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COURT OF APPEALS STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	
District Court, Arapahoe County, Colorado The Honorable Charles M. Pratt Case No. 2012CV17	
MARGARITA MADRIGAL, individually and as next friend of the minor children, M.M., R.M.M., and J.M. Plaintiffs/Appellants v. JUAN GUZMAN, in his Official Capacity as Records Clerk for the City of Aurora, and the CITY OF AURORA, Defendants/Appellees	▲COURT USE ONLY▲
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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).

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For the party raising the issue:

_x_ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority. A citation to the precise location in the record is not required, because the issue does not involve (i) admission or exclusion of evidence, (ii) giving or refusing to give an instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Kenneth A. Padilla
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INTRODUCTION

Plaintiffs, the spouse and minor children of Juan Contreras, made a request pursuant to the Colorado Criminal Justice Records Act ("CCJRA"), C.R.S. § 24-72-301 *et. seq.*, on August 9, 2011, seeking disclosure of records concerning the Aurora Police Department's investigation into the shooting and killing of Juan Contreras on July 23, 2011. The request was for basic information as to how and why the Aurora Police Department ("APD") had killed the Plaintiffs' husband and father. The City of Aurora, through Juan Guzman, the City of Aurora's Deputy City Clerk and Records Administrator summarily denied the request.

On January 4, 2012, almost six months later, when no information was released regarding the killing of Juan Contreras, including withholding the identity of the officer(s) who shot and killed Mr. Contreras, Plaintiffs filed their Complaint and Application for Order to Show Cause pursuant to C.R.S. § 24-72-305(7). The trial court issued the Order to Show Cause, nearly two months later on March 2, 2012 and, thereafter, conducted a hearing as to the Order to Show Cause, on April 12, 2012, almost nine months after Mr. Contreras was killed. The trial court finally, six months after the hearing, issued a written Order Discharging

Order to Show Cause on October 25, 2012, over one year and three months after Juan Contreras was killed by the APD.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. WHETHER THE TRIAL COURT ERRED IN DISCHARGING THE ORDER TO SHOW CAUSE AND DISMISSING MADRIGAL'S CCJRA COMPLAINT.

1. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE RECORDS CUSTODIAN DID NOT ABUSE HIS DISCRETION IN REFUSING TO RELEASE THE RECORDS REQUESTED.

2. WHETHER THE TRIAL COURT ERRED IN NOT IMPOSING MONETARY SANCTIONS AGAINST THE RECORDS CUSTODIAN AND THE CITY OF AURORA FOR FAILING TO RESPOND TO PLAINTIFFS' CCJRA REQUESTS, INCLUDING ATTORNEY'S FEES AND COSTS.

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from the District Court's Order Discharging Order to Show Cause ("Order") in regard to Plaintiffs' request to seek disclosure of records pursuant to the CCJRA, C.R.S. § 24-72-301, *et seq*. concerning the Aurora Police Department's investigation into the shooting and killing of Juan

Contreras by an Aurora Police officer on July 23, 2011. Plaintiffs are the spouse and minor children of Juan Contreras. Mrs. Madrigal made her CCJRA request on August 9, 2011 for copies of the police reports and investigation conducted by the APD regarding basic information as to the identity of the police officer who shot and killed Mr. Contreras, the identity of all witnesses to the shooting, all written witness statements, videotaped statements, police reports, photographs, and the results of the internal investigation. Plaintiffs sought this information, not only as the wife and children of a man who had been killed by a police officer, but also to investigate whether she and her minor children had any claim against the police officer who killed her husband, and other officers involved in the shooting and killing, and against the City of Aurora, including the denial of their civil rights.

Records Administrator Juan Guzman and the City of Aurora initially summarily denied Madrigal's request using the conclusory canting excuse that the release of information as to how, why and who shot Juan Contreras would be "contrary to the public interest." Pursuant to C.R.S. § 24-72-305(6) Plaintiffs requested the City to set forth why disclosure would be contrary to the public interest. Aurora failed to reply to Plaintiffs' request contrary to the mandates of C.R.S. § 24-72-305(6). The government piously takes the position that they do

not have to follow the law. The government can kill a man and owes no explanation to the man's wife and children or to the public. The government can wait over a year and claim they are investigating the case and disingenuously claim that they are not releasing any information to protect the public interest. Since Mrs. Madrigal and her children wanted to know why and how their husband and father was killed, Plaintiffs filed their Complaint and Application for Order to Show Cause pursuant to C.R.S. § 24-72-305(7) on January 4, 2012. After a hearing on April 12, 2012 the Court ultimately discharged the Order to Show Cause. The Court found that the City of Aurora did not improperly deny Plaintiffs access to the criminal justice records and found that the City's denial of access to the records was not arbitrary or capricious and therefore refused to impose any sanctions against the City of Aurora or the records custodian, Juan Guzman.

B. Statement of the Facts

On July 23, 2011 Juan Contreras was shot and killed by an unidentified Aurora police officer in the parking lot of the Family Dollar Store located at 12100 East Colfax Avenue. *See* Complaint and Application for Order to Show Cause, CD p. 6. Detective Craig Appel, of the APD Major Crimes Unit ("MCU") advised the family of Juan Contreras that major mistakes were made during the undercover

operation involving Contreras and the undercover operation should never have resulted in the death of Contreras. *See* Complaint and Application for Order to Show Cause, CD p. 6. On July 30, 2011 Chief Oates of the APD publicly announced the establishment of a Tactical Review Board to look into whether any officers involved in the shooting and killing of Juan Contreras violated APD policies, training and decision making procedures.[1] *See* Complaint and Application for Order to Show Cause, CD pp. 6-7. On July 30, 2011, Aurora Police Chief Dan Oates is quoted as follows:

> "Could we have done this better. We have an obligation to be the best we can be as a police department, and if we can learn from what occurred here and thereby avoid a deadly confrontation in the future, that will be a positive outcome."

See Complaint and Application for Order to Show Cause, Exhibit 1, CD p. 14. The APD failed to even name the police officer who shot and killed Contreras and

[1] On July 31, 2013 over two years after the killing of Juan Contreras the report of the Aurora Police Department Tactical Review Board regarding the killing of Juan Contreras was released. This report found multiple errors by the Aurora Police Department in the use of non-trained police officers in an impromptu undercover plain clothes police operation that was poorly planned not using best police practices and improperly supervised. This report was released a few weeks before the filing of Plaintiffs' Opening Brief and therefore is not part of the record. The report can be viewed at: https://www.auroragov.org/cs/groups/public/documents/document/016235.pdf.

failed to provide any other information or documentation to the Plaintiffs regarding the circumstances surrounding the shooting and killing of Contreras.

On August 9, 2011 Plaintiffs made a written request for copies of the police reports and investigation conducted by the APD regarding the shooting and killing of Contreras. *See* Complaint and Application for Order to Show Cause, Exhibit 2, CD p. 16. Plaintiffs requested all records and documents regarding the investigation by the APD concerning the shooting and killing of Contreras by an Aurora police officer on July 23, 2011 including, but not limited to, copies of all written witness statements, copies of any videotaped statements, all police reports, copies of photographs taken in connection with such investigation, and the results of the investigation, including whether any violation of APD regulations occurred. *See* Complaint and Application for Order to Show Cause, Exhibit 2, CD p. 16.

On August 15, 2011 counsel for Plaintiffs received an e-mail from Kerri Bishop, Office Coordinator and Assistant to Chief of Police Daniel J. Oates, to make an Open Records Request through the City of Aurora's City Clerk's office. *See* Complaint and Application for Order to Show Cause, Exhibit 3, CD p. 17. Promptly, in response to Ms. Bishop's directive, on August 18, 2011, counsel made the request pursuant to the Colorado Open Records Act (CORA) C.R.S. §

24-72-200.1 *et seq*., and the Colorado Criminal Justice Records Act (CCJRA), § 24-72-301 *et seq*. *See* Complaint and Application for Order to Show Cause, Exhibit 4, CD p. 18.

The open records request was received by the Records Custodian, Juan Guzman, on August 24, 2011 who assigned it Open Records request number 1285. *See* Transcript of April 12, 2012 Hearing, CD p. 259, L. 14-15. The Open Records request was disseminated to the APD records liaison, Captain Fran Gomez *(See* Transcript of April 12, 2012 Hearing, CD p. 264, L. 4-7) and to the Aurora City Attorney's Office. *See* Transcript of April 12, 2012 Hearing, CD p. 262, L. 7-9. Captain Gomez then contacted Sgt. Rudy Herrera of the Major Crimes Unit (MCU) who informed Captain Gomez that since the investigation was open, no records would be released. *See* Transcript of April 12, 2012 Hearing, CD p. 405, L. 22 - p. 406, L. 5. Captain Gomez informed Juan Guzman that no records would be released. *See* Transcript of April 12, 2012 Hearing, CD p. 306, L. 10-15. After receiving this information, on September 1, 2011, Plaintiffs received a letter dated August 30, 2011, from Guzman paraphrasing the statute, C.R.S. § 24-72-305(5), denying the request and stating,

> "It is the City's position that these documents are not available for inspection pursuant to C.R.S., section 24-72-305(5): On the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, 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 purposes."

See Complaint and Application for Order to Show Cause, Exhibit 5, CD p. 21.

Thereafter, on September 1, 2011 Plaintiffs sent a letter to the City requesting a written statement setting forth why disclosure would be contrary to the public interest as specifically provided for in C.R.S. § 25-72-305(6). *See* Complaint and Application for Order to Show Cause, Exhibit 6, CD p. 22. Guzman assigned the letter as Open Records request number 1324 on September 21, 2011 (*See* Transcript of April 12, 2012 Hearing, CD p. 277, L. 12-22). Guzman admitted that he failed to respond to Plaintiffs' September 1, 2011 letter and at the April 12, 2012 hearing verbally offered Plaintiffs an apology for his failure to follow the provisions of the CCJRA. (Transcript of April 12, 2012 hearing, CD p. 274, L. 5-11).

It is significant that at the April 12, 2012 hearing in the District Court, Chief of Police Oates testified that the APD's investigation of the shooting and killing of

Juan Contreras was completed on September 13, 2011 at which time the matter was closed and the case folder was turned over to the District Attorney. *See* Transcript of April 12, 2012 hearing, CD p. 439, L. 8-19).

Plaintiffs patiently waited for months and having never received a response to her request for records and an explanation as to who, how and why their husband and father was killed by the APD, Ms. Madrigal and her children filed a Complaint pursuant to C.R.S. 24-72-305(7) on January 4, 2012. See Complaint and Application for Order to Show Cause, CD p. 1-13.

The Complaint was served upon the City of Aurora on January 5, 2012 and upon Guzman on January 6, 2012. *See* Returns of Service, CD pp. 49-50, 52-53 and 55-56. Pursuant to C.R.C.P. 12 the Defendants' responsive pleading was due on or before January 27, 2012. The Defendants failed to file any responsive pleading and on January 30, 2012 Plaintiffs filed their Verified Motion for Entry of Default Judgment which was subsequently denied. See Verified Motion for Entry of Default Judgment, CD p. 58-62. Instead of responding to the Motion for Default, Defendants filed a C.R.C.P. Rule 12 Motion to Dismiss on February 3, 2012 which likewise was denied. See Defendants' Motion to Dismiss, CD p. 80-93.

Unconnected to Aurora's responsibilities under the CCJRA, C.R.S. 24-72-301 et. seq., on February 2, 2012, the Arapahoe County District Attorney convened a Grand Jury investigation into the shooting. (Transcript of April 12, 2012 hearing, CD p. 360, L. 21-22).

On April 12, 2012, the trial court held a hearing on the Order to Show Cause. *See* Transcript of April 12, 2012 hearing, CD p. 244-463. On April 17, 2012, after the Grand Jury returned a no true bill, the Arapahoe District Attorney delivered Grand Jury records including the Grand Jury report, transcripts of Grand Jury testimony and other documents to counsel for the Plaintiffs. These documents were not responsive to Plaintiffs' CCJRA request. *See* Plaintiffs' Status Report, CD p. 160-164.

The trial court belatedly entered its Order six months later on October 25, 2012 analyzing four periods or stages during which Plaintiffs were denied the records. *See* Order Discharging Order to Show Cause, CD p. 185-191. Only the first three periods are pertinent to this appeal. The first period as defined by the trial court is the "Investigatory Pre-Grand Jury Period" between the date of the request on August 9, 2011 and the convening of the Grand Jury on February 21, 2012. The trial court concluded that the City did not abuse its discretion in not

disclosing the records since the case was "relatively" recent and under active investigation and any release of the records could seriously compromise the investigation and any prosecution that might follow.

The second period as defined by the trial court is the "Grand Jury Period" during the Grand Jury investigation and deliberation. The trial court concluded that the City did not abuse its discretion in not disclosing the records since denial was designed to protect the integrity of the investigation and the right of all involved including the Contreras family to a fair and impartial proceeding and, if required, a fair and impartial trial for anyone indicted.

The third period as defined by the trial court is the "Post-Grand Jury Period" after the Grand Jury returned a no true bill on April 27, 2011. The trial court concluded that the City acted with reasonable dispatch in disclosing those documents and therefore found no abuse of discretion.

III. SUMMARY OF ARGUMENT

The trial court erred as a matter of law in determining that the records custodian did not abuse his discretion in refusing to release the records requested by Plaintiffs pursuant to the CCJRA. The records custodian failed to properly balance the interests to be considered to make a determination as to whether the

record should be released. Additionally, the trial court erred in not imposing monetary sanctions against Guzman and the City of Aurora for failing to respond to Plaintiffs' CCJRA requests. Therefore, the trial court erred in discharging the Order to Show Cause and dismissing Madrigal's Complaint.

IV. ARGUMENT

A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISCHARGING THE ORDER TO SHOW CAUSE AND DISMISSING MADRIGAL'S CCJRA COMPLAINT.

1. Standard of Review

Courts review de novo questions of law concerning the correct construction and application of the CCJRA. *Harris v. Denver Post Corp*., 123 P.3d 1166, 1170 (Colo. 2005), *People v. Thompson*, 181 P.3d 1143, 1145 (Colo. 2008), reh'g denied (Apr. 28, 2008). Additionally, statutory interpretation is a question of law, likewise reviewed de novo. *Spahmer v. Gullette*, 113 P.3d 158, 161-162 (Colo. 2005). Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law. *Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.*), 196 P.3d 892, 897-898 (Colo. 2008).

2. The Records Custodian Abused his Discretion in Refusing to Release the Records Requested.

The issues presented in this appeal are not complicated. When the government through a municipal police officer kills a man, the public, including the man's wife and children are entitled to timely know why the government killed him and who killed him. This is the information requested by the Plaintiffs from the City of Aurora after Juan Contreras was killed on July 23, 2011 by the APD. The release of these records not only are required under the CCJRA, but are at the heart of a free and democratic society. We in the United States are quick to criticize and judge other countries for their use of force including deadly force against its citizens, but we cavalierly deny information to the family and the public about the killing of a citizen by a police officer in the United States. The blatant denial of due process and equal protection along with the shamefulness of the government, the City of Aurora, to claim that even the basic information about the killing of a man by a police officer should be kept secret is what the District Court approved. What other recourse does a widow and her children have than to seek out information, pursuant to the law, about the killing of their husband and father by a government agent. To have another branch of government, the judiciary,

condone the police killing a man and not subject the police use of deadly force to the scrutiny of the public is frightening and abhorrent in a free society.

Aurora Chief of Police Daniel Oates himself recognizes the importance of public accountability when a police officer uses deadly force. Chief Oates testified as follows:

> 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.

(Transcript of April 12, 2012 hearing, CD p. 425, L. 13-18).

Police officers for the APD are peace officers pursuant to Colorado law and are authorized to investigate crimes, seize evidence and property, within the dictates of the Fourth Amendment, obtain witness statements, prepare reports, take photographs, and collect evidence. *Harris v. Denver Post Corp*., 123 P.3d 1166, 1172-1173 (Colo. 2005). C.R.S. §§16-2.5-101 and 102.

The APD is a "criminal justice agency" under the CCJRA. C.R.S. § 24-72-302(3). Since the criminal justice records that Plaintiff sought to inspect were not records of an "official action," pursuant to C.R.S. §§ 24-72-304 and 305, the

decision whether to grant the request was the responsibility of Defendant Guzman, the records custodian, to use sound discretion under the statute. The district court reviews the custodian's determination for abuse of discretion. *Harris*, 123 P.3d at 1175; *People v. Bushu*, 876 P.2d 106, 107 (Colo. App. 1994). "Sound discretion" does not mean unbridled discretion.

The CCJRA provides for, inter alia, "access and dissemination" of criminal justice records as "matters of statewide concern." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1171 (Colo. 2005). In enacting the CCJRA the General Assembly favored broad disclosure of records. *Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.*), 196 P.3d 892, 898 (Colo. 2008).

The CCJRA consigns to the custodian of a criminal justice record the authority to exercise its "sound discretion" to allow or not allow inspection. Such discretion includes balancing the public and private interests relevant to the inspection request. *Harris,* 123 P.3d at 1174. If the record is relevant to and obtained pursuant to the agency's public function, and no statute or court order prohibits inspection, the custodian should release the records in response to an inspection request. *Harris*, 123 P.3d at 1175. The custodian should consider and balance pertinent factors, which include 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. *Harris*, 123 P.3d at 1175.

The balancing role entails weighing the array of interests involved in the inspection request and making an inspection determination supported by an adequate rationale. *Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.*), 196 P.3d 892, 897 (Colo. 2008). As stated in *In re Freedom Colo. Info., Inc.*:

> The General Assembly has described this public and private interests balancing function as a weighing process involving the "public interest" versus the "harm to . . . privacy . . . or dangers of unwarranted adverse consequences." § 24-72-308(1)(c), C.R.S. (2008). The CCJRA record must be open for inspection unless the privacy interest or dangers of adverse consequences "outweigh" the public interest. See id. In *Harris*, we determined that the General Assembly intended for this standard of balancing to apply not only to courts when addressing "official actions," but also to all custodians who have discretionary authority regarding the inspection of criminal justice records under sections 24-72-304 and -305, C.R.S. (2008), including sheriffs. 123 P.3d at 1174-75. Indeed, section 24-72-305(5) favors making the record

> available for inspection unless the custodian, in exercising his or her sound discretion, finds "disclosure would be contrary to the public interest."

In re Freedom Colo. Info., Inc., 196 P.3d at 898.

In this case neither Juan Guzman, the records custodian, Captain Fran Gomez the records liaison, Sgt. Rudy Herrera of the Major Crimes Unit (MCU) nor anyone else bothered to perform the balancing act required in the CCJRA statute. In a conversation lasting less than five minutes Sgt. Herrera mandated that no records would be released since the investigation was open and there was an ongoing investigation. *See* Transcript of April 12, 2012 Hearing, CD p. 406, L. 6-8. No balancing of factors took place and only a directive was issued denying access to any records. *See* Transcript of April 12, 2012 Hearing, CD p. 405, L. 22 - p. 406, L. 5. This does not comport with the mandates of the General Assembly as highlighted in the cases cited herein. The typical reason that release of information could compromise an investigation were not present in the homicide investigation in this case. The shooter, an Aurora police officer, was known to the MCU. A shooting suspect did not have to be identified and located. There was no other possible, yet unidentified, co-suspects or co-defendants. There was no need

to search for any further evidence. The APD had full sole control of the crime scene and all witnesses. There was no possibility evidence would be destroyed since it was all collected at the scene of the shooting. There was no risk that a suspect could escape since the suspect was an Aurora Police officer known to the MCU. Any argument that revealing the results of the investigation may bring possible harm to any potential criminal defendant is not a valid reason under the guise of being contrary to the public interest. We have recently seen in the City of Aurora a mass shooting and killing at an Aurora movie theater on July 20, 2012. The police and the City of Aurora immediately released information as to what happened, who the suspect was, James Holmes, and graphic details of the shooting and killing, and dozens of other persons who were injured. The public demanded to know what happened and the information was released. In the present case a middle-aged Mexican man was killed by an Aurora police officer who removed any indicia that he was a police officer and confronted a man over an alleged $50.00 extortion attempt. The City of Aurora claims that it was in the "public interest" to keep the information about the killing secret, including witnesses' identity secret and the name of the police officer who killed Mr. Contreras. No explanation was given, as required under the statute, to Plaintiffs' letter dated

September 1, 2011 to substantiate the City of Aurora's conclusory and unsubstantiated claim that it was in the public interest not to reveal any information about the killing of Mr. Contreras and to keep secret the name of the Aurora police officer who killed him. This violation of the law was excused by the District Court by stating that the violation was "unintentional" and "without malice." *See* Order Discharging Order to Show Cause, CD p. 191. Although the District Court says that the failure of Aurora to respond to Plaintiffs' letter dated September 1, 2011 "cannot be condoned" this is exactly what the District Court did. Violations of the United States Constitution and the Colorado Constitution and the CCJRA cannot be excused by simple explanation that the request "fell through the cracks." The interest here is the public's right to know the circumstances of the killing of a man by the government. The denial of this information both by the executive branch, the City of Aurora, and the judiciary, the District Court in Arapahoe County, does not support the rule of law and an open and free democracy.

Moreover, any claim that releasing the records would compromise an on-going investigation is without factual or practical justification. As indicated above there was no need for secrecy in the facts and circumstances of this killing by an

Aurora police officer presumably in the line of duty. Certainly on September 13, 2011, when the investigation was complete and the file was turned over to the District Attorney, there was no longer any investigation by the City of Aurora. Therefore, the trial court's ruling, that withholding the records during the investigatory pre-Grand Jury period was not an abuse of discretion, is in error.

An example of the hypocrisy of the City of Aurora in trying to cover up ad hide the facts in the killing of Mr. Contreras is that early in the investigation, on July 25, 2011, the APD released evidence collected of the shooting to the press. The APD provided the press a photograph of the knife allegedly possessed by Contreras. Follow the link to Channel 9 Nine News report on July 25, 2011: http://www.9news.com/news/article/209778/339/Family-Man-didnt-know-it-was-an-undercover-cop.

Thus, the City of Aurora chose to release information that was favorable to the City of Aurora to justify the killing of Mr. Contreras. The City wanted to let the public know certain information favorable to the City and the police officer who killed Mr. Contreras, but has taken two years to release information that is damaging to the City and the police officer and his supervisors. See Tactical Review Board report dated July 31, 2013 which used the factual information that

Plaintiffs sought two years ago to determine that errors were made by the Aurora Police Department that resulted in the killing of Mr. Contreras. The CCJRA did not contemplate a two year delay to provide information required to be released.

The City failed to weigh the factors important to the public and to the requestor Margarita Madrigal and her three minor children. This lack of communication and information and outright ignoring of Plaintiffs' CCJRA is outrageous and shocking. In a State and Country that prides itself on an open and democratic government, a man can be shot to death by a police officer and the City can tell the widow and his children and the general public we do not have to explain how, why, or who killed this man because we are the government and it is in your best interest that we do not reveal any information about his killing to you. The attempt by the City of Aurora to avoid accountability and to deny access to records of the killing of a civilian by a police officer has no place in a free society.

Defendants state that allowing Plaintiffs access to the results of the investigation would compromise the investigation, but do not say how or why. The truth is that disclosing the results of the investigation would be beneficial to the investigation. Transparency is the watchword of an open and free government. Secrecy is the tool of a closed, dictatorial government. Releasing the records will

help to determine the true facts and may very well lead to additional witnesses coming forth with information they may have or additional evidence being made available or discovered.

The investigation regarding the basic facts of the killing of Contreras by the APD is completely independent of the charging decision. Plaintiffs only seek the basic facts of the APD's investigation of the shooting and killing of a citizen by one of their officers. Plaintiffs were only seeking the basic facts of the APD's investigation of the shooting and killing of a citizen by one of their officers. Plaintiffs were entitled to timely know how Juan Contreras, their husband and father, was shot and killed. They are entitled to know the explanation by the police officer why he killed Mr. Contreras and the Police Department concerning all facts and circumstances surrounding the killing of Mr. Contreras. In an open society the United States and the State of Colorado it is intolerable to suggest that the State has the power to kill a human being and not have to give any reason, justification or explanation regarding the killing of that person by a law enforcement officer. It had been over one year since the shooting and killing of Mr. Contreras when this matter was ruled upon by the trial court. Mr. Contreras' family was entitled to access to the information that Aurora kept to itself so

Plaintiffs could conduct their own investigation. They had no access to the names, addresses and telephone numbers of the witnesses. The City of Aurora steadfastly refused to provide any information to them and is therefore impeding Plaintiffs' civil rights. This investigation is now stale and Plaintiffs' rights have been jeopardized and compromised by the long delay in disclosing the requested information to them. The Police Department, after one of their own officers shot and killed Mr. Contreras, sealed off the entire area, interviewed witnesses, obtained names, addresses and telephone numbers of witnesses, and then kept the names and addresses and telephone numbers of any of these independent witnesses and police officer witnesses secret including the name of the officer who shot and killed Mr. Contreras. These are the actions of a closed, undemocratic, totalitarian government that cannot be tolerated in a free society.

The public is entitled to know the facts from a police department's investigation when an officer uses deadly force in the execution of his duties as a law enforcement officer. Since the records and investigation file that Plaintiffs have requested to inspect concerns only the official, on-duty conduct of public law enforcement officers acting within the scope of their authority, disclosure of the records would not be contrary to the public interest. The failure to disclose this

information is against the public interest. The public has a significant interest in knowing how its public law enforcement officers behave in their jobs, especially when they use their extreme power given to police officers to shoot and kill people.

The public also has a compelling interest in seeing that police officers are not engaging in misconduct and any use of deadly force be investigated thoroughly, fairly, and diligently, and that the department's conclusions, whether any violation of official departmental policies occurred, and if so, whether an appropriate level of disciplinary sanction was imposed, are well supported. See, e.g., *Romero v. City of Fountain*, 2011 Colo. App. LEXIS 732 (Colo. Ct. App. May 12, 2011)*; Welsh v. City & County of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("[T]he public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely."); *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) ("[T]here can be little doubt that allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great

public concern."); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) ("Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist.").

The Colorado Court of Appeals recognized this public interest where the appropriateness of a police officer's conduct is being investigated. In *Romero v. City of Fountain*, 2011 Colo. App. LEXIS 732 (Colo. Ct. App. May 12, 2011) the Court held:

> However, we further conclude [17] that the circumstances of this case present a risk of harm to the public interest if the disclosure of the summaries of the report is stayed pending appeal. As Romero has alleged in his publicly filed complaint, he was investigated based on allegations of inappropriate conduct, while in uniform, resulting in his resignation. The district court found that where an officer was found "rightly or wrongly, to have committed, at the very least, a rule violation which is potentially a serious misuse of the office," the investigation reflects a potentially serious abuse of police officer power and responsibilities. It concluded that this is the kind of information the public would have the right to know, given that the investigation was concluded and resulted in Romero's resignation from the police force.

Romero, 2011 Colo. App. LEXIS 732, at 16-17.

Providing Plaintiffs with access to the criminal justice records sought herein would promote the public interest and would not, as the Defendants contend, be "contrary to the public interest." Defendants' complete denial of access to any portion of the criminal justice records, i.e. the police reports and the investigation of the killing of Juan Contreras on July 23, 2011 by an unidentified Aurora Police Officer, sought by Plaintiffs constitutes an abuse of discretion in violation of the CCJRA.

Colorado appellate courts have found that abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair and that a misapplication of the law would constitute an abuse of discretion. *In re Freedom Colo. Info., Inc*., 196 P.3d 892, 899-900 (Colo. 2008). *Clark v. Farmers Ins. Exch*., 117 P.3d 26, 29 (Colo. App. 2004). *Kuhn v. State Dep't of Revenue*, 817 P.2d 101 (Colo. 1991)).

Colorado Courts also look to see if an agency has misconstrued or misapplied applicable law in determining whether thre has been an abuse of discretion. [*In re Freedom Colo. Info., Inc*., 196 P.3d at 899-900. *DeLong v. Trujillo*, 25 P.3d 1194, 1197 (Colo. 2001)]; or whether the decision under review

is not reasonably supported by competent evidence in the record. [*Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990)]. Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986). *In re Freedom Colo. Info., Inc*., 196 P.3d 892, 899-900 (Colo. 2008).

The *Freedom Colorado* Court went on to hold:

> Accordingly, under an abuse of discretion standard for reviewing the CCJRA custodian's determination, the district court does three things. First, the court reviews the criminal justice record at issue. Second, the court takes into account the custodian's balancing of the interests and articulation of his or her determination. Lastly, the court decides whether the custodian has properly determined to: (1) allow inspection of the entire record, (2) allow inspection of a redacted version of the record, 3 or (3) prohibit inspection of the record. If the custodian has failed to engage in the required balancing of the interests or has not articulated his or her rationale, then the trial court should remand the case to the custodian to do so in order to enable judicial review.

Freedom Colo. Info., Inc., 196 P.3d at 900.

In the present case the custodian failed to balance the interests involved and failed to provide any rationale for his determination. Thus, the custodian clearly abused his discretion and the trial court erred in discharging the Order to Show Cause.

The trial court's analysis that the records custodian did not abuse his discretion denying the records during the Grand Jury period is likewise in error. The records should have been disclosed upon Plaintiffs' initial request to the Chief of Police on August 9, 2011 or subsequent request to Juan Guzman, the records custodian, made on August 18, 2011, and in any event on September 13, 2011 once the claimed impediment of an on-going investigation was removed since, on that date, the APD investigation was complete.

The Court's analysis that the denial was designed to protect the integrity of the investigation and the rights of anyone indicted are contrary to the CCJRA. The act does not require the records custodian to consider the rights of an accused but rather the public interest in identifying the shooter. In this case the rights of the Aurora police officer who shot and killed Mr. Contreras was held to be

paramount to the rights of the public to know the circumstances of the killing of Mr. Contreras.

Furthermore, the Grand Jury did not even convene to hear this matter until February 2, 2012, nearly seven months after the killing of Juan Guzman, and five months after the APD turned its file over to the District Attorney. This should not have prevented disclosure. Byron Lee Jones, the Deputy District Attorney who presented the case to the Grand Jury, testified on behalf of the City of Aurora at the Show Cause hearing on April 12, 2012 that due to Grand Jury secrecy provisions contained in Colorado statutory laws and criminal rules he could not even disclose what aspect of the July 23, 2011 event was being investigated. *See* Transcript of April 12, 2012 hearing, CD p. 334, L. 10-20. It should be pointed out that Mr. Jones' characterization of his duty is misplaced. Pursuant to Colorado Rules of Criminal Procedure a prosecuting attorney is allowed to disclose the general purpose of the grand jury's investigation. Colo.R.Crim.P. 6.2 provides in pertinent part as follows:

> Nothing in this rule shall prevent a disclosure of the general purpose of the grand jury's investigation by the prosecutor.

Colo. Crim. P. 6.2. See also *People v. Rickard*, 761 P.2d 188 (Colo. 1988).

Colorado law is clear that the records and information sought by Plaintiff cannot be suppressed relying on the secrecy provisions of the grand jury. In *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1139 (10th Cir. Colo. 2003) the Tenth Circuit reviewed Colorado's grand jury secrecy rules under the U.S. Supreme Court ruling in *Butterworth v. Smith*, 494 U.S. 624 (U.S. 1990). The *Hoffman-Pugh* court held:

> In *Butterworth*, the Court considered a Florida statute permanently prohibiting a grand jury witness from disclosing not just his "testimony" but also the "content, gist, or import" thereof. Because that prohibition encompassed information the witness possessed prior to participating in the grand jury investigation, the Court determined the statute was unconstitutional. See *Butterworth*, 494 U.S. at 631-32. In making its determination, the Court distinguished its decision in *Seattle Times v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), where it concluded the First Amendment was not infringed by a protective order prohibiting the disclosure of information obtained through judicially compelled discovery of otherwise private information. Comparing the situation in *Butterworth*, the Court said: "Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury.494 U.S. at 632. *Butterworth* makes clear that the state cannot,

> by calling a person as a witness, prohibit her from disclosing information she possessed beforehand, that is, the substance itself of the information the witness was asked to divulge to the grand jury."
>
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Hoffmann-Pugh v. Keenan, 338 F.3d 1136, 1139 (10th Cir. Colo. 2003).

The Colorado Supreme Court has reached the same conclusion in regard to records presented to a grand jury and requested by someone with a particularized need. In *Granbery v. District Court of Denver*, 187 Colo. 316, 531 P.2d 390 (Colo. 1975) the Court held:

> When a grand jury undertakes a bona fide criminal investigation, facts incidentally brought to light are not tainted. The Attorney General may use such information for other legitimate purposes. This is true whether or not the grand jury has yet returned an indictment in the continuing criminal investigation. . . .

Granberry, 187 Colo. at 321.

> . . . None of those reasons apply in this case. The policy of secrecy is intended only to protect against disclosure

> of what is said or takes place in the grand jury room. But if a document is sought for itself, independently, rather than because it was presented to the grand jury, there is no bar to disclosure. *United States v. Interstate Dress Carriers*, Inc., 280 F.2d 52 (1960). . . .

Granberry, 187 Colo. at 322.

> . . . Respondent asks only to see documents which have been, or may at some time be shown to a grand jury. The request is to see these documents for an unrelated and independent purpose. The secrecy of the grand jury would not be violated by this procedure. We therefore rule against petitioners' arguments on this issue.

Granbery, 187 Colo. at 322.

The documents Plaintiffs seek were obtained prior to presentation to the grand jury and were not gathered as a result of a grand jury investigation. Plaintiffs did not seek any protected Grand Jury records or testimony in its CCJRA request. Furthermore, disclosure of the CCJRA records would not impinge upon the secrecy of the Grand Jury. Plaintiffs have shown they are entitled to disclosure of the records pursuant to the CCJRA. Furthermore, the Defendants have admitted that they failed to comply with the CCJRA. The Defendants have failed to respond to Plaintiffs' request dated September 1, 2011, and simply offer an

apology for failure to respond. Their offer of an apology for failure to respond does not comply with the remedies provided for in the CCJRA. The failure to respond is arbitrary and capricious. Merely reciting the statute as a reason for failing to provide the records as requested in Plaintiffs' August 16, 2011 letter is likewise arbitrary and capricious. Justice demanded that these records be produced to the widow and children of the man the Aurora police killed. Any argument against non-disclosure is outweighed by the public interest in disclosure.

The trial court's analysis of the post-Grand Jury period likewise is in error. The trial court concludes that the City acted with reasonable dispatch in disclosing the documents after the the Grand Jury returned a no true bill on April 27, 2011. The fact of the matter is that it was the District Attorney's office that provided Grand Jury records to counsel for Plaintiffs voluntarily and unsolicited by Plaintiffs. The records were not responsive to Plaintiffs' CCJRA request and the trial court erred in concluding the records custodian did not abuse his discretion.

B. WHETHER THE TRIAL COURT ERRED IN NOT IMPOSING MONETARY SANCTIONS AGAINST THE RECORDS CUSTODIAN AND THE CITY OF AURORA FOR FAILING TO RESPOND TO PLAINTIFFS' CCJRA REQUESTS, INCLUDING ATTORNEY'S FEES AND COSTS.

Similar to the determination of whether the custodian abused his discretion is whether the custodian acted arbitrarily and capriciously thereby invoking the penalties in the CCJRA. C.R.S. 24-72-305(7) provides:

> (7) Any person denied access to inspect any criminal justice record covered by this part 3 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why said custodian should not permit the inspection of such record. A hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of inspection was proper, it shall order the custodian to permit such inspection and, **upon a finding that the denial was arbitrary or capricious, it may order the custodian to pay the applicant's court costs and attorney fees in an amount to be determined by the court**. Upon a finding that the denial of inspection of a record of an official action was arbitrary or capricious, the court may also order the custodian personally to pay to the applicant a penalty in an amount not to exceed twenty-five dollars for each day that access was improperly denied.

C.R.S. 24-72-305(7) (emphasis supplied).

The records shows that Plaintiffs are entitled to fees costs and penalties pursuant to C.R.S. § 24-72-305(7) for Guzman's arbitrary and capricious decision to deny access of the records to Plaintiffs. Not only did Guzman and the City of Aurora fail to conduct an appropriate balancing test to determine whether the

records should be released they completely ignored Plaintiffs request to perform such a test in their letter dated September 1, 2011. It is undisputed and, moreover, admitted by the Defendants that Guzman failed to respond to Plaintiffs' September 1, 2011 letter. The City's failure to respond to Plaintiffs' inquiry is in derogation of C.R.S. § 24-72-305(6) provides in pertinent part as follows:

> (6) If the custodian denies access to any criminal justice record, the applicant may request a written statement of the grounds for the denial, which statement shall be provided to the applicant within seventy-two hours, shall cite the law or regulation under which access is denied or the general nature of the public interest to be protected by the denial, and shall be furnished forthwith to the applicant.

By failing to follow the carefully crafted statutory provisions of the CCJRA Defendants' actions were arbitrary and capricious. Just because the trial court labeled the City's actions as unintentional does not deter, but actually supports that the custodian's actions were "arbitrary and capricious." Aurora's explanation that the statutorily required response "fell through the cracks" is proof that the custodian's actions were "arbitrary and capricious." The City ignored Plaintiffs' request and basically indicated that they were not going to release any records. By not responding to Plaintiffs' request for an explanation the City told Plaintiffs we don't have to tell you why we are not releasing the records. There is no action

more arbitrary and capricious than a municipal agency ignoring its statutory duties and telling the public, "we are not going to release any information and we do not have to tell you why."

Many of the cases holding an act was an abuse of discretion also find that the act was arbitrary and capricious. *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986). (Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority). In *Charnes v. Robinson*, 772 P.2d 62, 68 (Colo. 1989) the court held:

> To determine that a hearing officer's decision was arbitrary and capricious, a reviewing court must be convinced from the record as a whole that there was not substantial evidence to support the hearing officer's decision.

Charnes, 772 P.2d at 68.

Since the custodian's decision to deny the records was without reason or foundation, it was arbitrary and capricious. The City of Aurora's delays and excuses for not releasing the requested records and information is not only an abuse of discretion but, moreover, arbitrary and capricious hiding the identity of the officer who killed Plaintiffs' husband and father, denying Plaintiffs access to

the identity of independent witnesses, covering up the inadequate supervision by the Aurora Police Department and thereby limiting Aurora's exposure to liability. This is unacceptable. As succinctly stated in *In re Freedom Colo. Info., Inc.*:

> The General Assembly's ultimate purpose in providing for judicial review of discretionary inspection determinations and authorizing the courts in appropriate circumstances to order the release or redacted release of the record, section 24-72-305(7), C.R.S. (2008), is to prevent the custodian from utilizing surreptitious reasons for denying inspection of law enforcement records or reasons which, though explained, do not withstand examination under an abuse of discretion standard.

Freedom Colo. Info., Inc., 196 P.3d at 904.

In the instant case the City of Aurora's actions in denying inspection of the records is without basis and, therefore, illegal. The City's failure to comply with the CCJRA statute and failure to respond to Plaintiffs' requests goes beyond an abuse of discretion and is arbitrary and capricious. The City's actions do not withstand appellate examination. The trial court erred in discharging the order to show cause and failing to impose monetary sanctions as provided in C.R.S. § 24-72-305(7).

V. CONCLUSION

The Arapahoe County District Court erred as a matter of law in determining that the records custodian did not abuse his discretion in refusing to release the records requested by Plaintiffs pursuant to the CCJRA. The records custodian failed to properly balance the interests to be considered to make a determination as to whether the record should be released. Additionally, the trial court erred in not imposing monetary sanctions against the records custodian and the City of Aurora for failing to respond to Plaintiffs' CCJRA requests. Therefore, the trial court erred in discharging the Order to Show Cause and dismissing Madrigal's Complaint.

WHEREFORE, Plaintiffs request that the Order Discharging Order to Show Cause be reversed, that all records sought by Plaintiff be released to her with direction that Defendants pay Plaintiffs' court costs and attorney fees and further pay of twenty-five dollars for each day that access to the records was denied.

Respectfully submitted,

PADILLA & PADILLA, PLLC

Original signature of Kenneth A. Padilla on file at Padilla & Padilla, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, **Opening Brief** was electronically served, via the ICCES Filing System, this 23rd day of August, 2013 to the following:

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