COURT OF APPEALS STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, CO 80202	DATE FILED: December 10, 2013 11:47 PM
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▲
Attorneys for Plaintiffs/Appellants Name: Kenneth A. Padilla Firm Name: Padilla & Padilla, PLLC Address: 1753 Lafayette Street Denver, CO 80218 Phone Number: (303) 832-7145 FAX Number: (303) 832-7147 E-mail: Padillaesq@aol.com Atty. Reg. #: 5632	Case Number: 12CA2551

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 Reply Brief complies with C.A.R. 28(g).

Choose one:

_x_ It contains 5,631 words.

___ It does not exceed 18 pages.

The Opening Brief complies with C.A.R. 28(k).

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
KENNETH A. PADILLA
Attorneys for Plaintiffs/Appellants

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COME NOW the above-named Appellants by and through their attorney Kenneth A. Padilla of Padilla & Padilla, PLLC and respectfully submit the following Reply Brief.

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants have sufficiently set forth the issues in their Opening Brief.

II. STATEMENT OF THE CASE

The statement of the case has been sufficiently set forth by the Appellants in their Opening Brief. Other pertinent portions of the record will be referred to in this Reply Brief with proper citations to the record.

III. SUMMARY OF ARGUMENT

The issue before the Court is simple and clear. The failure of the City of Aurora to release any records or to otherwise disclose to the Appellants who and why Aurora police officers had killed her husband and their father for over ten months cannot be justified in a civilized society. All that Appellants sought were answers to the question as to who, why and under what circumstances their husband and father was killed by the government by providing the records to answer these questions. The use of the CCJRA, or any other law, to refuse to

explain the death of a person killed by the police is antithetical to an open democratic society.

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 never balanced the interests to be considered prior to his denial to release the records. The interest of the public including the Appellants, the widow and minor children of Juan Conrteras to know who, why and how he was killed were not considered. The custodian and the City of Aurora wrongfully took the position that it was "all or nothing" and denied access to all records. The City of Aurora could have, at a minimum, revealed some of the records requested, redacting or releasing a portion of the records as is contemplated and authorized by the statute to properly balance the society's and the Appellants' right to know why, who and how Mr. Juan Contreras had been killed on July 23, 2011, by an unidentified Aurora police officer.

Additionally, the trial court erred in not imposing monetary sanctions, including court costs and attorney's fees 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

The parties are in agreement that 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. *See Opening Brief at page 12; Amended Answer Brief at page 15; 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).

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

The Defendant Juan Guzman as the records custodian for the City of Aurora refused to release any records requested by the Appellants. The CCJRA consigns to the custodian of a criminal justice record the authority to exercise its "sound discretion" to allow or not allow inspection of criminal justice records as

requested by the Appellant, Margarita Madrigal. "Sound discretion" does not mean unbridled discretion. Sound discretion requires balancing the public and private interests relevant to the inspection request. *Harris v. Denver Post Corp*., 123 P.3d 1166, 1175 (Colo. 2005). 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.

Each of these factors overwhelmingly weigh in favor of releasing the records as requested by the Appellants. Even assuming *arguendo* that some records might be appropriate to withhold from the Appellants, clearly all the records were not. Records regarding Aurora Police Department's (APD's) activities resulting in the death of Juan Contreras, the name of the officer who shot and killed Mr. Contreras and the purported reason that the APD was justifying the killing of Mr. Contreras should have been released to the Appellants and the public. Since this was a police officer that shot and killed Mr. Contreras in

furtherance of his alleged public duties, there is no privacy interest that can be claimed. *See Stidham v. Peace Officer Stds. & Training*, 265 F.3d 1144 (10th Cir. 2001); *Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432 (10th Cir. Colo. 1981). The *Stidham* court stated:

> [W]e have "held that police internal investigation files were not protected by the right to privacy when the 'documents related simply to the officers' work as police officers.'" *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) (quoting Lichtenstein, 660 F.2d at 435).

Stidham 265 F.3d at 1155.

A police officer is a public servant. *Willis v. Perry*, 677 P.2d 961 (Colo. App. 1983). When a police officer uses deadly force and kills someone his/her conduct should and must be subject to public scrutiny. The killing of a man by a police officer is a killing by the government. The government cannot hide the facts of this killing for one month, two months, or as in this case, for over ten months. Openness and transparency in an open and democratic society is not dependent upon the caprice or convenience of the government. As Chief Oates himself testified:

> 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).

Clearly the right of the family and the public to know the circumstances of the killing of Juan Contreras were not considered as required by the CCJRA.

The next factor mentioned is the agency's interest in pursuing an ongoing investigation without compromising the investigation. The City has failed to demonstrate even ten months later how the investigation would have been compromised by providing information how a police officer shot and killed a citizen. The APD had absolute control over the public location where this shooting and killing occurred at Colfax and Peoria in front of the Family Dollar Store. There was no indication that in any way the APD was compromised in any fashion in collecting evidence and information, interviewing witnesses, or in taking statements from eye witnesses and yet the APD refused to provide any of this information to the widow of the deceased. These acts of the APD and the City of Aurora prevented the Appellants from pursuing their own investigation. The City of Aurora waited until the information was stale and it was impossible to be able to even locate witnesses to attempt to interview them before releasing any

information. The City of Aurora's refusal to provide information prevented the Appellants from effectively investigating the death of their husband and father. Appellants rightfully believe that by refusing to timely release any information regarding the facts and circumstances of the killing of Juan Contreras, the City of Aurora was protecting the police officer who shot and killed their husband and father and that the City of Aurora was covering up the circumstances of his death. To be certain, the refusal to provide any information about the killing of Juan Contreras did not aid the investigation or secure the rights of the public and the Appellants.

The next factor is the public purpose to be served in allowing inspection. The public purpose is that in a free democratic society, if the government through its police and law enforcement agencies takes the life of a citizen, at a very minimum they should be required to provide information as to why they killed someone. If the government believes they were justified in taking a human's life, at a very minimum they must explain the details of how the life was taken and why the officer took the action to use deadly force and cause the death of a human being, along with the officer's identity. A closed, totalitarian and dictatorial government would not release this information. Why in the United States of

America do we condemn countries that refuse to divulge details of their police force's uses of deadly force, but refuse to recognize that such practices exists in our own country and in Colorado. The public's purpose to reveal at least some details of a killing of a person by the police is to make our public servants (police officers) accountable for their actions.

Finally, the last factor is any other pertinent consideration relevant to the circumstances of the particular request. As indicated the release of the information would not in any way compromise the investigation of the APD. No witness had refused to give any information to the APD. The fact that the APD subsequently presented the information to the Arapahoe County District Attorney's Office less than two months later (*See* Transcript of April 12, 2012 hearing, CD p. 439, L. 8-19) does not relieve the City of Aurora from releasing the information pursuant to the CCJRA when the request was made. Since it took the Arapahoe County DA nearly five months to refer the killing to a grand jury does not mean that the information cannot be released to the public. *Granbery v. District Court of Denver*, 187 Colo. 316, 531 P.2d 390 (Colo. 1975)*; People v. Rickard*, 761 P.2d 188 (Colo. 1988); Colo.R.Crim.P. 6.2. It is only the actual testimony before the Grand Jury that is held secret, which did not occur until some

six months after the request for the records by Mr. Contreras' widow and children. The Grand Jury did not begin considering the case until Appellants had already filed suit and had set a Show Cause hearing as to why the City of Aurora should not be ordered to provide the records requested. That is when the APD decided to take the matter to the District Attorney to try to hide behind a so-called "Grand Jury probe." Even though there is a grand Jury probe does not mean that the facts and circumstances of the shooting and killing of a citizen by a police officer is "confidential" and therefore cannot be released to the public including the dead man's wife and children. *Granbery v. District Court of Denver*, 187 Colo. 316, 531 P.2d 390 (Colo. 1975).

Aurora agrees that not only must this balancing of interests occur, but must be articulated to the requesting party. *See Answer Brief page 17*. The record is clear that the City never articulated its reasons for denying the records and, therefore, was in violation of the CCJRA provisions warranting fines, attorney's fees and costs.

This standard of balancing applies to custodians who have discretionary authority regarding the inspection of criminal justice records under C.R.S. §§ 24-72-304 and 305, *Harris*, 123 P.3d at 1175. The CCJRA favors making the records

available for inspection unless the custodian, in properly exercising his or her sound discretion, finds "disclosure would be contrary to the public interest." *Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.*), 196 P.3d 892, 898 (Colo. 2008).

The custodian in this case never performed the balancing of interests prior to denying Appellants any records. The City of Aurora concedes that no balancing of interests was performed prior to denying the records to Ms. Madrigal. In a conversation lasting less than five minutes Sgt. Herrera mandated that no records would be released since 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.

The City of Aurora attempts to bootstrap the testimony of Chief Oates in the April 12, 2012 Show Cause Hearing to justify the denial of the records request and claim that Chief Oates's testimony some eight months subsequent to denying the records was an appropriate balancing of the interests required by the CCJRA statute. The CCJRA did not provide for nor authorize such a series of events. Rather the CCJRA clearly provides that such balancing must be performed prior to

the decision to deny release of any records. This provision is found in C.R.S. § 24-72-305(6) which 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.

The City of Aurora ignores the seventy-two hour grounds for denial statement and the mandates of C.R.S. § 24-72-305(6) and disingenuously argues that on April 12, 2012, when Chief Oates offered testimony demonstrating that the interests have been balanced, that the records custodian was justified, almost eight months previously, on September 1, 2011 in denying the records to Ms. Madrigal. *Answer Brief page 11*. This position is not only illogical, but fraught with dangers in a free society. Allowing the government through its police department to kill a man and then to summarily tell the wife and his children we do not have to give you any information as to why or how he was killed is an act of a tyrannical, barbaric unrestrained and undemocratic government. There is a fundamental due process right that has been ignored by the government. A person has a right in the United States of American and the State of Colorado not to be unjustifiably killed

by the government. See Fifth and Fourteenth Amendment to the United States Constitution and Article II Section 25 of the Colorado Constitution. Also *see Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner,* 471 U.S. 1 (1985). If the family of the person killed does not have access to the information regarding the circumstances of this killing then they cannot effectuate their rights to due process. Denial of this type of information is *de facto* denial of due process. This fundamental right known to civilized societies has its roots not only in the United States Constitution but from the *Magna Carta*, which reads as follows:

> No free man shall be seized or imprisoned, or stripped of his rights of possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him or send others to do so except by lawful judgment of the land.

Clause 39 of the *Magna Carta*, 1215.

It is not only a violation of fundamental due process, but also a violation of the CCJRA to require the party requesting the records to have to hire counsel to file a lawsuit and then to wait over ten months to finally obtain some of the records.

What clearly occurred in this case is that no one associated with the City of Aurora or the APD bothered to perform the balancing test as required by statute.

Aurora summarily dismissed Ms. Madrigal's request pursuant to C.R.S. § 24-72-305(6), without articulating why disclosing the records would contravene the public interest, by not responding to her September 1, 2013 letter.

The City purports to cite to authority to uphold their position that the balancing of interests can occur at the Show Cause Hearing by citing to the case of *Romero v. City of Fountain*, 2011 Colo. App. LEXIS 732 (Colo. Ct. App. May 12, 2011). In *Romero* a local television station made a CCJRA request to the Fountain Police Department to release an internal affairs investigation record concerning officer Frank Romero. On March 11, 2011 the Chief of the Fountain Police Department notified officer Romero he was going to release the requested records. Officer Romero commenced an action to prevent release of the Internal Affairs record and a preliminary injunction hearing was held on March 23, 2011. At the March 23, 2011 preliminary injunction hearing the Chief of Police articulated his reasons for deciding to release the records and the *Romero* court concluded the Chief's testimony satisfied the balancing functions of the custodian. See *Romero* 2011 Colo. App. LEXIS 732 at *15. In *Romero* the testimony of the Chief of Police, articulating his balancing of the interests occurred, not in a Show Cause Hearing pursuant to C.R.S. § 24-72-305(7), but rather in a hearing regarding

Romero's complaint seeking a temporary restraining order and preliminary injunction to prevent release of the criminal justice records. This is a significant difference than in the case at bar. It is also of import that the preliminary injunction hearing in *Romero* occurred within 16 days of the Fountain Chief of Police notifying Romero, an officer with the Fountain Police Department who was seeking the injunction to prevent release of the records, that records would be released The *Romero* Court points out that the Chief's testimony discharges the custodian's obligation to the entity requesting the records under the CCJRA. In *Romero* the party requesting the records was a local television station who was not even a party in the *Romero* case. In the case before the Court, Chief Oates' testimony over eight months subsequent to denial of records did not discharge the duty of the records custodian to balance the interests required in the statute and articulated in case law. The balancing of interests must come prior to the decision whether or not to allow or deny access to records. To rule otherwise would allow the government to cover up the killing of Juan Contreras.

Moreover, Chief Oates' testimony at the Show Cause Hearing on April 12, 2012 demonstrates that no balancing occurred. Chief Oates did not properly identify the rational for non-disclosure particular to this case. *See Answer Brief*

page 5-7. The Chief testified in general he feels that all information regarding any case being investigated by the APD should be withheld from the public. Fortunately, this is not what the CCJRA mandates. Also, the case law does not support such an expansive denial of CCJRA records. The Chief's testimony demonstrated that the APD never properly balanced the interests when a case is being investigated. Chief Oates testifies as follows:

> **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. [Emphasis supplied]

Transcript of April 12, 2012 hearing, CD p. 418, L. 4-13.

Thus, Chief Oates admits that he does not consider the interest involved in a case by case basis, balancing the interests as required. Rather, in all cases being investigated, the APD has a steadfast rule that records will never be disclosed during an investigation. This policy amounts to a blanket denial of access to all records in all cases in derogation of the duty to balance the interests involved.

Chief Oates' testimony that releasing the records would compromise an on-going investigation is filled with conclusory statements and fails to explain why or how the investigation would be compromised. Furthermore, on September 13, 2011, when the APD investigation was complete the records should have been provided to Ms. Madrigal. The City arguing that the APD's investigation was not complete on September 13, 2012 is a matter of semantics. The fact is, as Chief Oates testified, since the file was turned over to the District Attorney on September 13, 2011 (*See* Transcript of April 12, 2012 hearing, CD p. 439, L. 8-19), there was no longer any investigation by the City of Aurora Police Department. Minimally, the records should have been disclosed at this time. The CCJRA did not contemplate a ten month delay to provide information required to be released. The City and custodian failed to weigh the factors, abused their discretion and thus violated the CCJRA.

Even if we accept that the CCJRA balancing of interest requirement can be made after the fact, 10 months after the killing of Mr. Contreras, there was an abuse of discretion in not releasing the records requested or a portion of the records requested. In determining whether there has been an abuse of discretion Colorado Courts look to see if an agency has misconstrued or misapplied

applicable law. [*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**, 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. [Emphasis supplied].

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

Providing Plaintiffs with access to the criminal justice records, or redacted portions of the records, sought herein would promote the public interest and would not be "contrary to the public interest." Defendants' complete denial of access to any portion of the criminal justice records constitutes an abuse of discretion in violation of the CCJRA.

The release of the records requested by the Appellant under the CCJRA are at the heart of a free and democratic society. As indicated previously Aurora Chief of Police Daniel Oates himself recognizes the importance of public accountability when a police officer uses deadly force. Chief Oates testified that the killing of a person by a police officer is,

> [T]he most significant event that happens in a police department . . . [I]t 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).

To withhold this information from the public and the family of the man the police killed prevents accountability and is in derogation of the CCJRA.

In the present case the custodian failed to balance the interests involved and

failed to provide any rationale for his determination. Appellants are not asking any Court to substitute its judgment for that of the custodian as City of Aurora argues. Rather, Appellants are asking the Court to find what is evident from the record - - that no balancing of interests ever occurred and nothing was articulated to Appellants. Thus, the custodian clearly abused his discretion and the trial court erred in discharging the Order to Show Cause.

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 REQUEST, INCLUDING ATTORNEY'S FEES AND COSTS.

Determining whether the custodian abused his discretion and whether the custodian acted arbitrarily and capriciously thereby invoking the penalties in the CCJRA involves a similar analysis. 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. [Emphasis supplied].

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

The record shows that Appellants are entitled to fees costs and penalties pursuant to C.R.S. § 24-72-305(7) for the record's custodian 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 an analysis 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. *See Answer Brief page 24*. 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.

C.R.S. § 24-72-305(6).

By failing to follow the carefully crafted statutory provisions of the CCJRA Defendants' actions were arbitrary and capricious. 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 "oops I am sorry" defense is without legal or logical foundation. The "oops' we forgot to respond to your request as to why we are not going to tell you why we killed your husband and father is no consolation to the family of Juan Contreras. The City ignored Appellants' 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 same 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, foundation or explanation, 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. § 24-2-305(7).

V. CONCLUSION

The issue before this Appellate Court is simple and clear. Will this Court condone and participate in the government's denial of information as to why, how

and who in the government killed a person? Will this Court demand that the City of Aurora abide by the law of the State of Colorado? Will this Court allow the City of Aurora to act as an oppressive, tyrannical, unrestrained and undemocratic government, free to withhold information about the killing of a citizen for months until they decide to release the information? Will this Court, as a branch of the government, participate in the denial of fundamental due process?

A democratic society is not dependent upon the benevolence of a chief of police or a municipality to decide what information will be released in regard to a police officer's killing of a person. An open society means transparency at all times, not just when it is convenient.

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 Appellants' Complaint.

Each member of this panel ruling on this case need only ask if your spouse or father were killed by the government would you be entitled to know how, why and who killed them? In a democratic society should you have to wait 10 months to get answers to these questions when there is no valid reason to deny the information to the family or the public. The family of a man killed by the government should not be forced to hire counsel, incur costs and expenses to sue the government to learn why their husband and father was killed.

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 the amount of twenty-five dollars for each day that access to the records was denied as provided for in C.R.S. 24-72-305(7).

Appellants believe that oral argument would assist the Court in understanding and resolving the questions presented in this appeal. Oral argument would allow the Appellants, the widow and children of the man killed by the government, to explain their position, to hear from the City of Aurora why they

needed to withhold the information about the death of Mr. Contreras and for the Court as a branch of the government to personally explain their ruling to the family of Mr. Contreras. This would be appropriate since neither the executive or judicial branch of the government, to date, has personally explained their reasoning to the widow and children of Juan Contreras. Appellants therefore request oral argument.

Respectfully submitted,
PADILLA & PADILLA, PLLC

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

By: s/ Kenneth A. Padilla
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, **Reply Brief** was electronically served, via the ICCES Filing System, this 10th day of December, 2013 to the following:

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