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District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	Filed NOV - 9 2012 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1290 Broadway, Suite 900 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 22

NOTICE OF DEFENSE POSITION WITH RESPECT TO ORDER RELATING TO DISCLOSURE OF RECORDS BY UNIVERSITY OF COLORADO PURSUANT TO COLORADO OPEN RECORDS ACT [P-002]

At the hearing on October 25, 2012, this Court asked the defense to submit a written pleading on its position regarding whether the Court's Order Relating to Disclosure of Records by University of Colorado Pursuant to Colorado Open Records Act [P-002] should remain in effect, and alerting the Court to issues it believes are likely to arise if the court lifts or modifies that order. In response to this request, James Holmes, through counsel, respectfully submits the following:

1. The Court originally issued its order regarding P-002 prohibiting the University of Colorado from responding to CORA requests on July 23, 2012, finding that disclosure of the requested records would be contrary to the public interest because it would impede an ongoing investigation. *See* Order P-002, para. 7; *Martinelli v. District Court*, 612 P.2d 1083, 1093 (Colo. 1980) (interpreting C.R.S. § 24-72-202(1)(c) as "expressive of the legislative intent that a court should consider and weigh whether disclosure would be contrary to the public interest.").

2. First, the defense's position is that this order must remain in effect.

3. No party has requested that this order be modified or vacated. Thus, there is no reason for the Court to lift or change its order *sua sponte*.

4. Moreover, there has been no change in circumstances justifying the release of the documents. There is no dispute that the original justification for the court's order – the risk that release of the requested documents would impede an ongoing investigation – continues to exist and remains of paramount concern.

5. Indeed, this Court recently recognized that the investigation in this case continues to be ongoing when it denied public access to the affidavits of probable cause, search warrants, and arrest warrants. *See* Order Re: Media's Motion to Unseal Redacted Information [C-13)], p. 10. The Court found that both the defense and the government have made representations that release of such documents would be harmful to their respective ongoing investigations and concluded that continued suppression of these documents was necessary to maintain "the integrity of the investigation and the proceedings." It further found that "disclosure of such documents would be imprudent at this stage of the proceedings where the preliminary proof evident/presumption great hearing has yet to take place." *Id.*

6. Because the majority of the documents that are the subject of the CORA requests at issue are likely to contain information that has not yet been released into the public domain, and because the investigation in this case is ongoing, there is no change in circumstances and this Court should maintain its original order at this stage in the proceedings. *Cf. Blesch v. Denver Pub. Co.*, 62 P.3d 1060, 1065 (Colo. 2002) (finding that passage of time and continued release of law enforcement investigatory reports were relevant changes in circumstance that must be considered when evaluating whether original judgment prohibiting release of autopsy reports in Columbine shooting incident under CORA as contrary to public interest should be modified).

7. Second, if the Court disagrees and vacates or modifies its original order, the defense anticipates that significant litigation will ensue over each of the individual CORA requests received by the University of Colorado.

8. For example, many of the requested documents are likely to be protected under various state and federal privilege or privacy laws, such as the Family Educational Records Privacy Act ("FERPA") (20 U.S.C.A. § 1232g), the Health Insurance Portability and Accountability Act ("HIPAA") (45 C.F.R. § 164.522 *et seq.*), C.R.S. § 13-90-107, or the Criminal Justice Records Act (C.R.S. § 13-72-301 *et seq.*), or may be subject to a CORA exception. Thus, before any documents are released in response to any of the outstanding CORA requests, a judicial determination about the applicability of these laws must be made with respect to each individual document that is subject to each of the 38 outstanding CORA requests.[1]

9. Additionally, the Colorado Supreme Court has made clear that each individual document that is the subject of an open records request must qualify as a "public record" before its release is sanctioned under CORA. *See Denver Publishing Company v. Board of County Commissioners*, 121 P.3d 190, 199 (Colo. 2005). The Court emphasized that such an injury is "content-driven" and that a particular document must "relate to the performance of public functions or involve the receipt or expenditure of public funds" to qualify as a public record that is subject to CORA. *Id.*

10. The defense has not seen the majority of the documents that have been requested, but after reviewing the list of requests provided by the University of Colorado, it believes that many of them will not meet this definition of a "public record" and are therefore not releasable under CORA. For example, several of the requests demand access to all of Mr. Holmes' email

[1] The University of Colorado recently provided the parties with an updated list of CORA requests it has received. As of October 31, 2012, there are 38 outstanding requests.

correspondence from his university account, or for a variety of electronic correspondence sent or received by university email accounts referencing Mr. Holmes. The defense anticipates that a vast majority of this correspondence does not relate to the performance of public functions or involve the receipt or expenditure of public funds and therefore does not fall within the purview of CORA. *See Denver Publishing Company*, 121 P.3d at 192 (holding that email messages maintained by Arapahoe County and exchanged between public employees were not public records unless the content of an individual email "addresses public functions or the receipt or expenditure of public funds.").

11. However, the defense believes that the only way to make such a determination is through a document-by-document, content-driven inquiry with respect to each of the requests.

Mr. Holmes files this notice, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

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Dated: November 9, 2012

I hereby certify that on November 9, 2012, I

____ mailed, via the United States Mail,
____ faxed, or
__√__ hand-delivered

a true and correct copy of the above and foregoing document to:

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