

<p>COURT OF APPEALS, STATE OF COLORADO  2 East 14<sup>th</sup> Avenue  Denver, Colorado 80203</p>	<p>DATE FILED: November 5, 2013 12:34 PM</p>
<p>Notice of Appeal from the Eighteenth Judicial District Court, Arapahoe County, Division 402, Case No. 2012CV17, The Honorable Charles M. Pratt</p>	
<p><b>Plaintiffs/Appellants:</b>  <b>MARGARITA MADRIGAL, individually and as next friend of the minor children, Maribel Madrigal, Rosa Madrigal and Jose Madrigal,</b></p> <p><b>v.</b></p> <p><b>Defendants/Appellees:</b>  <b>JUAN GUZMAN, in his Official Capacity as Records Clerk for the City of Aurora, and the CITY OF AURORA.</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Attorneys for Defendants/Appellees:</b></p> <p>Names: <b>Martha L. Fitzgerald, #14078</b>  <b>Carrie E. Johnson, #41596</b></p> <p>Address: <b>Brownstein Hyatt Farber Schreck, LLP</b>  410 Seventeenth Street</p> <p>Phone No.: Suite 2200</p> <p>FAX No.: Denver, Colorado 80202-4432</p> <p>E-mail: (303) 223-1100  (303) 223-1111  mfitzgerald@bhfs.com</p>	<p>Case No.: 12CA2551</p>
<p><b>AMENDED ANSWER BRIEF OF DEFENDANTS/APPELLEES JUAN GUZMAN AND THE CITY OF AURORA</b></p>	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with C.A.R. 28(g):**

It contains 6,027 words.

**The brief complies with C.A.R. 28(k):**

It contains under a separate heading a concise statement of the applicable standard of appellate review with citation to authority.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

*s/ Martha L. Fitzgerald*  
Martha L. Fitzgerald, #14078  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
(303) 223-1100

ATTORNEYS FOR  
DEFENDANTS/APPELLEES JUAN GUZMAN  
AND CITY OF AURORA

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court correctly held that the City of Aurora and records administrator Juan Guzman (collectively, the “City of Aurora”) did not abuse their discretion by delaying the release of documents requested by Margarita Madrigal and her children (collectively, “Ms. Madrigal”) pursuant to the Colorado Criminal Justice Records Act, Colo. Rev. Stat. § 24-72-305, on the basis that such disclosure would be contrary to the public interest;
2. Whether the District Court correctly held that the City of Aurora’s failure to respond to Ms. Madrigal’s letter requesting the grounds for denying access to certain records does not warrant a penalty or an award of court costs and attorney fees.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This action arises from an application by Ms. Madrigal to the City of Aurora for the release of criminal justice records pursuant to the Colorado Criminal Justice Records Act (“CCJRA”), Colo. Rev. Stat. § 24-72-305. Based on a balancing of the public and private interests involved, the City of Aurora initially denied Ms. Madrigal’s request because the records were part of an ongoing criminal

investigation. Following this initial denial, Ms. Madrigal filed this action, requesting that the district court order the City of Aurora to release the documents, and further that the City of Aurora pay Ms. Madrigal's attorney fees, costs and a penalty for failure to produce the documents. While the district court action was underway, the criminal investigation was completed and the City of Aurora provided the materials requested by Ms. Madrigal with the exception of certain documents that either it did not have the legal authority to produce or were not in its possession. Thereafter, the district court dismissed the action and denied Ms. Madrigal's request for costs, fees, and sanctions, on the basis that the City of Aurora did not abuse its discretion in delaying the release of the requested documents until after the investigation was complete.

**B. Course of Proceedings, Disposition Below, and Statement of Relevant Facts**

Juan Contreras, Ms. Madrigal's late husband, died on July 23, 2011 in an altercation with a City of Aurora police officer during an investigation into suspected criminal behavior by Contreras. On August 18, 2011, Ms. Madrigal submitted a request to the City of Aurora for the disclosure of certain records related to the city's investigation into her late husband's death. Specifically, Ms. Madrigal requested:

[A]ll records regarding the death of Juan Contreras. . . This request includes, but is not limited to: police reports and investigation; copies of statements, including videotaped statements, from any and all witnesses including, but not limited to employees and patrons at the Family Dollar Store and O'Reilly Auto Parts; photographs, videotapes obtained from the Family Dollar Store, O'Reilly Auto Parts or other businesses in the area or any videotapes captured by HALO cameras; identification of all persons whose automobiles were parked in the parking lot area where Mr. Contreras was shot and killed. I am also requesting copies of any internal investigation conducted by the Aurora Police Department regarding the violation of Aurora Police Department rules and regulations . . .

55014523\_12cv17-ptf-s-exhibits, CD page 218.

On August 24, 2011, Ms. Madrigal's request was forwarded to the City of Aurora's records administrator, Juan Guzman. 55014523\_12cv17-ptf-s-exhibits, CD page 217. In his role as records administrator, Mr. Guzman did not serve as the actual records custodian of criminal justice records maintained in accordance with the CCJRA. Instead, Mr. Guzman was responsible for disseminating the request to the City of Aurora department in custody of the requested materials for a determination and then communicating that determination to the requestor.

56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 281.

Pursuant to these responsibilities, Mr. Guzman transmitted the request to the City Attorney's Office and the Aurora Police Department. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 262.

The Aurora Police Department (the “APD”) reviewed Ms. Madrigal’s request and determined that the bulk of the material she sought was in the custody of the APD’s Major Crimes Unit as part of an ongoing criminal investigation into Contreras’ death. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 414. As the criminal justice agency in custody of the records, the APD concluded that it would be contrary to the public interest to release the requested material prior to the completion of the criminal investigation. The APD informed Guzman of this determination, who then notified Ms. Madrigal via letter that the request for materials was denied “[o]n the ground that disclosure would be contrary to the public interest . . .” pursuant to Colo. Rev. Stat. § 24-72-305(5). 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 21.

On September 1, 2011, Ms. Madrigal requested that the City of Aurora provide a written statement setting forth a specific justification for denying the records request. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 22. Due to an oversight and a change in personnel, the City of Aurora did not respond to the request. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 274-76.

Four months later, and without a single inquiry into the status of her request in the interim, Ms. Madrigal filed a Complaint and Application for Order to Show

Cause on January 4, 2012. 45131483\_Complaint---Request-for-Order-to-Show-Cause, CD pages 1-13. The district court held a show cause hearing on April 12, 2012, at which APD Chief Daniel Oates articulated the APD's balancing of the interests involved in denying requests for material related to an ongoing criminal investigation:

**Counsel for the City of Aurora:** Okay. So as to those documents, do you believe that the public, as the head of the agency, do you believe that the public has an interest in that type of information?

**Chief Oates:** Yes.

**Counsel:** And please describe that.

**Chief Oates:** Well, about the most significant event that happens in a police department is when a police department uses deadly force and takes someone's life so it is a -- it is a -- it is an event of major consequence for the public and for the police department in terms of accounting for the actions of the police department.

**Counsel:** And do you understand that Ms. Madrigal and the family of Juan Contreras specifically have an interest in that type of information that was contained in those files?

**Chief Oates:** Oh, absolutely, yes.

**Counsel:** As the head of the criminal justice agency, the Aurora Police Department, what is your belief or understanding of the public responsibility placed upon your agency to investigate, report on and prosecute criminal acts?

**Chief Oates:** It's to do as thorough an investigation as possible and provide all the information to the district attorney so that the district attorney can do an evaluation of whether or not the use of force was justified.

**Counsel:** And as a criminal justice agency, is there also a need for investigative secrecy during certain parts of your law enforcement duties?

**Chief Oates:** Yes. During the period that the matter is being investigated by the police department and then by the district attorney, I believe it to be essential that the investigation be conducted in confidentiality until there is a finding.

**Counsel:** Why do you believe that's essential?

**Chief Oates:** In order to be most effective in getting information from witnesses and gathering evidence, it's essential that the police department and the district attorney be able to do that work without interference from any outside parties that might in fact by their behavior affect the gathering of evidence or the quality of evidence or the gathering of all the facts.

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**Counsel:** You testified about your time in law enforcement. In your experience, have there been instances that you're aware of where there has been interference or an investigation could be jeopardized by the release of any public -- by the release to the public of any information?

\*\*\*\*

**Chief Oates:** I have seen many times in my career where pieces of information regarding an ongoing and sensitive investigation have been -- have found their way into the public media or the public discourse and it has impacted the ability of the police department to conduct as thorough and efficient an investigation as it could.

\*\*\*\*

**Chief Oates:** The concern I have about release, premature release of partial pieces of information in a case that's being investigated by the police department extends beyond cases where the department has used deadly force. It extends to all cases that the police department

does but the more -- my experience, the more sensitive, the more high profile, the more the case involves interest by the media, the more there is the possibility of a release that could be harmful and those are the cases I recall from my career where that has occurred.

56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD pages 415-18.

Balancing the interests articulated above, the APD determined that it should not release the Major Crimes Unit's file related to the criminal investigation into Contreras' death while that criminal investigation was ongoing.<sup>1</sup>

56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 420. Chief Oates testified that the public interest considerations would shift once the criminal investigation concluded, and at that point, the file should likely be released. *Id.*

Shortly after the Show Cause hearing, the criminal investigation into the officers' conduct related to Contreras' death concluded when the Grand Jury returned a no true bill on April 17, 2012. Opening Brief at 10. As a result, the City of Aurora determined that the public interest considerations had shifted, requiring the production of most the documents requested by Ms. Madrigal. *See,*

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<sup>1</sup> Ms. Madrigal incorrectly asserts in her Opening Brief that the criminal investigation was completed on September 13, 2011. In fact, the APD does not "consider the investigation complete until the district attorney's investigation is complete." 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 457. The APD transmitted its Major Crimes Unit file on September 13, 2011 to the Arapahoe County District Attorney's office for the completion of the investigation. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 439. As stated herein, the investigation concluded on April 17, 2012, when the Grand Jury returned a no true bill.

e.g., 48557167\_Madrigal-Exhibit-A, pages 168-69. To that end, the City of Aurora hand delivered to Ms. Madrigal over 800 pages of materials responsive to her records request, including the entirety of the Major Crimes Unit file which contained all documents related to the APD's criminal investigation into the matter. 48557100\_Madrigal-Defendant-s-Response-to-Status-Report, CD pages 165-67. The City of Aurora also provided Ms. Madrigal a list of materials which were not produced, as well as the reasons those materials were not produced, as follows:

- Search warrants and corresponding affidavits, return of inventory sheets, etc.: These items were sealed by court order on July 26, 2011 upon the motion of the District Attorney for the Eighteenth Judicial District, and the City of Aurora is therefore not allowed to release them. 48557100\_Madrigal-Defendant-s-Response-to-Status-Report, CD pages 165-67.
- Autopsy reports: The Office of the Coroner for Arapahoe County is the custodian of the autopsy reports and Ms. Madrigal must therefore direct her request for these documents to that office. *Id.*
- Aurora Fire Department patient care records: The Aurora Fire Department is the custodian of these documents, and cannot release

them without Ms. Madrigal's signed release of liability in conformance with HIPAA standards. For the release of these documents, Ms. Madrigal may contact the Aurora Fire Department.

*Id.*

- Internal affairs records: The internal affairs records were incomplete because the APD did not commence its internal investigation into whether APD policies or regulations had been violated until after the criminal investigation was concluded. *Id.*

At the show cause hearing, APD Chief Oates testified that upon the balancing of the public and private interests involved, APD has determined that materials related to an internal investigation should not be released prior to that investigation's completion:

[T]he department has an independent interest in making sure that our officers abide by the policies and procedures of the department. We have a longstanding practice in place as other police departments do that allows for investigation of those matters, inquiry among officers who are witnesses, among witnesses in the public and during the pendency of that investigation, it's crucial that the investigation remain confidential as well.

56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD pages 426-27.

On May 18, 2012, the City of Aurora filed a status report notifying the district court of the production of the bulk of the materials requested by

Ms. Madrigal and the reasons for not producing the balance of the documents. 48557100\_Madrigal-Defendant-s-Response-to-Status-Report, CD pages 165-67.

Ms. Madrigal filed a status report on June 28, 2012 in which she agreed that the City of Aurora had produced all records with the exception of the autopsy reports, Aurora Fire Department records, APD internal affairs records, and documents sealed by court order as listed in the City of Aurora's May 18, 2012 status report. 49554203\_Status-Report-06-12-12---Draft-2, CD pages 171-75. Nevertheless, Ms. Madrigal argued that the City of Aurora had wrongfully withheld this information, and further requested that the district court award her attorney fees, costs, and a statutory penalty for the delay in releasing the other requested materials. *Id.* The City of Aurora filed a response to Ms. Madrigal's status report on August 20, 2012 in which it reiterated its reasoning for not releasing the excepted documents. 50800735\_Defendant-s-Response-to-Plaintiff-s-Second-Status-Report, CD pages 177-80.

On October 25, 2012, the district court issued an Order Discharging Order to Show Cause, in which it dismissed the action and denied Ms. Madrigal's request for attorney fees, costs, and penalties. 52444489\_12cv17-Madrigal-findings-and-order, CD pages 185-91. In the order, the district court analyzed Ms. Madrigal's request and the City of Aurora's response thereto under an abuse of discretion

standard pursuant to the CCJRA. *Id.* The district court determined that the City of Aurora had not abused its discretion in delaying its release of the documents until after the Grand Jury returned a no true bill. *Id.* Additionally, the district court determined that the City of Aurora was justified in not releasing the remaining records<sup>2</sup> for the reasons articulated in the May 18, 2012 and August 20, 2012 status reports. *Id.* Ms. Madrigal appealed the district court's order to this Court on December 13, 2012. 53517169\_Notice-of-Appeal, CD pages 192-98.

### **SUMMARY OF THE ARGUMENT**

As required by the CCJRA, the City of Aurora balanced the public and private interests involved as articulated at the show cause hearing held in the district court. The City of Aurora thus did not abuse its discretion in its response to Ms. Madrigal's request for the release of criminal justice records related to the ongoing criminal and APD's internal investigations into Mr. Contreras' death.

Consistent with its balancing of the interests, the City of Aurora determined that the requested records should not be released while the respective investigations were ongoing. Upon the completion of the respective investigations, the City of Aurora promptly provided Ms. Madrigal with copies of all documents

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<sup>2</sup> On July 31, 2013, when the internal investigation was completed, the APD released a report detailing its findings. As Ms. Madrigal indicated in her Opening Brief, the report was released to the public and Ms. Madrigal has a copy.

responsive to her request with the exception of certain documents which the City of Aurora is not legally entitled to disclose. Even if this Court would have reached a different determination regarding the release of the requested documents, the CCJRA and related legal principles do not allow this Court to redo the City of Aurora's balancing of the public and private interests. Thus, this Court should uphold the district court's conclusion that the City of Aurora did not abuse its discretion in its response to Ms. Madrigal's CCJRA request.

Additionally, the City of Aurora's failure to respond to Ms. Madrigal's letter requesting a written statement of the grounds for the determination does not warrant the imposition of penalties or the award of attorney fees and costs. The CCJRA only authorizes penalties if the records custodian improperly denies access to records of "official action" as defined in the statute. None of the requested documents are records of official action, and therefore, the district court is not authorized to assess a penalty. Moreover, the CCJRA only authorizes the award of attorney fees and costs if the criminal justice agency's denial of the document request was arbitrary or capricious. Because the City of Aurora did not act arbitrarily or capriciously or otherwise abuse its discretion in delaying the release of the requested documents until the criminal and internal investigations had been completed, the district court correctly determined that an award of costs and

attorney fees was unwarranted. Accordingly, this Court should uphold the district court's rejection of Ms. Madrigal's request for the award of attorney fees, costs, and the imposition of a statutory penalty.

## **ARGUMENT**

### **A. Standards Governing Requests for the Release of Criminal Justice Records Pursuant to the CCJRA**

The CCJRA<sup>3</sup> governs requests by the public to inspect criminal justice records maintained by a criminal justice agency. Colo. Rev. Stat. § 24-72-301 *et seq.*; *see also Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005). Criminal justice records include “all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristic, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule . . .” Colo. Rev. Stat. § 24-72-302(4). Criminal justice records requested pursuant to the CCJRA fall into one of two categories: (1) records of “official action”; and (2) “all other criminal justice records.” Colo. Rev. Stat. § 24-72-301(2); *Freedom*

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<sup>3</sup> The parties do not dispute that the records requested by Ms. Madrigal are criminal justice records and their release is subject to the CCJRA. *See*, Opening Brief at 2. Thus, this brief does not include a discussion of the Colorado Open Records Act, Colo. Rev. Stat. § 24-72-200.1 *et seq.*

*Colorado Information v. El Paso County Sheriff's Department*, 196 P.3d 892, 898 (Colo. 2008).

Records of official actions include: “an arrest; indictment; charging by information; disposition; pretrial or post-trial release from custody; judicial determination of mental or physical condition; decision to grant, order or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify, or relocate any person under criminal sentence.” Colo. Rev. Stat. § 24-72-302(7). The CCJRA mandates that records of “official action” “shall be open to inspection by any person.” Colo. Rev. Stat. § 24-72-301.

If the requested material is a criminal justice record but does not fall under the definition of “records of official actions,” the determination of whether to permit the inspection of that material “is consigned to the custodian’s exercise of sound discretion.” *Freedom Colo. Info.*, 196 P.3d at 898. Based on a determination that “disclosure would be contrary to the public interest, . . . the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose.” Colo. Rev. Stat. § 24-72-305(5). If the custodian

denies access to any criminal justice record, the party seeking access may request a written statement of the grounds for denial. Colo. Rev. Stat. § 24-72-305(6). The custodian must then provide a written statement to the requesting party citing the “law or regulation under which access is denied or the general nature of the public interest to be protected by the denial” within seventy-two hours. *Id.*

A party who is denied access to criminal justice records pursuant to Colo. Rev. Stat. § 24-72-305 may apply to the district court for an order “directing the custodian to show cause why said custodian should not permit the inspection of such record.” Colo. Rev. Stat. § 24-72-305(7).

**B. The District Court Correctly Held that the City of Aurora Did Not Abuse Its Discretion in Its Determination of Ms. Madrigal’s Request for Criminal Justice Records.**

**1. Standard of Review**

In a CCJRA case, the Court of Appeals reviews *de novo* “whether the district court applied the correct legal standard to its review of the custodian’s determination.” *Freedom Colo. Info.*, 196 P.3d at 897 (citing *Harris*, 123 P.3d at 1170; *People v. Thompson*, 181 P.3d 1143, 1145 (Colo. 2008)).

The district court, for its part, must “review the custodian’s determination for abuse of discretion” when a party applies for an order to show cause regarding the denial of his CCJRA request. *Id.* Under the abuse of discretion standard, the

district court must: (1) review the criminal justice record at issue; (2) take into account the custodian’s balancing of the interests and articulation of his or her determination; and (3) decide whether the custodian has properly determined to allow an inspection of the entire record or a redacted version of the record, or prohibit inspection of the record. *Id.* at 900. Stated more simply, the “[p]roper application of an abuse of discretion standard primarily entails the court holding the custodian to its balancing role, which includes adequately explaining the reasons for the custodian’s inspection determination.” *Id.* at 901. Importantly, “the district court should not redo the custodian’s balancing of the interests” or “substitute its judgment for that of the” custodian’s. *Id.* Indeed, even if the district court “may have balanced the respective interests differently, . . . it is not the role of any court to do so.” *Romero v. City of Fountain*, No. 11CA0690, 2011 LEXIS 732, at \*16 (Colo. App. May 12, 2011).

**2. The City of Aurora Did Not Abuse Its Discretion by Delaying the Disclosure of Materials Responsive to Ms. Madrigal’s CCJRA Request Until the Criminal and Internal Investigations Were Complete.**

- a. The City of Aurora Properly Balanced the Public and Private Interests and Articulated Its Rationale for the Determination.

In exercising his or her discretion to grant or deny a CCJRA request, the records custodian must “engage in balancing the public and private interests in the

inspection request.” *Freedom Colo. Info.*, 196 P.3d at 899 (citing Colo. Rev. Stat. § 24-72-301(2)). This balancing test requires the custodian to consider the following factors: “the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency’s interest in keeping confidential information confidential; the agency’s interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request.” *Id.* (citing *Harris*, 123 P.3d at 1174). The records custodian must also articulate the rationale for the determination either in “a written statement [provided to the requestor] of the grounds for denial” or the “response to the court’s show cause order.” *Id.* at 902.

In *Romero v. City of Fountain*, a local television station made a CCJRA request for the City of Fountain, Colorado and the Fountain Police Department to release summaries of an internal investigation related to the conduct of Fountain police officer Frank Romero. 2011 Colo. App. LEXIS 732, at \*1. Romero sought a temporary restraining order to prevent the city and police department from releasing the requested material. *Id.* Romero argued that the police department had not conducted a proper balancing of the public and private interests involved “because no reasons explaining the decision to release the summaries of the report

were set forth” in the letter the city sent notifying Romero of the release. *Id.* at \*14-15. The court rejected Romero’s argument, concluding that the Fountain police chief (the records custodian in this case) fulfilled his duty to articulate the rationale for his determination through his testimony at the show cause hearing:

“The testimony at the hearing reveals that the police chief took into account Romero’s privacy interest, as well as the public interest in disclosure of the summaries of the internal report, and exercised his discretion. The police chief identified and ‘articulated’ both Romero’s privacy interest and the public interest in knowing the contents of the report as factors that he considered in making his determination to release the summaries of the report. . . While this court, or the district court, may have balanced the respective interests differently on these facts, it is not the role of any court to do so.”

*Id.* at \*15-16 (quoting *Freedom Colo. Info.*, 196 P.3d at 904). Because the police chief balanced the interests involved and articulated his determination during his testimony at the show cause hearing, the court held that he did not abuse his discretion, and therefore, that the district court correctly denied Romero’s request for a temporary restraining order. *Id.* at \*16.

Here, Ms. Madrigal incorrectly asserts that the City of Aurora neither balanced the public and private interests nor articulated the rationale for its determination. In fact, as in *Romero*, APD Chief Daniel Oates articulated the City of Aurora’s balancing of the interests and corresponding rationale during testimony at the show cause hearing on April 12, 2012. Specifically, Chief Oates

acknowledged that Ms. Madrigal has a personal interest in the requested materials, but explained that her interest must be weighed against the public interest of the potential harm to the investigation if its confidentiality is compromised. Chief Oates further testified that to balance those competing interests, APD policy dictates that material that is part of an investigation should only be released after that investigation has been completed. In the present case, that is exactly what happened: the City of Aurora provided the entire criminal investigation file to Ms. Madrigal once the Grand Jury returned a no true bill, and the entire internal administrative investigation<sup>4</sup> once the APD published the report detailing its findings.

- b. Even If this Court Would Have Balanced the Interests Differently, It Must Decline Ms. Madrigal’s Invitation to Do So.

Ms. Madrigal uses the vast majority of her brief to argue that the City of Aurora should have balanced the public and private interests differently and, in so doing, asks the Court to conduct an independent balancing of the respective

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<sup>4</sup> Ms. Madrigal cites *Romero* for the proposition that the public has an interest in a police department’s internal investigation related to an officer’s conduct. *See* Opening Brief at 25. The City of Aurora does not deny that this proposition is correct. However, Ms. Madrigal mistakenly reads *Romero* to hold that the public’s interest in internal investigations requires the release of related material **while the investigation is ongoing**. In actuality, *Romero* explicitly notes that the public has the right to the information once “the investigation [is] **concluded**.” *Romero*, 2011 Colo. App. LEXIS 732 at \*16-17 (emphasis added).

interests. Rather than respond to each of Ms. Madrigal’s arguments regarding how, in her view, the custodian should have balanced the respective interests, the City of Aurora only reiterates that this Court must “not redo the custodian’s balancing of the interests” or “substitute its judgment for that of the” custodian’s. *Freedom Colo. Info.*, 196 P.3d at 901. Thus, even if this Court “may have balanced the respective interests differently” than the City of Aurora did, “it is not the role of any court to do so.” *Romero*, 2011 LEXIS 732, at \*16. Given that the City of Aurora complied with the CCJRA by balancing the respective interests involved and articulating its rationale at the show cause hearing, this Court should uphold the district court’s conclusion that the City of Aurora did not abuse its discretion in delaying the release of the requested materials.

**C. The District Court Correctly Held that the City of Aurora’s Denial of Ms. Madrigal’s CCJRA Request and Failure to Respond to Ms. Madrigal’s Letter Does Not Warrant a Penalty or an Award of Court Costs and Attorney Fees.**

**1. Standards of Review**

- a. Standard of Review Governing the Application and Construction of Statutes

The Court of Appeals reviews *de novo* “questions of law concerning the application and construction of statutes,” including the CCJRA. *Freedom Colo. Info.*, 196 P.3d at 897 (citing *Harris*, 123 P.3d at 1170; *People v. Thompson*, 181

P.3d at 1145). The Court’s primary task is to discern the legislative purpose underlying the statute. *East Lakewood Sanitation Dist. v. Dist. Court*, 842 P.2d 233, 235 (Colo. 1992). “To determine legislative intent we first look to the plain language employed by the General Assembly.” *City of Westminster v. Dogan Const. Co., Inc.*, 930 P.2d 585, 590 (Colo. 1997). If the language of a statute is unambiguous, the Court’s inquiry is complete, as “there is no need to resort to interpretive rules of statutory construction.” *Id.* (citing *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 545 (Colo. 1995)).

b. Standard of Review Governing the Award of Costs, Attorney Fees, and Penalties Under the CCJRA

This Court must review the district court’s decision whether to award costs and attorney fees under an abuse of discretion standard. *Anderson v. Purcell*, 244 P.3d 1188 (Colo. 2010). A trial court only abuses its discretion if its decision is “manifestly arbitrary, unreasonable, or unfair.” *Colo. Nat’l. Bank of Denver v. Friedman*, 846 P.2d 159, 167 (Colo.1993) (citations omitted).

Under the CCJRA, if the district court finds that the “denial of inspection of a record of an official action was arbitrary or capricious,” the court may, in its discretion, order the custodian to pay the applicant a penalty of up to twenty-five dollars “for each day that access was improperly denied.” Colo. Rev. Stat. § 24-72-305(7) (emphasis added). Additionally, if the district court finds that the

custodian's denial of inspection of any criminal justice record was arbitrary or capricious, it may, in its discretion, order that the custodian pay the applicant's court costs and attorney fees. *Id.*

**2. The City of Aurora Did Not Withhold Any Records of Official Action Responsive to Ms. Madrigal's CCJRA Request, and Therefore the Penalty Requested by Ms. Madrigal Is Unwarranted.**

As discussed above, the CCJRA by its plain language allows a district court, in its discretion, to order a records custodian who arbitrarily or capriciously denies the inspection of a "record of an official action" to pay a penalty of up to twenty-five dollars per day for "each day that access was improperly denied." Colo. Rev. Stat. § 24-72-305(7). Importantly, the CCJRA only authorizes a district court to assess a penalty for the failure to disclose a record of "official action"; the CCJRA does not authorize a penalty for the failure to disclose any other type of criminal justice record. *Id.*

In arguing that the district court erred in not assessing a penalty against the City of Aurora, Ms. Madrigal fails to appreciate the distinction between a "record of official action," disclosure of which the CCJRA mandates, and all other types of criminal justice records, disclosure of which are subject to the discretion of the records custodian. Colo. Rev. Stat. § 24-72-305. Indeed, the criminal justice records related to the investigation into Mr. Contreras' death do not include any

records of “official action” as defined by the CCJRA. There was no “arrest; indictment; charge by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; [or] any decision to formally discipline, reclassify, or relocate any person under criminal sentence” in connection with Mr. Contreras’ death, and therefore, there are no records of official action responsive to Ms. Madrigal’s CCJRA request. Colo. Rev. Stat. § 24-72-302(7). Instead, all records responsive to Ms. Madrigal’s request are categorized as “other criminal justice records.” Thus, by its plain language, the CCJRA does not authorize the assessment of a penalty against the City of Aurora, and this Court should uphold the district court’s order declining to do so.

**3. Since the City of Aurora’s Determination Regarding Ms. Madrigal’s Criminal Justice Record Request Was Not Arbitrary or Capricious, the District Court Correctly Declined to Order the City of Aurora to Pay Ms. Madrigal’s Court Costs and Attorney Fees.**

“[U]pon a finding that the denial [of a CCJRA request] was arbitrary or capricious,” the district court may, in its discretion, order the records custodian to pay the applicant’s court costs and attorney fees. Colo. Rev. Stat. § 24-72-305(7) (emphasis added). By its plain language, the CCJRA only permits the award of

costs and fees if the criminal justice agency should have allowed the applicant access to certain materials but failed to do so. *Id.*

Here, the City of Aurora readily admitted at the show cause hearing that it did not respond to Ms. Madrigal's letter requesting a written statement setting forth the grounds for the denial of her CCJRA request. 56028898\_Margarita-Madrigal\_2012-CV-17\_April-12-2012, CD page 274. While the City of Aurora regrets the error, this oversight does not warrant the award of costs and attorney fees. For the reasons discussed above, the City of Aurora did not act arbitrarily or capriciously<sup>5</sup> by delaying the release of the materials requested by Ms. Madrigal until the criminal and internal APD investigations were complete. The City of Aurora based its determination on a balancing of the interests involved and articulated that determination at the show cause hearing. Moreover, after the criminal and internal investigations were completed, the City of Aurora provided Ms. Madrigal with access to all the requested materials in the City of Aurora's discretion to disclose. Thus, even though the City of Aurora admittedly should have responded to Ms. Madrigal's letter, the denial of the request itself was not

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<sup>5</sup> As Ms. Madrigal states in her Opening Brief, Colorado courts have often found that the arbitrary or capricious standard is similar to the abuse of discretion standard. Opening Brief at 36 (citing *Ross v. Fire & Policy Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986); *Charnes v. Robinson*, 772 P.2d 62, 68 (Colo. 1989)). Thus, for the purposes of this subsection, the City of Aurora uses "arbitrary or capricious" and "abuse of discretion" interchangeably.

arbitrary or capricious because Ms. Madrigal was not otherwise entitled to access the materials at that time. Pursuant to the plain language of the CCJRA, the district court therefore correctly rejected Ms. Madrigal's request for attorney fees.

Additionally, even if the City of Aurora had acted arbitrarily or capriciously in denying Ms. Madrigal's records request or failing to respond to her letter, the award of attorney fees and costs is not mandatory. Rather, the CCJRA gives the district court the discretion to grant or deny requests for fees and costs. *Id.* In exercising that discretion, the district court concluded that neither the denial of Ms. Madrigal's CCJRA request nor the failure to respond to her letter warranted an award of costs and fees:

While [not responding to Ms. Madrigal's letter], even unintentional, cannot be condoned by the Court especially when there is legal obligation to respond promptly, because the evidence supports a finding that the oversight was purely unintentional and without malice or ulterior motive, and because the Court has found that the Plaintiff was not otherwise entitled to the release of the records at that time, the Court declines to impose sanctions.

52444489\_12cv17-Madrigal-findings-and-order, CD page 191. The district court's determination is based on a careful consideration of the issues and therefore is not manifestly arbitrary, unreasonable, or unfair. 52444489\_12cv17-Madrigal-findings-and-order, CD pages 188-91. Therefore, this Court should uphold the district court's denial of Ms. Madrigal's request for attorney fees and costs.

**D. The City of Aurora Has Provided All Requested Materials to Ms. Madrigal with the Exception of Materials that the City of Aurora Is Not Legally Allowed to Disclose.**

As a final matter, the City of Aurora notes that in her Opening Brief, Ms. Madrigal requests “all records sought by Plaintiff.” Opening Brief at 38. However, Ms. Madrigal does not state in her Opening Brief which documents she still believes the City of Aurora should release. While the City of Aurora does not know what materials Ms. Madrigal still seeks, the City of Aurora affirmatively states that it has provided Ms. Madrigal with all requested materials of which the City of Aurora is the CCJRA custodian and is legally allowed to disclose.

**CONCLUSION**

For the foregoing reasons, the City of Aurora respectfully requests that this Court uphold the trial court’s October 25, 2012 Order Discharging Order to Show Cause in all respects.

**REQUEST FOR ORAL ARGUMENT**

The City of Aurora believes that Oral Argument would assist the Court in understanding and resolving the questions presented in this appeal and therefore will request that one be held.

Respectfully submitted this 5<sup>th</sup> day of November 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

*s/ Martha L. Fitzgerald*

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Martha L. Fitzgerald, #14078

Carrie E. Johnson, #41596

410 Seventeenth Street, Suite 2200

Denver, Colorado 80202

(303) 223-1100

ATTORNEYS FOR  
DEFENDANTS/APPELLEES JUAN GUZMAN  
AND CITY OF AURORA

**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2013, a true and correct copy of the foregoing **AMENDED ANSWER BRIEF OF DEFENDANTS/APPELLEES JUAN GUZMAN AND THE CITY OF AURORA** was electronically filed and served via ICCES which will send notification to the following:

Kenneth A. Padilla  
Padilla & Padilla, PLLC  
1753 Lafayette Street  
Denver, Colorado 80218  
*Padillaesq@aol.com*

*/s/ Shirley M. Newman*  
Shirley M. Newman