

<p>Denver District Court 1437 Bannock Street, #256 Denver, CO 80202</p> <hr/> <p><b>AMERICAN CIVIL LIBERTIES UNION OF COLORADO,</b> a Colorado corporation,</p> <p><b>Plaintiff,</b></p> <p>v.</p> <p><b>ALVIN J. LaCABE, JR., in his official capacity as Manager of Safety, and THE CITY AND COUNTY OF DENVER,</b></p> <p><b>Defendants.</b></p>	<p><b>This case is NOT subject to the simplified procedures for court actions under Rule 16.1 because:</b></p> <p><b>This matter is an expedited proceeding under § 24-72-305(7), C.R.S. (2003).</b></p>
<hr/> <p><i>Attorneys for Plaintiff</i> John A. Culver, Esq., #21811 Benezra &amp; Culver, L.L.C. 274 Union Blvd., #220 Lakewood, CO 80228-1835 (303) 716-0254 (303) 716-0327 facsimile jaculver@bc-law.com</p> <p>Mark Silverstein, Esq., #26979 Taylor S. Pendergrass, Esq., #36008 ACLU Foundation of Colorado 400 Corona Street Denver, CO 80218 (303) 777-5482 msilverstein@aclu-co.org</p>	<hr/> <p><b>Case Number:</b></p> <p><b>Div.:      Ctrm:</b></p>
<p align="center"><b>VERIFIED COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE</b></p>	

Plaintiff, American Civil Liberties Union of Colorado (“ACLU”), through its attorneys, John A. Culver of the law firm of Benezra & Culver, L.L.C., and Mark Silverstein and Taylor S. Pendergrass of the ACLU Foundation of Colorado, for its Complaint and Application for Order to Show Cause against the Defendants, Alvin J. LaCabe, Jr. and the City and County of Denver (“Denver”), alleges the following:

## I. INTRODUCTION

1. The Denver Sheriff's Department ("DSD") operates the Pre-Arrestment Detention Facility ("PADF") in downtown Denver. The PADF serves as the initial intake facility for arrestees in Denver. At the PADF, arrestees are processed into the system, booked, fingerprinted, and temporarily housed until they are able to make bond or have been given an advisement by the Court.

2. This lawsuit seeks disclosure of the Policy and Procedure Manual of the PADF pursuant to the Colorado Criminal Justice Records Act ("CCJRA"), C.R.S. § 24-72-301, et seq. Relief from this Court is required, because Defendants have refused to produce a complete copy of the PADF Manual, without legitimate justification under the CCJRA. While Defendants have refused inspection and copying on the grounds that disclosure is "contrary to the public interest," the public interest clearly compels public disclosure of this information.

## II. JURISDICTION AND PARTIES

3. This Court has jurisdiction to consider Plaintiff's claims, pursuant to C.R.S. §§ 24-72-305(7).

4. Plaintiff ACLU of Colorado is a not-for-profit public interest membership organization incorporated in Colorado and headquartered in Denver, Colorado. As such, it is a "person" as defined in the CCJRA, C.R.S. § 24-72-302(9).

5. Defendant Alvin J. LaCabe, Jr. is the Manager of Safety for the City and County of Denver, Colorado, and is both the "custodian" and the "official custodian" of the criminal justice records at issue in this case. (See C.R.S. § 24-72-302(5) and (8).) He is sued in his official capacity only.

6. The City and County of Denver is a home-rule political subdivision of the State of Colorado and is also a "custodian" of the criminal justice records at issue in this case pursuant to C.R.S. § 24-72-302(5).

## III. APPLICABLE LAW

7. The DSD is a "criminal justice agency" as defined by C.R.S. § 24-72-302(3). The records at issue in this case, the PADF Manual, are "criminal justice records" as defined by C.R.S. § 24-72-302(4). Unless specifically exempt, C.R.S. § 24-72-305 requires that all criminal justice records should be made available for public inspection and copying, unless such disclosure would be "contrary to the public interest."

8. Upon application to the District Court for the District in which the criminal justice records can be found, the Court is to enter an order to show cause "at the

earliest practical time” at which time the custodian of records must demonstrate why the records at issue should not be disclosed. (See C.R.S. § 24-72-305(7).) Unless the Court finds that the custodian’s refusal to permit access to the records at issue was proper, the Court shall order the custodian to permit such access. (Id.)

9. Upon a finding that the custodian’s denial of access was arbitrary or capricious, the Court may order the custodian to pay the applicant’s court costs and attorney fees in an amount to be determined by the Court. (Id.)

#### **IV. FACTUAL ALLEGATIONS**

##### **A. The Public Interest Served by Disclosure of Defendant’s PADF Manual.**

10. The disclosure of the PADF Manual serves the compelling public interest of providing the public knowledge of whether the government’s policies effectively and competently protect the constitutional and statutory rights and the health, safety, and welfare of the 48,000 persons annually processed and detained at the PADF. The public interest in transparency and openness regarding the government’s policies at the PADF is manifest and clearly outweighs any arguable interest in denying inspection of the PADF Manual.

11. Disclosure serves the public interest in multiple ways, including, but not limited to, the following: (a) the general public interest in knowing how and whether the constitutional and statutory rights of pre-trial detainees and prisoners the PADF are protected; (b) the public interest in knowing about the government’s policies, or lack thereof, regarding persons wrongfully arrested by Denver officers in cases of mistaken identity and detained at the PADF; (c) the public interest in investigating unreasonable and unnecessary delays in processing detainees and releasing them from the PADF after they have posted bond; and (d) the public interest in knowing whether existing policies are adequate to protect the constitutional and statutory rights, and the health and safety, of pre-trial detainees during a major event like the Democratic National Convention (“DNC”).

##### **1. The public interest in protecting the rights of pre-trial detainees and prisoners.**

12. The ACLU of Colorado is dedicated to promoting the public interest by protecting and defending the civil rights and civil liberties of all persons in Colorado. In particular, the ACLU is interested in and engages in advocacy to protect the constitutional and statutory rights of pre-trial detainees and prisoners.

13. The ACLU of Colorado’s advocacy in furtherance of the public interest on behalf of the rights of pre-trial detainees and prisoners includes numerous instances of informal advocacy, such as letters, phone calls, or other communication encouraging

governmental officials to add or amend policies or practices that relate to the treatment of pre-trial detainees and other prisoners.

14. Each year, the ACLU of Colorado receives thousands of requests for legal assistance from persons in Colorado. A majority of these requests come from pre-trial detainees and prisoners, including persons who are processed through the PADF. Prisoners and pre-trial detainees write about a range of issues such as religious exercise, overcrowding, access to counsel, access to medication, medical and mental health care, and other issues.

15. In addition to letters from pre-trial detainees, prisoners, and their families, the ACLU of Colorado also receives communications from private attorneys, public defenders and others regarding the PADF. These communications include allegations that the PADF is dangerously overcrowded; that detainees have been “lost” at the PADF as a result of internal misidentification; that there are unnecessary delays in releasing persons after they have posted bond; and that understaffing and limited infrastructure pose risks to the health and safety of persons at the PADF, among other concerns.

16. In this regard, the public interest served by disclosure of the PADF Manual includes, but is not limited to, the public interest in knowing the procedures for booking these detainees, the information collected by Denver during that process, the access provided to counsel and family for these detainees, the medical care and treatment they receive while detained, risks attendant to overcrowding at PADF, the use of the PADF for immigration detention and immigration holds, the procedures for identification of detainees, procedures for posting bond and release, religious exercise at the PADF, accurate computation of sentences, and other issues.

**2. The public interest in disclosure of policies protecting the rights of pre-trial detainees who may wrongfully be detained at the PADF.**

17. The ACLU has investigated multiple incidents in which innocent persons have been mistakenly arrested and detained at the PADF on the basis of a warrant for a different person. In these cases, the innocent parties who have been mistaken for criminal suspects have been wrongfully detained from a few hours up to two, eight, nine, and even to 25 days before being released. There is a strong public interest in knowing whether Defendants have adequate policies in place to ensure that a suspect arrested on a warrant and brought to the PADF is indeed the person named in the warrant. There is a strong public interest in knowing whether the failure to promptly identify and correct these mistakes results from deficient policies or, instead, from a failure to follow existing policies that would be adequate if followed.

18. In cases the ACLU has investigated, the innocent persons who were mistakenly arrested and detained repeatedly informed DSD deputies at the PADF that a mistake had been made and that they were not the criminal suspect named in the

warrant. In some cases friends or family members brought documentation to the PADF to prove that the persons being detained were not the person for whom the warrant issued, but DSD deputies at the PADF did not investigate or verify the identity of the innocent parties. There is a strong public interest in knowing whether the Sheriff's Department has adequate policies in place to ensure that such claims of mistaken identify are taken seriously and promptly investigated. There is a strong public interest in knowing whether the failures to investigate in these cases result from deficient policies or, instead, from a failure to follow existing policies that would be adequate if followed.

19. Rule 5 of the Colorado Rules of Criminal Procedure states that a person arrested, with or without a warrant, must be brought before a judicial officer without unreasonable delay. In more than one case, the innocent persons who were mistakenly arrested and detained at the PADF were not brought to court for the prompt judicial appearance the rule requires. There is a strong public interest in knowing whether the Sheriff's Department has adequate policies in place to ensure that persons arrested and detained at the PADF are indeed brought before a judicial officer without unnecessary delay.

20. Rule 5 of the Colorado Rules of Criminal Procedure states that when a person is arrested and detained on a warrant that originates from another jurisdiction, that person must be transferred to that jurisdiction within 48 hours if he or she has not posted bond. In one case, an innocent person mistaken for a criminal suspect was arrested and held at the PADF on a warrant from another jurisdiction, and, he was not transferred to that jurisdiction until eight days after his arrest. When he was eventually transferred to that jurisdiction, he was immediately released. There is a strong public interest in knowing whether the Sheriff's Department has adequate policies in place to ensure that persons arrested and detained at the PADF on a warrant from another jurisdiction will be transferred to that jurisdiction within 48 hours.

21. The problem of wrongful detentions at PADF due to mistaken identity has garnered significant press attention. (See, e.g., Susan Greene columns, attached as Exhibit A.) That attention plainly demonstrates the public interest in this matter.

22. The failures described in the cases described above underscore the public interest in knowing whether these cases result from deficient policies or, instead, from a failure to follow existing policies that would be adequate if followed. The public interest would thus be served by disclosure of the PADF Manual.

### **3. The public interest regarding unreasonable and unnecessary delays in processing and releasing detainees.**

23. Persons arrested and detained at the PADF, criminal defense attorneys, and public defenders have long complained that it takes hours for persons to be "booked" into the PADF, that it takes hours before persons ready and able to pay their

bond immediately upon their arrest are allowed to do so, and that it takes even more time to release a detainee even after bond has been posted.

24. Some criminal defense attorneys have stated that when they are counseling a client who is going to turn herself in on an active Denver warrant, they arrange for that to take place at a jurisdiction outside of Denver, because the delays in processing and release at the PADF are so common and so long.

25. There is a strong public interest in knowing whether the delays in processing and releasing persons who have posted bond are the result of deficient policies, or whether the delays are the result of failure to follow policies that are adequate on their face. Disclosure of the PADF manual will serve that public interest.

**4. The heightened public interest in the potential consequences of mass arrests during the time of the 2008 Democratic National Convention.**

26. Issues arising from the potential for mass arrests during the upcoming Democratic National Convention (“DNC”) highlight the public interest in disclosure of the policies and procedures of the PADF. The DNC is scheduled for the week of August 24, 2008.

27. Representatives of the ACLU began meeting with Denver officials in May of 2007 to discuss plans to accommodate demonstrations during the time of the convention. The ACLU was aware of numerous complaints of serious violations stemming from the mass arrests made by the New York City Police Department during the Republican National Convention in 2004. One complaint was that New York had apparently made full custodial arrests for minor violations, resulting in an overload of the available processing infrastructure, excessive backlogs in processing, and serious problems with access to food, medicine, attorneys, sanitary facilities, and delivery of medical care to vulnerable detainees.

28. At a meeting about the DNC during the summer of 2007, an ACLU representative suggested that Denver Police issue a citation or summons in the case of minor violations, instead of making a full custodial arrest. Deputy Chief of Police Michael Battista responded that implementing such a suggestion would require a change of policy. The current policy, as Chief Battista described it, is that “for protests, we don’t cite and release.”

29. Several months later, Denver Police apparently followed the “no cite and release” policy with regard to protesters accused of minor law violations during the annual Columbus Day Parade. Approximately 80 protesters were subjected to full custodial arrests and were detained at the PADF.

30. The addition of 80 arrestees overwhelmed the physical and staffing infrastructure at the PADF. Almost all of the arrestees were prepared to post bond immediately, either with cash or credit cards they carried, or through friends or family who were ready with the necessary money. Nevertheless, dozens of the Columbus Day arrestees were forced to wait for many hours before their bond money was accepted and listed as “posted” on the jail’s computer. Even after bond money was accepted and “posted,” many arrestees remained locked up an additional six, eight, ten, even twelve hours before they were released.

31. In a letter dated October 23, 2007, ACLU of Colorado Legal Director Mark Silverstein wrote to Denver officials (attached as Exhibit B). The letter noted the unreasonable delays -- up to 12 hours -- in releasing persons who had posted bond for minor arrests in connection with protests of the Columbus Day Parade. The letter noted that the problems the PADF faced in processing only 80 accused protesters would be increased exponentially during the DNC if Denver failed to change the “no cite and release” policy for minor violations in connection with protests. The ACLU urged City officials to abandon the “no cite and release” policy. The letter also asked the City to investigate the reasons why the PADF was unable to release persons for up to 12 hours even after they had paid their bond money and presumably had a right to a prompt release. The City did not respond to the letter.

32. On information and belief, the Denver Police Department has not modified the policy, as described by Chief Battista, that with regard to alleged protest-related offenses, the Denver Police Department will not issue citations for minor violations but instead carries out full custodial arrests. On information and belief, the Denver Police Department plans to carry out full custodial arrests for alleged violations of law -- even for minor offenses -- in connection with protests during the DNC.

33. The ACLU of Colorado has attempted to advise various Denver City officials that the prospect of full custodial arrests on a mass scale will overload the staffing and physical infrastructure of the PADF and the Denver Sheriff’s Department and will pose a risk of multiple violations of the constitutional and statutory rights of the prisoners. One example of that effort is a letter dated April 29, 2008 to judges of the Denver County Court (attached as Exhibit C). In cases where the staffing is not adequate to provide medications or medical care to vulnerable arrestees, there is a risk of serious damage to prisoners’ health and possibly a risk of a tragic death. The City and County of Denver already faces a federal lawsuit over the death of Emily Rice while she was detained at the PADF.

34. Disclosure of PADF policies may inform public discussion of the PADF’s ability to adequately ensure protection of prisoners’ statutory and constitutional rights, especially in light of the prospect of mass arrests in connection with the DNC. Disclosure may also help inform public discussion of the question whether Denver police should modify the “no cite and release” policy in order to minimize the potential overload of the PADF.

35. For all the reasons discussed above, disclosure of the PADF Manual is not contrary to the public interest. On the contrary, disclosure overwhelmingly advances the public interest.

**B. Defendants' Denial of Plaintiff's Request for Access to Records.**

36. On November 8, 2007, Taylor Pendergrass of the ACLU submitted a request (attached as Exhibit D) pursuant to the CCJRA for the following:

- a. All Denver policies, procedures, guidelines or other criteria related to when Denver will accept the payment of bail by an arrestee;
- b. All records related to any administrative steps or other processes Denver requires to be completed prior to accepting the payment of bail by an arrestee;
- c. All Denver policies, procedures, guidelines, or other criteria related to when Denver will release an arrestee after Denver has accepted the payment of bail by an arrestee;
- d. All records related to any administrative steps or other processes Denver requires to be completed before any arrestee will be released after Denver has accepted the payment of bail by an arrestee.

37. On November 25, 2007, Mary Dulacki, Assistant Manager of Safety ("MOS") for the City and County of Denver, responded to the ACLU's request. In her response, Ms. Dulacki provided access to just four sections of the PADF Manual (attached as Exhibit E). In her response, Ms. Dulacki did not assert that production of such materials would negatively impact a security interest for DSD. (*Id.*)

38. On March 11, 2008, Mr. Pendergrass requested production of the entire PADF Manual (attached as Exhibit F). In response, Ms. Dulacki produced four additional sections of the PADF Manual. Ms. Dulacki then objected to production of the remainder of the PADF Manual. As grounds for withholding, she stated, "it would be contrary to the public interest because it relates to security procedures of the Denver Sheriff Department" (attached as Exhibit G).

39. That same day, ACLU disputed Ms. Dulacki's rationale for denying inspection of the Manual, and again requested a copy of the entire PADF Manual. In that communication, the ACLU suggested that Defendants could redact portions of the Manual that directly related to security procedures. In an effort to reach a compromise that might avoid the need to disclose portions of the Manual that specifically related to security procedures, the ACLU then requested that the MOS send the Table of

Contents (“TOC”) to the ACLU (attached as Exhibit H). The ACLU then indicated it would designate specific sections for disclosure so that they could be produced subject to appropriate redaction. By voicemail, Ms. Dulacki agreed to the compromise and then forwarded by facsimile a copy of the TOC to Mr. Pendergrass (TOC, attached as Exhibit I).

40. On March 25, 2008, Mr. Pendergrass sent a copy of the TOC to Ms. Dulacki with approximately 94 sections designated for production.

41. On March 27, by facsimile, Ms. Dulacki disclosed to the ACLU 6 additional sections of the PADF Manual.

42. On April 10, Ms. Dulacki spoke to Mr. Pendergrass regarding the outstanding requests. During that conversation, Ms. Dulacki asserted, for the first time, that the remaining sections of the PADF Manual were going to be withheld because the Manual was a “discovery issue in the Emily Rice [et al. v. City and County of Denver, et al., Case No. 07CV01571-MSK (D. Colo.)] case.”

43. On April 17, Mr. Pendergrass sent a letter to Ms. Dulacki disputing that the newly-asserted rationale justified withholding, and again requesting production of the PADF Manual (attached as Exhibit J). On April 30, Ms. Dulacki responded to Mr. Pendergrass’ request (attached as Exhibit K). In that correspondence, Ms. Dulacki abandoned her rationale based on the Emily Rice litigation. This time, she returned to her assertion that production of the entire PADF Manual would be contrary to the public interest. (Id.) Her correspondence did not address the ACLU’s offer to accept redacted copies of the sections specifically designated on the basis of the Table of Contents. (Id.)

44. Ms. Dulacki abused her discretion to determine whether disclosure of the requested sections contravened the public interest by failing to make a section-by-section, policy-by-policy determination regarding the public interests at issue. The vast majority of the sections Dulacki refused to produce do not even arguably pertain to the “security” interest upon which she relies to justify non-disclosure. Even where a section generally pertained to a security issue, she failed to make a specific determination regarding the balance of competing interests and failed to consider redactions to accommodate security concerns.

45. As of the date this Complaint was filed, Defendants have failed to disclose numerous policies in the PADF Manual that directly pertain to the public interests described herein. The PADF Manual contains approximately 205 policies. Of these, the Defendants produced only 16 policies before refusing to disclose any additional policies.<sup>1</sup>

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<sup>1</sup> The policies initially produced are the following: 201 (Initial Booking), 202 (Search Desk), 206 (Booking), 207 (Fingerprinting), 301 (Booking Requirements), 304 (Change of Charge), 406 (Credit Card Acceptance for Bonds), 407 (Cash Bonds), 408 (Bond Surrenders), 477 (Order for Release of Bonds),

## V. CLAIM FOR RELIEF

### Order to Show Cause and Award of Reasonable Attorney Fees Pursuant to C.R.S. § 24-72-305(7)

46. Plaintiff hereby incorporates Paragraphs 1 through 45 above as if fully set forth herein.

47. The information requested by the Plaintiff as described herein has been made, maintained and kept by Defendants and constitutes criminal justice records under C.R.S. § 24-72-302.

48. Defendants have refused to provide access to criminal justice records pursuant to Plaintiffs' request.

49. No statutory exception under the CCJRA warrants Defendants' decision to deny access to the public records requested by Plaintiff.

50. Defendants' denial of access to the records sought by Plaintiff violates the CCJRA.

51. There was no good faith basis or grounds to support Defendants' refusal to provide access to the CCJRA records sought by Plaintiff herein, and such denial was arbitrary and capricious, thereby entitling it to an award of attorney fees and costs.

WHEREFORE, Plaintiff ACLU asks this Court to enter judgment in its favor and award the following relief:

- (a) The Court enter an Order directing the Defendants to show cause why they should not permit inspection and copying of the entire PADF Manual as described herein. An Order to Show Cause has been filed separately from this Complaint.
- (b) The Court conduct a hearing pursuant to such Order "at the earliest practical time," at which time the Court should make the Order to Show Cause absolute and order production of the requested documents;
- (c) The Court enter an Order directing Defendants to pay Plaintiff's court costs and reasonable attorney fees;
- (d) The Court order any other and further relief that the Court deems just and proper.

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934 (Bond Posted Prior to I.D. Bureau Clearance), 935 (Make Own Bond), and 944 (After House Bond/Fine Procedures).

Respectfully submitted this 19<sup>th</sup> day of May, 2008.

**BENEZRA & CULVER, L.L.C.**

**s/John A. Culver**

John A. Culver, Esq., #21811  
274 Union Blvd., #220  
Lakewood, CO 80228-1835  
(303) 716-0254

ACLU Foundation of Colorado  
Mark Silverstein, Esq., #26979  
Taylor S. Pendergrass, Esq., #36008  
400 Corona Street  
Denver, CO 80218  
(303) 777-5482

Plaintiff's Address  
400 Corona Street  
Denver, CO 80218

**VERIFICATION**

Mark Silverstein, being first duly sworn on oath, deposes and says that he is the Counsel of the American Civil Liberties Union of Colorado, Plaintiff in this action, that he has read the foregoing Verified Complaint and Application for Order to Show Cause, and that the factual allegations set forth in paragraph IV(A) thereof are true to the best of his knowledge, information and belief.

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF COLORADO**

By: s/Mark Silverstein  
Mark Silverstein

State of Colorado )  
County of Denver )

Subscribed and sworn to before me this 16<sup>th</sup> day of May, 2008, by Mark Silverstein. WITNESS my hand and official seal. My Commission expires: 6-27-2010.

s/Debra L. Woods  
Notary Public

Taylor S. Pendergrass, being first duly sworn on oath, deposes and says that he is the Counsel of the American Civil Liberties Union of Colorado, Plaintiff in this action, that he has read the foregoing Verified Complaint and Application for Order to Show Cause, and that the factual allegations set forth in paragraph IV(B) thereof are true to the best of his knowledge, information and belief.

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF COLORADO**

By: s/Taylor S. Pendergrass  
Taylor S. Pendergrass

State of Colorado )  
County of Denver )

Subscribed and sworn to before me this 16<sup>th</sup> day of May, 2008, by Taylor S. Pendergrass. WITNESS my hand and official seal. My Commission expires: 6-27-2010.

s/Debra L. Woods  
Notary Public