REDACTED

District Court, Arapahoe County, Colorado 7325 S. Potomac Street Centennial, CO 80112	2014 JUL 21 AM 10:35 *** COURT USE ONLY ***
THE PEOPLE OF THE CITY OF AURORA, Plaintiff v. **JAMES HOLMES**, Defendant	Case No. **12CR1522** Division 201
City of Aurora David Lathers, Reg. No. 19265 Assistant City Attorney 15151 E. Alameda Parkway Aurora, Colorado 80012 Phone: 303-739-7030 Fax: 303-739-7042	

MOTION TO QUASH, IN WHOLE OR IN PART, SUBPOENA DUCES TECUM DSDT – 3 (REDACTED)

COMES NOW the City of Aurora ("City"), by and through the Office of the City Attorney, to hereby move this Court to quash the subpoena duces tecem in the instant matter and as grounds therefore the City would state as follows:

1. Defendant's subpoena demands production of: "... **all** (emphasis added) Aurora Police Department internal affairs investigations of Officer xxxxx xxxxxx, including but not limited to all information concerning a finding that Officer xxxxxxx "made a false or untruthful declaration", as well as **all** (emphasis added) records contained in personnel files of Officer xxxxx xxxxxx that involve allegations of dishonesty or untruthfulness."

LEGAL AUTHORITY

2. The seminal case in Colorado speaking to discovery of officer disciplinary files is *Martinelli v. District Court,* 612 P.@d 1083 (Colo. 1980). That civil case, now over 33 years old and subsequently modified in application to criminal matters, set forth some

fundamental principals still applicable today. *Martinelli* recognized that government self evaluation could be thwarted if investigative files of police officers were readily made public matters. It recognized that witnesses to alleged police abuses might be unlikely to come forward if their identities were not protected. Most prominently, perhaps, the case affirmed that police officers posses a constitutionally protected privacy interest in their personal information contained in personnel records. That case noted that the "right to confidentiality", the officers constitutionally protected privacy interest, "encompasses the power to control what we [meaning police officers] reveal about our intimate selves, to whom, and for what purpose." According to the Court in *People v. Coleman*, 349 N.Y.S.2d 298, 304 (1970), allowing criminal defendants universal and uncritical access to such information risks making the witness box a "slaughterhouse of reputations". *Martinelli* sought to avoid that possibility through the protection of providing *in camera* review to limit production to relevant and material matters only.

3. The request in this matter is a demand for *all* records for the officer. Colorado and federal case law requires the showing of a compelling state interest prior to requiring the production of internal affair records and would in fact limit that production not to *all* records, but rather to records involving only matters of untruthfulness or excessive force. *see, e.g., Denver P.P.A. v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981); and *People v. Walker*, 666 P.2d 113 (Colo. 1983). In the *Walker* case, *supra*, the Court agreed with the *Lichtenstein* Court that a criminal defendant charged with assaulting a police officer was entitled to an *in camera* review and possible release of internal affairs files regarding only the limited issues of excessive force and untruthfulness, whether allegations in those internal affair's files were sustained or not, as those types of matters alone may potentially be relevant to a defense of the charges a defendant is facing. Those seminal cases do not compel this Court to examine *all* the records of an officer, but rather they suggest that the Court *may* do so as to matters of excessive force or untruthfulness only. These cases further invited courts to examine relevancy prior to conducting reviews of disciplinary type files

4. The Colorado Court of Appeals offered further guidance on the analysis Courts should undertake in determining whether even an *in camera* review should be undertaken to examine internal affairs records upon the demand of a subpoena duces tecum. The Colorado Court of Appeals was asked to rule, in *People v. Blackmon,* 20 P.3d 1215 (Colo. App. 2000), as to the extent of a Defendant's right to discovery and to *in camera* review of police disciplinary files in a criminal matter. In *Blackmon* the Court had before it a case wherein officers had arrested a person in a high crime area well known for drug activity. The Defendant in that matter was seen surreptitiously disposing of an item on the approach of two officers. The officers discovered the disposed item to be a crack cocaine pipe. Upon a search of the Defendant incident to arrest more drugs were discovered at which time the Defendant initiated a struggle with the officers. The Defendant was charged with resisting arrest. Defense Counsel in the trial of that matter sought to obtain disciplinary records on the officers hoping to discover enough information to mount a defense involving officer credibility or

propensity towards use of excessive force raising the issue of self defense. The Trial Court denied that opportunity, and the Court of Appeals agreed that *Martinelli* did not stand for the proposition that such files must always be reviewed *in camera*. The Court determined that there must be a preliminary threshold, shown by the Defense, that the materials would be relevant before the Court would take up an *in camera* review. The Court noted with disapproval the practice of constant *in camera* reviews of disciplinary files without some relevancy threshold having been established. The Court noted that absent a relevancy threshold that the review of files would occur in "virtually every criminal case" and would be "unnecessarily burdensome to the courts and police".

5. For a time *Blackmon* may have stemmed overuse of requests for *in camera* review of disciplinary files, but by 2010 the matter became one which the Colorado Supreme Court could no longer ignore. At that time the Court was compelled to speak, in *People v. Spykstra,* 234 P.3d 662 (Colo. 2010), to the issue of limiting the use of third party subpoenas duces tecum in criminal matters as tools of broad discovery similar to those available in civil matters. The Colorado Supreme Court, in *People v. Spykstra*, 324 P.3d 662, announced definitive standards for production of records under a subpoena duces tecum, and by extension for production of Internal Affairs files. In *Spykstra*, the Court adopted and expanded on the test from *United States v. Nixon*, 418 U.S. 683 (1974). The *Spykstra* Court stated that when a criminal pretrial third-party subpoena is challenged, a defendant **must** (emphasis added) demonstrate:

> (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
>
> (2) That the materials are evidentiary and relevant;
>
> (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
>
> (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and
>
> (5) That the application is made in good faith and is not intended as a general fishing expedition.

The *Spykstra* Court very specifically added an element to the long-standing test from *Nixon,* that element being that Defendants must show a reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis. By doing so the Court emphasized that new element, perhaps in an attempt to further define what the *Nixon* Court meant by the term "general fishing expedition".

The *Spykstra*, Court specifically noted that a subpoena under Crim. P. 17 was not an investigatory tool or nearly equivalent to the broad discovery of civil litigants.

This tool is limited quite specifically to matters that are evidentiary and relevant and when there is a reasonable likelihood that the subpoenaed materials exist, a likelihood established by a specific factual basis, not by asking the court to speculate that there is some hypothetical chance such records may exist.

ARGUMENT

6. As to the nature of the Defendant's request in the present matter that they are entitled to "*all* Aurora Police Department internal affairs investigations pertaining to Officer XXXXX XXXXXX"; to the extent that this demand contains a presumption there are any records other than what the Prosecution has forthrightly identified in compliance with their *Brady* obligations, the City of Aurora would object. At this juncture there has been no showing, as required by *Spykstra*, that matters other than the matter identified by the prosecution in their letter to Defense counsel, exist by any reasonable likelihood through citing a specific factual basis. The first prong of *Spykstra* is unsatisfied. Moreover there has been no showing or argumentation that should such matters exist that they would be remotely relevant to the issues at hand, thus leaving the second *Spykstra* factor unsatisfied as well. In fact, one might presume quite the opposite. The Prosecution having been diligent and forthright in their *Brady* disclosure of potential impeachment material, one would wonder, then, why they would not disclose all such information, should other information exist.

7. As to the one matter referenced by the Prosecution and specifically demanded by the Defense; the City of Aurora would not argue that the first *Spykstra* factor or element has not been satisfied, but the City of Aurora would challenge the Defense to state the relevancy and materiality of the information to the issues at trial given the charges against the Defendant and the nature and scope of the Officer's potential testimony. The City would argue that Officer XXXXXX's testimony, if even eventually proffered at trial, an uncertain and unlikely proposition at this time, does not go to an essential element of the charges in this matter, and would at best be cumulative and insignificant to the massively greater weight of testimony when it comes to any potential sentencing which might occur if and when the charges are sustained. Defendant has not, therefore, satisfied the second mandatory element required by *Spykstra* to even have the Court conduct an *in camera* review.

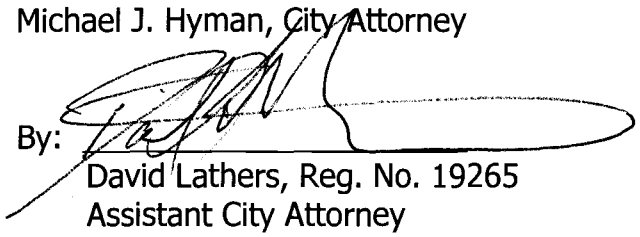
ALTERNATIVE REQUEST SHOULD THE COURT DENY THE MOTION TO QUASH

8. Should the Court rule that the City of Aurora must produce records in response to the subpoena duces tecum in this the matter the City would respectfully request the leave of this Court to produce at that time a proposed Protective Order regarding use or dissemination of those records in line with the Court's suggestions in the *Martinelli* matter.

For the above reasons, the City urges the Court to quash the subpoenas duces tecum in the instant matter.

Respectfully submitted this 20th day of July, 2014.

City of Aurora
Michael J. Hyman, City Attorney

By: 
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CERTIFICATE OF SERVICE

Counsel for the City of Aurora hereby certifies that on July 20, 2014, he did cause to be served by Fax a true and correct copy of the foregoing motion to the following parties:

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