide. This incident fell into the "serious" and "sustained" categories, and resulted in a \$4.6 million dollar payout to Mr. Marshall's family.<sup>15</sup>

Beyond incidents reported in the logs received in response to the first wave of requests, we also requested six IA files from five jurisdictions regarding alleged police misconduct for which there was significant media coverage, and where the agency internal affair investigation resulted in an unfounded or exonerated result, but nonetheless provided a substantial monetary settlement to the alleged victim.<sup>16</sup> A particularly strong public interest exists in releasing these files not only because press coverage is a good indicator of public interest, but also because taxpayers funded a substantial monetary settlement under circumstances in which law enforcement found no misconduct. There is strong public interest in understanding the justification for expending taxpayer money when law enforcement believes their officers did nothing wrong. Three of the incidents at issue are highlighted in text boxes in this report.

## IV. FINDINGS

Based on the research and categorization discussed above, we requested sixty-one specific internal affairs files from seventeen law enforcement agencies across the state.<sup>17</sup>



*Darsean Kelley moments before officer tased in him the back.*

### **DARSEAN KELLEY**

#### **Tased in the back, \$110,000 settlement, access to IA file denied**

In July 2017, the City of Aurora paid Darsean Kelley \$110,000 to settle claims against an Aurora police officer who tased him in the back. Mr. Kelley was walking down the sidewalk when he was ordered to stop and put his hands in the air by an Aurora police officer who wanted to investigate whether Mr. Kelley was engaged in criminal activity. Mr. Kelley had done nothing wrong and was not a suspect sought by the police. Mr. Kelley verbally protested the encounter while still complying with police directives to turn around and place his hands in the air. An Aurora police officer nonetheless tased Mr. Kelley in the back, causing him to fall straight back, hit his head on the concrete, and cry out in pain. A video of the incident has been viewed thousands of times,<sup>48</sup> and Mr. Kelley's case has generated nationwide media coverage.<sup>49</sup>

The Aurora police investigated the incident and found that the officer's actions were "reasonable, appropriate and within policy." Nevertheless, in exchange for Mr. Kelley's agreement not to file a lawsuit, the City of Aurora paid him \$110,000. In response to our open records request, the City of Aurora refused to provide us the internal affairs file. As such, the City of Aurora denied the public the opportunity to know how the city justified such a significant expenditure of taxpayer money and yet found no officer wrongdoing. The case caused the Aurora Sentinel to call for a change to Aurora's police misconduct review process.<sup>50</sup>

## A. Access to IA Files is Extremely Limited in Colorado

While the responses varied greatly, we did not obtain a completed internal affairs file from any of the seventeen law enforcement agencies. Seven jurisdictions<sup>18</sup> did not respond to our requests after attempting to follow up with the agencies multiple times. Seven others<sup>19</sup> flatly denied the requests. One agency<sup>20</sup> provided us with a duplicative summary report that it sent during the first wave of requests and two other agencies<sup>21</sup> appeared willing to consider the release of the actual files, after initially receiving our requests, but they estimated four-figure fees that made fully exploring the option cost prohibitive.

## B. Categorical Denials

Many agencies categorically deny access to IA files without regard to the public interest in a particular file. This approach violates the Colorado Supreme Court's decision in *Harris v. Denver Post Corp.*,<sup>22</sup> which mandates that records custodians make determinations about the release of records under the CCJRA on a case-by-case basis. Custodians must weigh five factors in reaching their decision to release or not release files: (1) the privacy interests of individuals who may be impacted by a decision to allow for inspection; (2) the agency's interest in keeping confidential information confidential; (3) the agency's interest in pursuing ongoing investigations without compromising them; (4) the public purpose to be served in allowing inspection; and (5) any other pertinent considerations

### **PING WANG**

#### **Accused a police detective of lying in an affidavit related to her arrest; \$150,000 settlement; access to IA file denied**

The city of Greeley agreed to pay massage business owner Ping Wang \$150,000 in March 2017 to settle her lawsuit against a police detective whom she accused of blatantly lying in an affidavit to support her arrest on suspicion of prostitution and running a place of prostitution. A jury found Ms. Wang not guilty of the charges against her, and the detective later resigned from the police department "to pursue other opportunities." The city, however, did not admit fault in the settlement and Greeley's police chief said the detective was not fired because of the lawsuit.<sup>51</sup>

The police department denied *The Greeley Tribune's* request for internal affairs records on the case, telling the newspaper that releasing the files "would not be in the public interest." Making internal affairs files public could have a "chilling effect" on future investigations, the police chief said.<sup>52</sup> Likewise, our request for the investigative file in this case was denied.

relevant to the circumstances of the particular request.<sup>23</sup> Thus, law enforcement agencies may not merely dismiss requests for internal affairs files without weighing these considerations for each file requested.

In the *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department* decision, the Colorado Supreme Court also noted that records custodians' power to redact is "an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary."<sup>24</sup> The Court directed custodians to "redact sparingly to promote the CCJRA's preference for public disclosure."<sup>25</sup>

Yet, of the seven agencies that denied our request to access particular files, nearly half of them made that determination without individually discussing reasons for denying each particular file we requested.<sup>26</sup> These three jurisdictions, which include the University of Colorado – Boulder Police Unit, the Aurora Police Department, and the Littleton Police Department, provided a letter with a general explanation of the rationale behind denying the requests without consideration of the public interest in individual files. Jurisdictions categorically denying access to records often generically cited the privacy concerns of police involved in the alleged misconduct to justify the denial without citation to any legal authority.<sup>27</sup> Indeed, several media reports reveal that this response from law enforcement agencies is far from uncommon.<sup>28</sup> However, in Colorado, courts have repeatedly dismissed the notion that an officer's privacy interest outweighs the public interest in learning the details of an investigation into police conduct that occurred as part of a police officers' official duties.<sup>29</sup>

The categorical denial letters we received utilized the same or remarkably similar language in denying the requests, so much so that it was difficult to spot differences between the letters. For example, both the Littleton Police Department and the Aurora Police Department included the following language in their denial letters: "A police officer has a legitimate expectation of privacy in any materials or information that may exist within his or her personnel and internal affairs file, including the discipline imposed related to a finding of a policy violation." Neither letter cited a specific source from which this language originated. Those rejection letters that recited the balancing test, did not reflect that the custodian actually performed the balancing for each specific file we requested. In fact, one law enforcement department candidly stated, "While each investigation pertains to different facts and circumstance, in all instances the release of the internal affairs investigative material would negatively impact the privacy interests of the officers and third parties involved."<sup>30</sup>

These denials are particularly concerning because, as mentioned above, obtaining meaningful court review of rejected requests is increasingly difficult in Colorado.<sup>31</sup> In 2008, the Colorado Supreme Court held that reviewing courts are to



give deference to a records custodians' refusal to provide a record under the CCJRA, so long as the records custodian has engaged in the required balancing test.<sup>32</sup> The reviewing court must provide deference to the custodian's reason for nondisclosure and may not substitute its own opinion for that of the custodian.<sup>33</sup>

Moreover, we found that in denying access to IA files, law enforcement agencies did not distinguish investigations that were serious from those that were minor, or those that garnered public attention from those that went unnoticed. For instance, we requested a file from the Aurora Police Department regarding an internal affairs investigation arising out of an officer improperly investigating a traffic accident involving two civilians. We categorized this incident as "minor," but the department still determined that the privacy concerns outweighed the public interest. Moreover, the Aurora Police Department sent us a single response that acted as a categorical denial for all four files we requested, although the other three incidents were of a more serious nature.

Not only did we encounter barriers in the form of categorical rejections and lack of responses, but cost barriers also arose throughout our research study. While the CCJRA provides for a discretionary fee waiver, it mandates that agencies may only assess "reasonable fees, not to exceed actual costs, including but not limited to personnel and equipment for the search, retrieval, and redaction of criminal justice records."<sup>34</sup> Several agencies denied our requests for fee waivers.<sup>35</sup> For instance, the Denver Sheriff's Department and the Denver Police Department initially told us they were willing to release at least some parts of the files we requested, but they could not waive fees. The records custodian from each agency estimated the cost at approximately \$1,500 for eight files, explaining that it would take thirty-five to fifty hours to redact the files at a rate of \$30 per hour. When we inquired into the cost of a single file, as opposed to the eight files initially requested, the records custodian merely offered to send us summary documents without providing a figure for only one of the files. The Denver Police Department was willing to release one of the summary documents for free, but was only willing to provide that document after numerous negotiations and informed us that we would be charged a fee if we wanted to obtain the other requested summary documents. These barriers are extremely problematic for those who cannot afford such high costs.

### C. Research Study Conclusion

After requesting some form of documentation regarding internal affairs investigations from forty-three law enforcement agencies across the state of Colorado, we were unable to receive a single full and complete investigation file. While two departments indicated a willingness to release some IA file materials subject to cost-prohibitive fees, the remaining jurisdictions merely did not respond, denied our request, or sent a duplicative list of investigations from the 2015 and 2016 cal-

endar years. This research study indicates that many Colorado law enforcement agencies simply are unwilling to provide the public with such files, instead finding that the officer's privacy interests and other considerations categorically outweigh the public's interest in disclosure. This systematic denial of requests for files results in a lack of transparency and does not allow the public to hold law enforcement agencies accountable for their actions.

## V. RECOMMENDATION: Public Access to Law Enforcement Agencies' Internal Affairs Files Serves the Public Interest in Government Transparency and Accountability

Even as other states require mandatory release of law enforcement files and records, Coloradans often remain in the dark as records custodians routinely reject requests for such files. Indeed, as our study illustrates, many Colorado law enforcement agencies are unwilling to release any sort of internal affairs files. This lack of transparency among Colorado law enforcement agencies hinders accountability and public trust in these organizations and is directly contrary to the purpose of Colorado's open records laws. To increase police accountability and transparency, Colorado should follow the lead of those states where the release of such files is mandatory.

For instance, in Georgia, the legislature mandates that law enforcement agencies must release requested employee disciplinary files if the investigation has been closed for ten or more days.<sup>36</sup> While the Georgia General Assembly allows for the redaction of information in these records, such redactions are limited to Social Security numbers, birthdates, financial information, insurance or medical information, phone numbers, personal e-mail address, mother's birth name, utility account information, passwords, home addresses, and identities of immediate family members.<sup>37</sup> If records custodians refuse to release these files ten days after the investigation has been closed, they could face criminal or civil penalties. This includes misdemeanor charges carrying penalties of up to \$1,000 or civil penalties of up to \$2,500 for repeat offenses within one calendar year.

When he served as Georgia's attorney general in 2014, Sam Olens released a statement intended to familiarize Georgia law enforcement agencies with the state's policies on records requests, also known as the "sunshine laws."<sup>38</sup> "Georgia's 'sunshine laws' are critical to our citizens' ability to observe the workings of their government," Mr. Olens wrote. He went on to say, "As members of the law enforcement community, we must be ever vigilant to ensure that the public we are sworn to protect and to serve is also protected in its rights to know what the government is doing." Such a policy stance illustrates that a strong public interest exists in allowing for

access to information and records, as opposed to blanket denials of such requests.

Georgia is not alone in its progressive stance toward promoting law enforcement accountability and transparency. At least eleven other states have enacted similar policies that show a public interest exists in releasing these files.<sup>39</sup> For example, the Wisconsin General Assembly has codified a similar stance, providing that the public records laws “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business.”<sup>40</sup> Moreover, the Wisconsin public records statutory scheme further states that, “the denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”<sup>41</sup> The only constraint Wisconsin places on the release of internal affairs files is when the investigation remains ongoing.<sup>42</sup> However, once a department has concluded an investigation, the files must be released upon request.

While states across the nation have enacted policies with a presumption of releasing law enforcement disciplinary files, Colorado law enforcement agencies continue to routinely deny such requests. In fact, several lawsuits have been filed in Colorado regarding this blanket denial policy.<sup>43</sup> Still, as described above, the policy persists. While some – but not all – of these lawsuits have been successful, Colorado citizens involved in such incidents should not be required (and most do not have the financial means) to file legal actions just to access these documents.

To fulfill the promise of Colorado’s open records laws – to ensure transparency and accountability in government actions – the Colorado legislature should pass legislation requiring law enforcement agencies to disclose completed internal affairs files in response to CCJRA requests. Legislation should allow for appropriate, limited redactions, including to protect witnesses and victims and to prevent disclosure of the private contact information of officers. Without such legislation, the public will remain in the dark even when it comes to police conduct.

## ENDNOTES

1 See COLO. REV. STAT. § 24-72-301(1) (2017).

2 *Nash v. Whitman*, Case No. 05-CV-4500 at slip op. at 5 (Denver County Dist. Ct. Dec. 7, 2005).

3 *City of Loveland v. Loveland Publ’g Corp.*, No. 03-CV-513, 2003 WL 23741694 at \*2 (Larimer County Dist. Ct. June 16, 2003).

4 See, e.g., *Krantz v. Dulacki*, Case No. 14-CV-34756 (Denver Dist. Ct. Apr. 30, 2015); *Nash*, Case No. 05-CV-4500 at slip op. at 3 (collecting cases).

5 See, e.g., International Association of Chiefs of Police, Best Practices Guide, *Internal Affairs: A Strategy for Smaller Departments*, at p. 6, available at <http://www.theiacp.org/portals/0/pdfs/BP-InternalAffairs.pdf>;

*Nash*, Case No. 05-CV-4500 at slip op. at 4.

6 See *Freedom Colo. Information, Inc. v. El Paso Cty. Sheriff’s Dept.*, 196 P.3d 892, 895 (Colo. 2008) holding that a records custodian’s decision regarding release of records under the CCJRA is not reviewable so long as the custo-

dian has engaged in the required balancing of public and private interests).

7 See generally COLO. REV. STAT. § 24-72-204 (2017).

8 COLO. REV. STAT. § 24-72-305 (2017).

9 The law enforcement agencies include: Denver Police Department, Boulder Police Department, Denver Sheriff’s Department, Parker Police Department, University of Colorado at Boulder Police, Aurora Police Department, Greeley Police Department, Larimer County Sheriff, Morgan County Sheriff, Pueblo Police Department, Colorado Bureau of Investigations, Colorado State Patrol, Colorado State University Campus Police, Grand Junction Police Department, La Plata County Sheriff, Lakewood Police Department, Littleton Police Department, Adams County Sheriff, Arapahoe County Sheriff, Arvada Police Department, Broomfield Police Department, Castle Rock Police Department, Commerce City Police Department, Delta County Sheriff, Eagle County Sheriff, El Paso County Sheriff, Fort Collins Police Department, Garfield County Sheriff, Loveland Police Department, Pueblo County Sheriff, Summit County Sheriff, Weld County Sheriff, Colorado Department of Corrections, Colorado Springs Police Department, Douglas County Sheriff, Fremont County Sheriff, Longmont Police Department, Mesa County Sheriff, Montrose County Sheriff, Thornton Police Department, University of Colorado at Colorado Springs Police, University of Colorado at Denver Police, and Westminster Police Department.

10 The following agencies denied our requests: Adams County Sheriff, Arapaho County Sheriff, Broomfield Police Department, Castle Rock Police Department, Delta County Sheriff, Eagle County Sheriff, El Paso County Sheriff, Fort Collins Police Department, Garfield County Sheriff, Loveland Police Department, Pueblo County Sheriff, Summit County Sheriff, and Weld County Sheriff.

11 The following agencies gave no response: Colorado Department of Corrections, Colorado Springs Police Department, Douglas County Sheriff, Fremont County Sheriff, Longmont Police Department, Mesa County Sheriff, Montrose County Sheriff, Thornton Police Department, University of Colorado at Colorado Springs, University of Colorado at Denver, and Westminster Police Department.

12 The following agencies gave “substantially transparent” responses: Boulder Police Department, Denver Police Department, Denver Sheriff Department, Parker Police Department, and University of Colorado Boulder.

13 The following agencies gave “moderately transparent” responses: Aurora Police Department, Greeley Police Department, Larimer County, Morgan County, and Pueblo Police Department.

14 The following agencies gave “minimally transparent” responses: Colorado Bureau of Investigations, Colorado State Patrol, Colorado State University Campus Police, Grand Junction Police Department, La Plata County Sheriff, Lakewood Police Department, and Littleton Police Department. Additionally, two agencies—Arvada Police Department and Commerce City Police Department—assessed fees to process and release records, and we thus omitted them from the categorization as we were not able to pay the fees to examine the records they were willing to release.

15 Noelle Phillips & Danika Worthington, *Denver agrees to pay \$4.6 million settlement to family of inmate killed in 2015 by sheriff’s deputies*, DENVER POST, Nov. 1, 2017.

16 We requested these IA files from the Greeley Police Department, Aurora Police Department, Castle Rock Police Department, Colorado Springs Police Department, and Englewood Police Department. We requested an IA file from the Greeley PD for the investigation of a claim made by a woman alleging Detective Jared Weeks lied in an affidavit on her arrest for suspicion of prostitution. We requested two particular IA files from Aurora PD pertaining to two separate incidents. The first involved an incident where Officer Paul Jerothe shot and killed an unarmed man, Naeschylus Carter-Vinzant, in 2015. The second involved an incident where a citizen, Darsean Kelly, was shocked with a stun gun by Aurora officers in 2016. We requested an IA file from Castle Rock PD for the investigation of an incident where Michael and Susan Cardella’s vehicle was struck by a bullet fired by a Castle Rock officer (described in the text box above). We requested an IA file from Colorado Springs PD for an investigation for the investigation

of an incident where Officer Tyler Walker used force on Alexis Acker after she had been arrested for assault on an officer. Finally, we requested an IA file from Englewood PD for an investigation of an incident where former Officer Megan Feebeck made a false entry or falsely altered a public record.

17 The seventeen law enforcement agencies we sent requests to include: Denver Police Department, University of Colorado – Boulder Police Unit, Aurora Police Department, Greeley Police Department, Morgan County Sheriff's Department, Littleton Police Department, Boulder Police Department, Parker Police Department, Pueblo Police Department, Colorado State University Campus Police, Grand Junction Police Department, La Plata County Sheriff's Department, Denver Sheriff's Department, Castle Rock Police Department, Colorado Springs Police Department, Englewood Police Department, and Larimer County Sheriff's Office.

18 These jurisdictions include: Boulder Police Department, Parker Police Department, Pueblo Police Department, Colorado State Campus Police, Grand Junction Police Department, Colorado Springs Police Department and La Plata County Sheriff.

19 These jurisdictions include: University of Colorado – Boulder Police, Aurora Police Department, Greeley Police Department, Morgan County Police Department, Englewood Police Department, Castle Rock Police Department and Littleton Police Department. While Castle Rock Police Department denied our request to release the IA file, it did provide us documents from the 18th Judicial District Critical Response Team (CRT). These documents do not reflect the Castle Rock's Police Department's internal response to the incident.

20 Larimer County Sheriff provided us with a duplicative report.

21 These jurisdictions include: Denver Sheriff's Department and Denver Police Department.

22 123 P.3d 1166, 1175 (Colo. 2005).

23 *Id.*

24 196 P.3d 892, 900 n.3 (Colo. 2008).

25 *Id.*

26 These jurisdictions include: University of Colorado – Boulder Police, Aurora Police Department, and Littleton Police Department.

27 Aurora Police Department, Greeley Police Department, Morgan County Sheriff's Department, Englewood Police Department, and Littleton Police Department all cited privacy concerns in their denial letters. These letters utilized the same or remarkably similar language in denying the requests, so much so that it was difficult to spot differences between the letters. For example, both Littleton Police Department and Aurora Police Department included the following language in its denial letter: "A police officer has a legitimate expectation of privacy in any materials or information that may exist within his or her personnel and internal affairs file, including the discipline imposed related to a finding of a policy violation." Neither letter cited to specific source from which this language originated.

28 Brandon Johansson, *Aurora police increase cop discipline reports, but ACLU says changes fall short of what's needed*, AURORA SENTINEL, Dec. 6, 2017; Tommy Simmons, *Greeley Police Department joins others across the state in denying access to internal affairs investigations related to officer misconduct*, GREELEY TRIBUNE, Apr. 12, 2017; Paul Zubeck, *CPD withholds investigation of cop who cost taxpayers \$100,000 in lawsuit settlement*, COLORADO SPRINGS INDEPENDENT, July 20, 2016.

29 Every court in Colorado to consider the issue has determined that internal investigation files concerning only police officers' official on-duty conduct are not "personnel files" prohibited from disclosure under CORA. See, e.g., *ACLU v. City & Cty. of Denver*, 97-CV-7170, slip op. at 2 n.1 (Denver Dist. Ct. April 7, 1998) (finding that "personnel files" exemption of CORA does not apply to IAB files and "is not relevant"), attached as Ex. 4, *aff'd* *ACLU v. Grove*, 98CA0981, slip op. (Colo. Ct. App. Oct. 21, 1999), attached as Ex 5; Ex. 2 (*Nash v. Whitman*) at 4 ("IAB files do not contain personnel files."). Further, a reasonable public law enforcement officer "should expect his actions to be subject to public scrutiny. What he did or did not do in public, in front of witnesses, is not personal and sensitive such that there is

a significant public policy in not making them available to the public." Ex. 1 (*City of Colo. Springs v. ACLU*) at 3.

30 Deputy Sheriff David Martin of the Morgan County Sheriff's Department included this statement in his denial of our request.

31 See *Freedom Colo.*, 196 P.3d at 895; *Madrigal v. City of Aurora*, 349 P.2d 297 (Colo. App. 2014).

32 *Freedom Colo.*, 196 P.3d at 895.

33 *Id.*

34 COLO. REV. STAT. § 24-72-306(1) (2017).

35 While the Denver Police Department indicated that it was willing to release the six files we requested, it would not provide us with a fee waiver. It estimated that the cost of the six files we requested would be approximately \$1,000 to \$1,500 to perform the proper redactions at a rate of \$30 per hour.

36 GA. CODE ANN. 50-18-72(a)(8) (2017).

37 *Id.* at 50-18-72(a)(20).

38 *Georgia Law Enforcement and the Open Records Act: A Law Enforcement Guide to Open Records in Georgia*, Report (2014), available at [https://law.georgia.gov/sites/law.georgia.gov/files/related\\_files/site\\_page/Blue-Book2014.pdf](https://law.georgia.gov/sites/law.georgia.gov/files/related_files/site_page/Blue-Book2014.pdf).

39 Disciplinary Records, WNYC, <https://project.wnyc.org/disciplinary-records/> (reporting a survey of all state laws on access to police disciplinary records, and classifying Alabama, Arizona, Connecticut, Florida, Georgia, Maine, Minnesota, North Dakota, Ohio, Utah, Washington, and Wisconsin as states in which these records are public).

40 WIS. STAT. § 19.31 (2017).

41 *Id.*

42 *Id.* § 19.31(10)(b).

43 See *Madrigal*, 349 P.2d 297; *Krantz v. Dulacki*, Case No. 14-CV-34756 (Denver Dist. Ct. Apr. 30, 2015); *Cardella v. Town of Castle Rock*, Case. No. 2013CV30844, (Douglas County Dist. Ct. Nov. 20, 2013) (discussed in text box above); *Nash v. Whitman*, Case No. 05-CV-4500 (Denver County Dist. Ct. Dec. 7, 2005).

44 Pam Zubeck, *CSPD withholds investigation of cop who cost taxpayers \$100,000 in lawsuit settlement*, COLORADO SPRINGS INDEPENDENT, July 20, 2016

45 *Cardella v. Town of Castle Rock*, Case. No. 2013CV30844, (Douglas County Dist. Ct. Nov. 20, 2013).

46 John Ferrugia, *Town upholds Castle Rock officer's use of force that endangered an innocent, retired cop and his wife*, 7News, Sep. 29, 2013.

47 Virginia Grantier, *Judge rules for town in open-records case*, CASTLE ROCK NEWS-PRESS, Feb. 24, 2014; Sadie Gurman, *Castle Rock couple sues town for records in February police shooting*, DENVER POST, Nov. 20, 2013.

48 Youtube, *Knew his rights. Got tased anyway*, Sept. 9, 2016, available at <https://www.youtube.com/watch?v=G4fUElyR9yw>

49 See, e.g., Michael Roberts, *See Darsean Kelley says "I know my rights" just before Aurora cop tases him*, WESTWORD, Dec. 5, 2016; Anica Padilla, *Aurora to pay \$110,000 to settle lawsuit after unlawfully detaining, using stun gun*, FOX 31 NEWS, July 27, 2017; Tom McGhee, *Aurora agrees to pay \$110,000 to man police shocked with stun gun*, DENVER POST, July 28, 2017.

50 Aurora Sentinel Editorial Board, *Disturbing ACLU video shows Aurora must change police misconduct review process*, AURORA SENTINEL, Sept. 15, 2016 ("What this incident is now, is disturbing and to.

51 Tommy Simmons, *City of Greeley agrees to pay woman \$150,000 to settle federal lawsuit against former Greeley police officer*, THE GREELEY TRIBUNE, Mar. 8, 2017.

52 Tommy Simmons, *Greeley Police Department joins others across the state in denying access to internal affairs investigations related to officer misconduct*, THE GREELEY TRIBUNE, Apr. 12, 2017.



UNIVERSITY *of*  
DENVER

---

STURM COLLEGE OF LAW