

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	Case Number: 1:21-cv-00401-KBJ
)	
v.)	
)	
UNITED STATES CAPITOL POLICE,)	
)	
Defendant.)	
_____)	

**PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR LIMITED DISCOVERY**

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I. Introduction.

This case concerns whether the public has a right of access to records about what Speaker of the U.S. House of Representatives Nancy Pelosi has describe as “one of the darkest days in our nation’s history,” “an attack on our very democracy[,]” and “an attack on the peaceful transfer of power.”¹ Speaker Pelosi also has stated, “It is imperative that we find the truth of that day and ensure that such an assault on our Capitol and Democracy cannot ever again happen.”²

To find out the truth about what took place at the U.S. Capitol on January 6, 2021 and to understand how Defendant United States Capitol Police and other government entities responded on that day, Plaintiff Judicial Watch requested access to certain communications and video recordings. Because USCP is not subject to the Freedom of Information Act, Plaintiff submitted its request pursuant to the common law right of access. USCP denied Plaintiff’s request and has now moved for summary judgment, asserting that the requested records are not public records and that, even if they were public records, compelling reasons exist why the records should not be disclosed.

USCP moved for summary judgment before Plaintiff had the opportunity to conduct discovery and gather the facts necessary to oppose USCP’s motion and ultimately prove Plaintiff’s case. Plaintiff therefore moves for limited discovery to seek evidence to prove that the requested records are public records subject to the common law right of access and that the public’s interest in disclosure outweighs the government’s interest in keeping the records secret.

¹ Press Release, Speaker of the House Nancy Pelosi, *Pelosi Names Members to Select Committee to Investigate January 6th Attack on the U.S. Capitol* (July 1, 2021), <https://www.speaker.gov/newsroom/7121-0>.

² *Id.*

II. Procedural History.

Pursuant to the common law right of access, on January 21, 2021, Plaintiff submitted a request to USCP for access to:

- A. Email communications between the U.S. Capitol Police Executive Team and the Capitol Police Board concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.
- B. Email communications of the Capitol Police Board with the Federal Bureau of Investigation, the U.S. Department of Justice, and the U.S. Department of Homeland Security concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.
- C. All video footage from within the Capitol between 12 p.m. and 9 p.m. on January 6, 2021.

Exhibit A to Defendant's Motion for Summary Judgment (ECF No. 12-4). After USCP declined to provide the requested records, Plaintiff sued. *See generally* Complaint (ECF No. 1).

USCP subsequently answered, and the parties met and conferred. *See generally* Answer (ECF No. 10) and Joint Proposed Briefing Schedule (ECF No. 11) at 1. At that time, Plaintiff informed USCP that Plaintiff may need limited discovery depending on the arguments made on summary judgment. Declaration of Michael Bekesha at ¶ 6. Specifically, Plaintiff stated that it would most likely seek discovery if USCP argued the requested records were not public records. *Id.* Because USCP had not finalized its arguments (*id.*), the parties set a briefing schedule, while recognizing that Plaintiff may seek modification of the schedule in the event it determined discovery was warranted. Joint Proposed Briefing Schedule (ECF No. 11) at 2.

USCP moved for summary judgment based on three arguments. *See generally* Memorandum in Support of Defendant's Motion for Summary Judgment (ECF No. 12-2). First,

USCP asserts sovereign immunity bars this action.³ *Id.* at 5-6. Second, it argues the requested records are not public records subject to the common law right of access. *Id.* at 9-13. Third, USCP claims that, even if the records are public records, there are compelling reasons why they should not be disclosed. *Id.* at 13-15.

III. Argument.

“[S]ummary judgment ordinarily is proper only after the plaintiff has been given adequate time for discovery.” *Americable International v. U.S. Department of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997) (citations and internal quotations omitted). Stated another way, “summary judgment is premature unless all parties have had a full opportunity to conduct discovery.” *Convertino v. U.S. Department of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012) (citations and internal quotations omitted). In addition, a nonmoving party’s request for discovery “should be granted almost as a matter of course unless the []party has not diligently pursued discovery of the evidence.” *Id.* (citations and internal quotations omitted). This is especially true if the nonmoving party bears the burden of proof at trial. *Webster v. U.S. Department of Energy*, 267 F. Supp. 3d 246, 255 (D.D.C. 2017) (quoting *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986)).

Rule 56(d) of the Federal Rules of Civil Procedure states, “[I]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or take discovery.”

Fed. R. Civ. P. 56(d)(2). To obtain relief, the affidavit or declaration must:

1. Outline the particular facts that the movant intends to discover and describe why those facts are necessary to the litigation;
2. Explain why the movant could not produce the facts in opposition to the motion for summary judgment; and

³ USCP concedes that the question of sovereign immunity merges with the merits of Plaintiff’s claim. *Id.* at 6, fn. 1.

3. Show that the facts sought are discoverable.

Convertino, 684 F.3d at 99-100. The attached Declaration of Michael Bekesha describes the particular facts that Plaintiff seeks, why these facts are necessary to this litigation, and why they are not already available.

A. Plaintiff intends to discover facts needed to demonstrate that the requested records are public records subject to the common law right of access and that the public’s interest in disclosure outweighs the government’s interest in keeping them secret.

Whether a record “must be disclosed pursuant to the common law right of access involves a two-step inquiry.” *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897, 902 (D.C. Cir. 1996). First, a court must decide whether the records are public records, which the D.C. Circuit has defined as “government document[s] created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived.” *Id.* at 905. Second, if the records are public records, a court must conclude whether “the public’s interest in disclosure” outweighs the “government’s interest in keeping the document secret.” *Id.* at 902. Plaintiff intends to discover facts needed to demonstrate that the video footage is a public record subject to the common law right of access and that the public’s interest in disclosure of the video footage outweighs the government’s interest in keeping it secret.⁴ Bekesha Decl. at ¶ 9.

In its motion, USCP argues the video footage is nothing more than routine “raw surveillance footage.” USCP’s Mem. at 12. In support of that proposition, USCP relies on the Declaration of James W. Joyce. *See generally* Declaration of James W. Joyce (ECF No. 12-3). Although Joyce testifies generally about video recordings from the USCP closed circuit video

⁴ Plaintiff seeks limited discovery with respect to the video footage only. Additional information with respect to the requested communications is not needed.

system (Joyce Decl. at ¶¶ 13-15), he does not provide any specific evidence about the creation, preservation, and use (or future use) of the requested video footage. In fact, most of the declaration concerning the requested video footage simply describes why USCP opposes the public release of it. Joyce Decl. at ¶¶ 16-20.

In an unrelated matter, USCP's General Counsel provides more relevant information concerning the requested video footage. Declaration of Thomas A. DiBiase, *IN RE: PRESS AND PUBLIC ACCESS TO VIDEO EXHIBITS IN THE CAPITOL RIOT CASES*, Case No. 21-46-BAH, attached as Exhibit A to Bekesha Decl. In that declaration, DiBiase testifies:

Soon after the events of January 6, the Department knew that its footage of the riots would be essential to both the criminal prosecutions arising out of the events as well as to assist Congress and possibly other entities to understand how such a vast breach of security could occur. The Department immediately preserved all the footage from that date, starting at noon and continuing until 8:00 p.m.

DiBiase Decl. at ¶ 10. In addition, DiBiase states, "Without affirmative preservation, all Department footage is automatically purged within 30 days." *Id.* at ¶ 10, fn. 1. Contrary to Joyce's testimony, USCP is not treating the requested video footage as routine "raw surveillance footage." Unlike routine footage, the requested video footage is being indefinitely preserved. Unlike routine footage, USCP believes the requested video footage will be used in various capacities in the future. In light of these admitted differences, Plaintiff seeks discovery to fully flesh them out. For example, specific facts Plaintiff would seek to discover would include, at a minimum:

- Who made the decision to immediately preserve the requested video footage;
- How was the decision made to immediately preserve the requested video footage;
- Why was the decision made to immediately preserve the requested video footage;
- Is the requested video footage being preserved in a different system of records from where routine footage is stored;

- What did DiBiase mean by “other entities to understand how such a vast breach of security could occur;”
- Does USCP intend to destroy the requested video footage at some point;
- Have discussions occurred about using the requested video footage as part of a museum or an exhibit in the Capitol Visitor Center; and
- Does the requested video footage contain footage of USCP and other government entities responding to the events of that day.

Bekesha Decl. at ¶ 9. Plaintiff’s intended discovery of these facts will show that the requested video footage is a public record because it is being “kept for the purpose of memorializing or recording” a “matter of legal significance, broadly conceived.” *Washington Legal Foundation*, 89 F.3d at 902.⁵

Plaintiff also seeks discovery to uncover evidence showing whether compelling reasons exist why the requested video footage should not be disclosed. Bekesha Decl. ¶ 10. In his declaration, Joyce argues that the requested video footage should be kept from the public because disclosure of the footage would “result in the layout, vulnerabilities, and security weaknesses of the U.S. Capitol being collected, exposed and passed on to those who might wish to attach the Capitol again.” Joyce Decl. at ¶ 18. In addition, Joyce states that some of the requested video footage has been designated “security information.” *Id.* at ¶ 20. Plaintiff does not dispute that some of the requested video footage may contain sensitive information; however, Joyce’s Declaration fails to provide any evidence about how many hours of the requested video footage contains such information. Bekesha Decl. at ¶ 10. This is an essential fact because, as DiBiase testifies, the requested video footage contains “over 14,000 hours.” DiBiase Decl. at ¶

⁵ Plaintiff does not intend to argue – and the Court will not need to decide – whether all raw surveillance video footage falls within the definition of a public record. The fact that the requested video footage is being treated differently than all other footage underlies Plaintiff’s assertion that the requested video footage is a public record subject to the common law right of access.

10, fn 2.⁶ Joyce also fails to testify about how many of the 14,000 hours reveal “the layout, vulnerabilities, and security weaknesses of the U.S. Capitol.” Bekesha Decl. at ¶ 10. Nor does Joyce’s Declaration identify how many of the 14,000 hours have been shown publicly or used in court proceedings. *Id.* In the absence of such facts, Plaintiff seeks discovery to fill in the gaps left by USCP’s evidence submitted on summary judgment, which is essential to Plaintiff demonstrating that the public’s interest in disclosure outweighs USCP’s interest in keeping the video footage secret.⁷ Bekesha Decl. at ¶ 10.

B. Plaintiff cannot currently produce the facts necessary.

Plaintiff cannot currently produce the facts necessary to demonstrate that the requested records are public records subject to the common law right of access or refute the assertion that compelling reasons exist why the records should not be disclosed for two reasons. First, USCP has not provided the relevant information (as described above) in the Joyce Declaration submitted in this case or the DiBiase Declaration submitted elsewhere. Bekesha Decl. at ¶ 11. Second, Plaintiff has not had the opportunity to conduct discovery. USCP moved for summary judgment prior to discovery taking place in this case. *Id.* Because USCP alone possesses the relevant facts, discovery is necessary for Plaintiff to gather such evidence.

⁶ Whereas Joyce’s declaration does not provide a total number of hours that has been designated “security information,” DiBiase testifies that “less than 17 hours of footage” has been designated as “security information.” DiBiase Decl. at 16.

⁷ Discovery is not needed to uncover evidence relating to the public interest in disclosure of the requested video footage. Not only is Plaintiff’s understanding of the public interest known to Plaintiff but also the significance of the video footage is apparent. *See e.g.* The Law Enforcement Experience on January 6th: Hearing Before the Select Committee to Investigate the January 6th Attack on the United States Capitol, 117th Cong. (2021) (Chairman Bennie G. Thompson: “[J]ust describing that attack doesn’t come close to capturing what actually took place that day. So we’re going to see some of what our witnesses saw on January 6th. Let’s see the video please.”).

C. The facts sought are discoverable.

There can be no dispute that the facts Plaintiff seeks are discoverable. The evidence Plaintiff seeks is “both relevant and proportional to the claims and needs of the case.” *Hill v. Garland*, 2021 U.S. Dist. LEXIS 47628, at *24 (D.D.C. Mar. 21, 2021). Plaintiff is seeking additional information relating to whether the requested records are public records subject to the common law right of access and whether compelling reasons exist why the records should not be disclosed. Bekesha Decl. at ¶ 12. In addition, such evidence exists and is not privileged. *Hill*, 2021 U.S. Dist. LEXIS 47628, at *24. USCP has already submitted two declarations about some of the relevant information. Therefore, USCP cannot claim more complete information on the same topic does not exist or is privileged. Such an argument would strain credibility.

D. The burden of proof lies with Plaintiff.

Plaintiff believes USCP will argue that because discovery is rare in FOIA cases, discovery should not be granted here. However, this is not a FOIA case. Plaintiff brings this lawsuit pursuant to the common law right of access.

Prior to the enactment of FOIA, the common law applied to the records of all three branches of government. *See United States v. Mitchell*, 551 F.2d 1252, 1260 (1976) (noting that access to public records is a historically recognized common law right that predates the Constitution); *see also Washington Legal Foundation*, 89 F.3d at 903-04 (explaining that the common law right of access extends to the records of all three branches of government). FOIA changed that. Congress created a statutory scheme that generally applies to the executive branch, while not applying to the judicial or legislative branches. 5 USC § 552(f).

As part of the statutory scheme, Congress passed FOIA to make records more accessible by changing the burden of proof. *See e.g.* 112 CONG REC. 13,647 (1966) (statement of Rep. Laird regarding FOIA) (“Mr. Speaker, this legislation is long overdue, and marks a historic

breakthrough for freedom of information in that it puts the burden of proof on officials of the bureaus and agencies of the executive branch who seek to withhold information from the press and public, rather than on the inquiring individual who is trying to get essential information as a citizen and taxpayer.”). It specifically shifted the burden from the individual to the government. H.R. Rep. No. 109-226, pt. 2, at 3 (2005) (“With the passage of the FOIA, the burden of proof shifted from the individual to the government.”); *see also* U.S. DEPT. OF THE TREASURY, TD P 25-05, THE FREEDOM OF INFORMATION HANDBOOK, at 1 (2005) (“Before the FOIA in 1966, the burden was on the individual to establish a right to examine Government records. With the passage of the FOIA, the burden of proof shifted from the individual to the Government”).

It is because of this shift that discovery is rare in FOIA cases. *See Schrecker v. United States DOJ*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002). No longer must a FOIA requester prove that requested records are subject to FOIA, that an agency conducted an inadequate search, or that an agency is improperly withholding records. Instead, a government agency must demonstrate that requested records are not subject to FOIA, that it conducted an adequate search, and that it is properly withholding records. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action.”).

“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Barnhart v. Sigmon Coal Company*, 534 U.S. 438, 461-462 (2002) (quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Congress intentionally shifted the burden of proof for the executive branch, which is subject to FOIA. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”).

Congress however did not shift the burden of proof for government entities not subject to FOIA, including the judicial and legislative branches. *See United States ex rel. Cimino v. IBM*, 2021 U.S. App. LEXIS 19955, at *13 (D.C. Cir. July 6, 2021) (“Under the presumption against change in common law, ‘[a] statute will be construed to alter the common law only when that disposition is clear.’”) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 318 (2012)).

The burden remains on Plaintiff to demonstrate that the requested records are public records and that the public’s interest in disclosure outweighs the government’s interest in keeping the records secret. Because Plaintiff will bear the burden of proof at trial, discovery is not only proper but necessary. *Webster*, 267 F. Supp. 3d at 255. FOIA simply does not apply. Nor is it analogous. Congress has stated otherwise.

IV. Conclusion.

For the reasons stated above, Plaintiff’s motion for limited discovery should be granted.

Dated: September 2, 2021

Respectfully submitted,

/s/ Michael Bekesha
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	Case Number: 1:21-cv-00401-KBJ
)	
v.)	
)	
UNITED STATES CAPITOL POLICE,)	
)	
Defendant.)	
)	

**DECLARATION OF MICHAEL BEKESHA IN SUPPORT
OF PLAINTIFF’S MOTION FOR LIMITED DISCOVERY**

I, Michael Bekesha, declare as follows:

1. I am an attorney for Plaintiff Judicial Watch, Inc., and I represent Plaintiff in this case.

2. I submit this Declaration in support of Plaintiff’s Motion for Limited Discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure.

3. As required by Rule 56(d), this Declaration describes the particular facts that Plaintiff seeks; why these facts are necessary to this litigation; and why they are not already public. *Convertino v. U.S. Department of State*, 684 F.3d 93, 99-100 (D.C. Cir. 2012). It also shows that the facts are discoverable. *Id.*

4. Pursuant to the common law right of access, on January 21, 2021, Plaintiff submitted a request to the U.S. Capitol Police for access to:

- A. Email communications between the U.S. Capitol Police Executive Team and the Capitol Police Board concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.
- B. Email communications of the Capitol Police Board with the Federal Bureau of Investigation, the U.S. Department of

Justice, and the U.S. Department of Homeland Security concerning the security of the Capitol on January 6, 2021. The timeframe of this request is from January 1, 2021 through January 10, 2021.

C. All video footage from within the Capitol between 12 p.m. and 9 p.m. on January 6, 2021.

5. After USCP declined to provide the requested records, Plaintiff sued to compel compliance.

6. USCP subsequently answered, and the parties met and conferred. At that time, Plaintiff informed USCP that Plaintiff may need limited discovery depending on the arguments made on summary judgment. Specifically, Plaintiff stated it would most likely seek discovery if USCP argued the requested records were not public records. Because USCP did not know what arguments it would make, the parties set a briefing schedule, while recognizing that Plaintiff may seek modification of the schedule in the event it determines that seeking discovery is warranted.

7. In its motion for summary judgment, USCP asserts that the requested records are not public records subject to the common law right of access and that, even if the records are public records, there are compelling reasons why they should not be disclosed.

8. Plaintiff requires discovery to oppose USCP's motion on these issues.

9. Plaintiff seeks to discover facts that will show that the requested video footage is a public record subject to the common law right of access because it is being "kept for the purpose of memorializing or recording" a "matter of legal significance, broadly conceived." *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897, 902 (D.C. Cir. 1996). This is necessary because USCP asserts that the requested video footage is not a public

record subject to the common law right of access. Plaintiff intends to discover, at a minimum, the following particular facts:

- Who made the decision to immediately preserve the requested video footage;
- How was the decision made to immediately preserve the requested video footage;
- Why was the decision made to immediately preserve the requested video footage;
- Is the requested video footage being preserved in a different system of records from where routine footage is stored;
- What did DiBiase mean by “other entities to understand how such a vast breach of security could occur;”
- Does USCP intend to destroy the requested video footage at some point;
- Have discussions occurred about using the requested video footage as part of a museum or an exhibit in the Capitol Visitor Center; and
- Does the requested video footage contain footage of USCP and other government entities responding to the events of that day.

These facts as well as other similar facts will shed light on whether the requested video footage is now a public record subject to the common law right of access even if it was not a public record when it was first created.

10. Plaintiff also seeks to discover facts that show whether compelling reasons exist why the requested video footage should not be disclosed. Specifically, Plaintiff intends to discover, at a minimum, the following particular facts:

- How many hours of the requested video footage contain “security information;”
- How many hours of the requested video footage reveal “the layout, vulnerabilities, and security weaknesses of the U.S. Capitol;”
- How many hours of the requested video footage have been shown publicly or used in court proceedings.

These facts as well as other similar facts will fill in the gaps left by USCP's evidence submitted on summary judgment, which is essential to Plaintiff demonstrating that the public's interest in disclosure outweighs USCP's interest in keeping the video footage secret.

11. Admissible evidence concerning whether the requested records are public records subject to the common law right of access and whether compelling reasons exist why the records should not be disclosed is not already available to Plaintiff because USCP possesses all the relevant information. USCP also did not disclose all relevant evidence in the declaration submitted in support of its motion for summary judgment or in the declaration submitted in *IN RE: PRESS AND PUBLIC ACCESS TO VIDEO EXHIBITS IN THE CAPITOL RIOT CASES*, Case No. 21-46-BAH. *See* Exhibit A. In addition, USCP moved for summary judgment before Plaintiff had the opportunity to conduct discovery in this case.

12. The facts that Plaintiff seeks are discoverable. Under the Federal Rules of Civil Procedure, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," which includes inadmissible information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). As discussed above, the discovery that Plaintiff seeks is relevant to the issues raised in USCP's motion: whether the requested records are public records subject to the common law right of access and whether compelling reasons exist why the records should not be disclosed.

13. To obtain the factual evidence essential to Plaintiff's opposition to USCP's motion for summary judgment, Plaintiff intends to serve notices of depositions for Thomas A. DiBiase and James W. Joyce, who are both employees of USCP and have relevant information relating to whether the requested records are public records subject to the common law right of

access and whether compelling reasons exist why the records should not be disclosed. Plaintiff may also serve interrogatories and requests for admissions, if necessary, for information relating to those same, limited issues.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on this 2nd Day of September 2021.

/s/ Michael Bekesha
Michael Bekesha

Exhibit A

DECLARATION OF THOMAS A. DIBIASE

I, Thomas A. DiBiase, have personal knowledge of the following facts and will testify to them, if called to do so:

1. I have been the General Counsel for the United States Capitol Police (“USCP” or “Department”) since August of 2020. From October 2019 to August of 2020, I served as the Acting General Counsel, and from April of 2010 to October of 2019, I served as the Deputy General Counsel. Between 1991 and 2010, I worked as a litigator at two District of Columbia law firms and served for 12 years as an Assistant United States Attorney at the United States Attorney’s Office for the District of Columbia.
2. As part of my duties at the USCP, I have authorized the release of camera footage from the Department’s extensive system of cameras on U.S. Capitol Grounds (“Grounds”). These cameras, part of a sophisticated closed circuit video (CCV) system, are resident both inside and outside the buildings including the U.S. Capitol itself and the other Congressional office buildings on the Grounds. This CCV system provides the backbone of the security for the U.S. Capitol Grounds. The CCV system is monitored by sworn police officers 24-7 in our Command Center and is relied upon to provide real time information regarding any incident occurring on the Grounds. The first step whenever an incident occurs is for the Command Center to pull up the CCV cameras closest to the incident. This enables the Department to have a real-time view of the incident and provides an additional layer of safety for our officers when responding to any incident.
3. Access to this CCV system is strictly limited. Because the system is a closed circuit, access to the cameras only occurs from dedicated workstations and monitors located in a handful of locations on the Grounds. Our system is not “in the cloud” and may not be monitored or

hacked by anyone not connected via a dedicated workstation and monitor.

4. The disclosure of any footage from these cameras is strictly limited and subject to a policy that regulates the release of footage. Per Department Directive 1000.002, Retrieval of Archived Video (see Attachment 1), the release of *any* footage from the Department's CCV system must be approved by the Assistant Chief of Police for Operations, the Department's second highest sworn officer. The Directive notes that, "[t]he Capitol Police Board [which oversees the USCP] directed that cameras would only be used for matters related to national security and legitimate law enforcement purposes (e.g., serious crimes). The [Assistant Chief of Police for Operations] is the sole authority for the approval of any and all requests for archived video footage..." The Directive goes on to note that, "[v]ideo footage received through an approved request shall not be delivered, copied, or transmitted to anyone other than necessary parties (e.g., court, General Counsel) without approval from the [Assistant Chief of Police for Operations]."
5. There is a specific Department form, a CP-411 (Attachment 2), which must be completed and signed by several officials including the Assistant Chief of Police for Operations before any camera footage can be released.
6. As part of my duties as General Counsel and my prior duties as the Deputy General Counsel, I have often been consulted regarding the release of camera footage. The Office of the General Counsel has consistently taken a restrictive view of releasing camera footage in cases other than serious crimes or national security. We regularly deny footage to civil plaintiffs who may have been involved in accidents on the Grounds unless they involved serious injuries or death. (Even in those cases, I have only approved an attorney or investigator coming to the USCP and viewing the footage in our offices with a USCP

employee present.) We are also often asked for camera footage related to non-USCP administrative investigations, and we generally do not provide that footage. We will, however, allow investigators from agencies with which we regularly work, such as the Architect of the Capitol, to view such footage in the presence of a USCP employee. Even a member of Congress looking to view footage of our officers' interactions with his staff had to come to our office and view the footage with our employees present.

7. In 2014, the USCP, with the assistance of the District of Columbia's Office of the Attorney General (OAG), litigated the release of USCP camera footage in Driving under the Influence ("DUI") cases. The Department successfully argued that any footage of a DUI defendant, including arrest footage and footage of the defendant being processed in our prisoner processing area, should be subject to a protective order. Since 2015 the Department provides any relevant DUI arrest footage to the OAG who in turn provides it to the defendant subject to a protective order. (A sample protective order in a DUI case along with a sample motion is attached as Attachments 3 and 4.) As noted in this protective order, an attorney for a DUI defendant "may only show the street video to the defendant and any investigators working on this case and shall not share street video nor show it to any other person not directly affiliated with this case...." (Attachment 3 at 1.) The order further notes that the attorney for a DUI defendant may not "reproduce, share, disseminate, nor discuss with any person not named in this Order, the depictions shown in the video; and ... must return the street video to the [OAG] after the later of a plea, trial or sentencing in the above-entitled case." *Id.*

8. As noted in the motion for these protective orders, the OAG argues that:

Here, the release of Capitol security street videos could compromise USCP's ability to protect the Capitol. The USCP's primary mission is to police the United States Capitol Buildings and Grounds, and it has the power to enforce the laws of the District of Columbia pursuant to 2 U.S.C. §1961. As part of its policing

responsibilities, the USCP maintains and controls a series of video surveillance cameras throughout the Capitol Grounds. The purpose of the cameras is to assist in the maintenance of national security by detecting threats to U.S. Congressmen, their staff, and constituents, deterring and preventing terrorism, and providing for the safety and security of the Capitol Buildings and Grounds. The cameras are generally not used to collect evidence in criminal matters.

(Attachment 4 at 3.)

9. It is my understanding that these protective orders are regularly signed by District of Columbia Superior Court judges, and the USCP has provided hundreds of videos pursuant to these orders since 2015.
10. I am familiar with the production of camera footage related to the attempted insurrection at the U.S. Capitol on January 6, 2021. Soon after the events of January 6, the Department knew that its footage of the riots would be essential to both the criminal prosecutions arising out of the events as well as to assist Congress and possibly other entities to understand how such a vast breach of security could occur. The Department immediately preserved all the footage from that date, starting at noon and continuing until 8:00 p.m.¹ This footage² was then provided to two distinct groups: Congressional entities and non-Congressional entities.
11. The two main Congressional entities that requested the eight hours of footage were the Senate Rules Committee (“Rules”) and the Committee on House Administration (“CHA”). Rules and CHA are the primary oversight bodies of the USCP, and the Department provided the total footage from the eight-hour period to them.³ In addition, in response to a request from the House of Representatives General Counsel, the Department provided numerous

¹ Without affirmative preservation, all Department footage is automatically purged within 30 days.

² The total of footage provided is over 14,000 hours.

³ In response to later requests from both committees, the Department provided footage from the entire 24-hour period for January 6, 2021.

clips from our footage to the House Impeachment Managers who were prosecuting the case against former President Donald J. Trump.

12. The Department also provided the complete footage from the eight-hour period to two non-Congressional entities, the Federal Bureau of Investigation (“FBI”) and the D.C.

Metropolitan Police Department (“MPD”), to assist in the investigation and prosecution of the cases arising out of the events of January 6, 2021.⁴ It is our understanding that it is this footage for which the United States now seeks a protective order. When the Department provided its CCV camera footage to the FBI and MPD, it did so subject to several restrictions. The footage was: (a) to remain in the legal control of the USCP; (b) not to be subject to the Freedom of Information Act; and (c) to be returned to the USCP at the conclusion of any investigation. These restrictions did not apply to any footage used as “evidence or discovery as part of any prosecution of any criminal offense.” (Attachment 5 at 1, and Attachment 6 at 1.)

13. The Department has not provided this footage to any other entity other than those listed above. Any public release of this footage, to the extent there has been, is not because of any authorized release by the USCP. (Note that the use of footage by the House Impeachment managers during the trial was permitted since, as a part of the Legislative Branch, the House Impeachment managers have a right to use footage from our cameras for impeachment processes similar to what would be show in a court of law.) It is important to note the wealth of publicly available footage that comes from non-USCP sources such as social media posts, footage recovered from indicted or arrested insurrectionists and footage from body worn cameras from other police departments that responded on January 6, 2021. Notably,

⁴ The Department has provided a very limited number of video clips to the U.S. Attorney’s Office for the District of Columbia for an investigation related to potential January 5th incidents.

published footage that contains sound is not from USCP, as our CCV system does not record sound. Further, USCP officers do not wear body cameras, and thus any published body-worn camera footage is from other police departments.

14. The Department has significant concerns with the release of any of its footage to defendants in the Capitol attack cases unless there are safeguards in place to prevent its copying and dissemination. The Department is aware of efforts made before January 6, 2021, by such defendants and others, to gather information regarding the interior of the U.S. Capitol, including references to the tunnels below the Grounds and maps of the building's layout, which information is generally not publically available.⁵ Our concern is that providing unfettered access to hours of extremely sensitive information to defendants who have already shown a desire to interfere with the democratic process will result in the layout, vulnerabilities and security weaknesses of the U.S. Capitol being collected, exposed and passed on to those who might wish to attack the Capitol again.

15. Pursuant to 2 U.S.C. § 1979, USCP information designated as “security information” may only be released with the approval of the Capitol Police Board. Security information is defined as information that:

- (1) is sensitive with respect to the policing, protection, physical security, intelligence, counterterrorism actions, or emergency preparedness and response relating to Congress, any statutory protectee of the Capitol Police, and the Capitol buildings and grounds; and
- (2) is obtained by, on behalf of, or concerning the Capitol Police Board, the Capitol Police, or any incident command relating to emergency response.

16. At this juncture, the Department in consultation with the Capitol Police Board, has designated only a small subset, consisting of less than 17 hours of footage, as “security

⁵ Indeed, the Architect of the Capitol treats its “blueprints” of the Capitol as “security information” under 2 U.S.C. §1979, *see below*.

information,” as that footage relates to evacuation of Members from their respective chambers on January 6. In addition, the Department is concerned that defendants may be provided access to large sections of footage or even all of the footage, and would deem such information, in the aggregate, to constitute “security information” under 2 U.S.C. § 1979. The ability of the defendants to copy or disseminate such footage would provide the defendants or others to whom it is released with a clear picture of the interior of the Capitol, including entry and exit points, office locations, and the relation of the crucial chambers and offices (such as the Speaker’s Office or Majority Leader’s Office) to other areas of the Capitol.⁶

* * * * *

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 17th day of March 2021.



Thomas A. DiBiase

⁶ The aggregating of information as creating a national security risk is known as the Mosaic Theory. See, https://en.wikipedia.org/wiki/Mosaic_theory_of_intelligence_gathering, last accessed March 2, 2021.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	Case Number: 1:21-cv-00401-KBJ
)	
v.)	
)	
UNITED STATES CAPITOL POLICE,)	
)	
Defendant.)	
_____)	

[Proposed] Order

Upon consideration of Plaintiff's Motion for Limited Discovery and the entire record herein, it is hereby ORDERED that:

1. The motion is GRANTED;

SO ORDERED.

Dated:

The Hon. Ketanji Brown Jackson
U.S. District Court Judge