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December 13, 2017

Via E-mail

Sheriff Bill Elder
El Paso County Sheriff's Office
27 E. Vermijo Ave.
Colorado Springs, CO 80903

Re: Violation of Constitutional Rights Under Color of State Law

Dear Sheriff Elder:

This law firm represents the *Colorado Springs Independent* and its reporter Pamela Zubeck. In an e-mail to Editor Matthew Schniper on November 16, 2017, Jacqueline Kirby declared that your office will no longer fulfill any requests for access to criminal justice records under § 24-72-301, *et seq.*, C.R.S., submitted on behalf of Pam Zubeck.¹ In the hastily-called press conference on November 8th, you stated that you considered Ms. Zubeck's reporting concerning your office "crap," and her posting online of a public record (your Candidate Affidavit that remains publicly available on the Secretary of State's website (<http://tracer.sos.colorado.gov/PublicSite/SearchPages/FilingAmendmentSelect.aspx?FilingID=228578>) was an egregious violation of your personal privacy. Thus, there can be no mistake that your office has denied Ms. Zubeck's rights, available to any other member of the public, in retaliation for her exercising her rights as a journalist. As you know, those rights are protected by the First Amendment to the Constitution of the United States and by Article II, Section 10 of the Colorado Constitution.

I write to respectfully ask that you immediately cease and desist from continuing to violate Ms. Zubeck's constitutional rights while acting under color of state law. Such content-based discrimination among members of the news media has been found actionable by courts throughout the land. *See, e.g., Quad-City Community News Serv. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971) (holding that a police department's denying an underground newspaper access to the department's records, while allowing access to another newspaper, constituted a denial of equal protection);

¹ Notwithstanding Ms. Kirby's statement, we understand that that your office would not respond to any CORA request submitted by Ms. Zubeck, but your office has, in fact, provided records requested by Ms. Zubeck but has only provided them to either Ms. Stanley or Mr. Schniper at the *Colorado Springs Independent*.

Sheriff Bill Elder
December 13, 2017
Page 2

McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996) (noting “consistent condemnation by the Supreme Court of “all governmental reprisals” such that “[n]o reasonable official could possibly believe that it is constitutionally permissible to retaliate against a reporter for unfavorable news coverage”); *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 197-98 (2003) (reporter’s allegation that “he was denied access to records given to other similarly situated reporters, based on [the defendant’s finding his reporting offensive]” has stated a valid claim for violation of First Amendment rights under color of state law, actionable under 42 U.S.C. § 1983); *Times-Picayune Publ’g Co. v. Lee*, Civ. A. No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *21, 24 (E.D. La. 1988) (“Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the First Amendment.” . . . [That provision protects], “at a minimum, a [particular reporter’s] right of access to information made available to the public or made available generally to the press.”).

As the Texas Court of Appeals has put it, “[i]n the absence of some compelling government interest to the contrary, all representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience.” *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. App. 1979).

The Colorado Supreme Court adopted the same anti-discrimination principle in *Star Journal Publishing Company v. District Court*, 591 P.2d 1028, 1030 (Colo. 1979), holding that an order that excluded media representatives from a hearing that other members of the public were allowed to attend violates the First Amendment.

I trust that upon review of the above authorities, and after consulting the County Attorney, you will immediately discontinue the practice of discriminating against Ms. Zubeck in retaliation for her editorial news coverage of your office, and will provide her equal access to your office’s records as you provide to any other member of the public.

Please do not hesitate to contact me if you wish to discuss this further.

Sincerely,



Steven D. Zansberg

SDZ/cdh

cc: Amy Folsom, Esq., El Paso County Attorney
Pam Zubeck, Reporter, Colorado Springs Independent
J. Adrien Stanley, News Editor, Colorado Springs Independent

Sheriff Bill Elder
December 13, 2017
Page 3