

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. CAPITOL POLICE,

Defendant.

Case No. 1:21-cv-0401 (FYP)

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN
SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this memorandum of points and authorities in opposition to the Motion for Summary Judgment of Defendant U.S. Capitol Police (ECF No. 12) and in support of Plaintiff’s Cross Motion for Summary Judgment:

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 described 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.” 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.”

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 (“USCP”) and other government entities responded on that day, Plaintiff Judicial Watch requested access to certain video recordings and communications. 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 this litigation commenced.

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.

See Exhibit A to USCP's Motion for Summary Judgment (ECF No. 12-4).

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. *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.

In order to assist in resolution of this matter, Plaintiff moved for discovery of additional facts under Rule 56(d). The Court subsequently ruled that these additional facts were not necessary to resolve this matter. Mem. Op. (ECF No. 18).

III. Argument

A. Sovereign Immunity Is Not a Bar to this Lawsuit.

USCP's initial argument is that this lawsuit is precluded by sovereign immunity. USCP's Mem. at 5. This claim fails, as Plaintiff's complaint specifically seeks mandamus relief under 28 U.S.C. § 1361. *See* Compl. at 1, 3. In *Washington Legal Foundation v. U.S. Sentencing Comm'n*, 89 F.3d 897, 902 (D.C. Cir. 1996) ("*WLF II*"), the D.C. Circuit affirmed that "[i]f a plaintiff seeks a writ of mandamus to force a public official to perform a duty imposed upon him in his official capacity," "no separate waiver of sovereign immunity is needed." *WLF II*, 89 F.3d at 901 (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996)). This is the "*Larson-Dugan* exception" set forth in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) and *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). Plaintiff has more than adequately pled that USCP, through its officers, has violated the duty to release the requested records. 28 U.S.C. § 1361 (mandamus relief against agencies). And because this "question of jurisdiction merges with the question on the merits" (*WLF II* at 902), sovereign immunity does not prevent this case from moving forward. Notably, USCP concedes that the question of sovereign immunity merges with the merits of Plaintiff's claim. *Id.* at 6, fn. 1.

Recently, a similar claim of sovereign immunity was rejected by this Court. *See Judicial Watch, Inc. v. Schiff*, 474 F. Supp. 3d 305 (D.D.C. 2020), *aff'd on other grounds*, 998 F.3d 989 (D.C. Cir. 2021). As this Court explained, "[s]hould the common-law right of access apply to the requested records, then HPSCI's exercise of discretion (upon majority vote of Committee members) whether to release those records to plaintiff would be cabined accordingly by the legal duty or obligation to fulfill plaintiff's request." *Id.* at 312-13. In this case, as the common law

requires USCP to disclose the requested records, its discretion as whether to release the records is similarly controlled by its legal duty to comply with Plaintiff's request.

B. The Common Law Right of Access.

“In ‘the courts of this country’—including the federal courts—the common law bestows upon the public a right of access to public records and documents.” *WLF II*, 89 F.3d 897, 902 (D.C. Cir. 1996) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). In *Nixon*, “the Supreme Court was unequivocal in stating that there is a federal common law right of access ‘to inspect and copy public records and documents.’” *Id.* (quoting *Nixon*, 435 U.S. at 597). “[T]he general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right.” *Id.* at 903 (quoting *Schwartz v. U.S. Dep't of Just.*, 435 F. Supp. 1203, 1203 (D.D.C. 1977)). The right of access is “a precious common law right . . . that predates the Constitution itself.” *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

The Court of Appeals for this circuit has recognized that “openness in government has always been thought crucial to ensuring that the people remain in control of their government.” *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997). “Neither our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny. An official policy of secrecy must be supported by some legitimate justification that serves the interest of the public office.” *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 19 (1986) (Stevens, J., dissenting). In the analogous Freedom of Information Act (FOIA) context, the United States Supreme Court has made clear that citizens “know[ing] ‘what their Government is up to’ . . . [is] a structural necessity in a real democracy.”

Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 171-72 (2004) (quoting *U.S. Dep't of Justice v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). Hence, under the common law right of access, there is a “strong presumption in favor of public access” to records. *Leopold v. United States*, 964 F.3d 1121, 1127 D.C. Cir. 2020) (common law right of access to judicial records).

C. The Common Law Right of Access Applies to the Requested Records.

Whether a record “must be disclosed pursuant to the common law right of access involves a two-step inquiry.” *WLF II* at 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 if “the public’s interest in disclosure” outweighs the “government’s interest in keeping the document secret.” *Id.* at 902.

1. The Requested Video Footage Is a Public Record.

The extraordinary video footage of January 6 fits comfortably within the definition of a public record. USCP claims 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 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 hereto as Exhibit A. 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. Hence, 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." *WLF II*, 89 F.3d at 902.¹

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 attack 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

¹ Plaintiff is not contending that 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 demonstrates that the requested video footage is a public record subject to the common law right of access.

not dispute that some of the requested video footage may contain sensitive information. Joyce's Declaration, however, fails to provide any evidence about how many hours of the requested video footage contain such information or why those portions cannot be segregated from the other portions of the video. Nor does Joyce's Declaration identify how many portions of video footage already may have been shown publicly or used in court proceedings. *Id.* But USCP concedes it already has released portions to multiple entities for a wide range of purposes. USCP's Mem. at 13.

A similar non-specific claim as to purported security risks of release of January 6 video footage already has been rejected by this Court:

The government does not explain how the information it seeks to protect could not already be obtained by, for example, reviewing already-public videos taken inside the Capitol, and the government does not articulate a particular threat stemming from the release of these particular videos. As petitioners persuasively argue, the asserted security risk is undercut by the already extensive release of CCV footage from the Capitol.

United States v. Torrens, Case No. 21-cr-204 (BAH), 2021 U.S. Dist. LEXIS 174997, 2021 WL 4192048 at *14 (D.D.C. Sep't 15, 2021). Judge Howell further noted how, like here:

[T]he government fails to explain how knowledge regarding the “perspectives and capabilities of the cameras” . . . would provide information that would compromise the security of the building, or how the video exhibits would disclose “police tactics and capabilities” . . . and compromise Capitol security. Petitioners observe that a vast amount of released footage—including 50 videos captured on body-worn cameras—depict officers' actions during the January 6 storming of the U.S. Capitol . . . and the government has not explained how the police tactics and capabilities depicted in these videos might differ from those already released.

Id. See also *In re Application for Access to Video Exhibits*, No. 21-mc-90 (RC), 2021 U.S. Dist. LEXIS 233103 (Dec. 6, 2021) (granting access to video and audio exhibits); *United States v. Jackson*, 2021 U.S. Dist. LEXIS 49841 (D.D.C. Mar. 17, 2021) (Howell, C.J.) (granting access to video exhibits).

Far from routine surveillance footage, the requested video footage is a unique and critical record of an extraordinary moment in our history. USCP recognizes this as they preserved the footage because of its undisputed legal and historical significance. It is a public record. At least significant portions of it can and should be released.

2. Release of the Video Footage Is in the Public Interest.

The extraordinary public interest in release of the requested video footage outweighs the interests articulated by USCP. On January 6, 2021, while the U.S. Congress was convened at the seat of our nation’s democracy, hundreds of rioters “took over the United States Capitol; caused the Vice President of the United States, the Congress, and their staffs to flee the Senate and House Chambers; engaged in violent attacks on law enforcement officers charged with protecting the Capitol; and delayed the solemn process of certifying a presidential election.” *United States v. Cua*, No. 21-107 (RDM), 2021 U.S. Dist. LEXIS 44293, 2021 WL 918255, at *3 (D.D.C. Mar. 10, 2021). As Judge Moss has articulated, “[t]his was a singular and chilling event in U.S. history, raising legitimate concern about the security—not only of the Capitol building—but of our democracy itself.” *Id.*

In order to fully understand such an event, the significance of 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.”). As this Court has said, “release of videos for the public to see for itself promotes the underlying goals of the common law right of ‘produc[ing] an informed and enlightened public opinion’ and ‘assur[ing] confidence in judicial

remedies.’” *Munchel*, 2021 U.S. Dist. LEXIS 194604, 2021 WL 4709745, at *4 (quoting *In re Leopold*, 964 F.3d at 1127). The extraordinary public interest outweighs any conceivable interest of USCP in keeping the videos secret.

3. At Least Some of the Requested Communications Are Public Records.

Plaintiff also has requested certain email communications of the USCP during a very narrow timeframe. For substantially the same reasons set forth above, at least some of these communications likely have been memorialized due to the extraordinary nature of the January 6 events and therefore constitute public records. Since USCP has not provided an itemized breakdown of the responsive emails (equivalent to a *Vaughn* Index), Plaintiff cannot yet evaluate which of these emails are public records and should be released. In such a situation, “[t]he court should assess separately each category of documents requested to determine whether part or all of that category might be composed of public records. If there is any legitimate question as to any or all of the categories, then the court should order a *Vaughn* index to evaluate the individual documents within these categories.” *Washington Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1452 (D.C. Cir. 1994). USCP should be ordered to provide an index of the responsive email communications.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant’s motion for summary judgment and grant Plaintiff’s cross motion.

January 21, 2022

Respectfully submitted,
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4. The Capitol Police Board consists of the House Sergeant at Arms, the Senate Sergeant at Arms, and the Architect of the Capitol. Joyce Decl. ¶¶ 6, 11.

Response:

Undisputed.

5. The Chief of the Capitol Police is an ex officio, non-voting member of the Capitol Police Board, and is not authorized to speak on behalf of the Board. Joyce Decl. ¶¶ 11, 12.

Response:

Undisputed.

6. The USCP Executive Team consists of the Chief of the Capitol Police, the Assistant Chief of Police – Protective and Intelligence Operations, the Assistant Chief of Police – Uniformed Operations, the Chief Administrative Officer, and the General Counsel. Joyce Decl. ¶ 6.

Response:

Undisputed.

7. The emails of the principal, voting members of the Capitol Police Board are not maintained in email servers to which the USCP has access. Joyce Decl. ¶ 11.

Response:

Plaintiff lacks knowledge as to the accuracy of this statement.

8. None of the emails located by the USCP in response to Plaintiff's first requested category of information were created or kept to memorialize or record any official action by the USCP. Joyce Decl. ¶¶ 7, 8.

Response:

Disputed, as the statement contains argument and a legal conclusion which should be disregarded by the Court.

9. The emails that the USCP located that are responsive to Plaintiff's first requested category of information include correspondence regarding situational security updates, recommendations on security measures for the Capitol and Members of Congress, updates and

recommendations on police personnel issues, scheduling for upcoming USCP meetings and conference calls, draft documents and statements, and updates about news media reports. Joyce Decl. ¶ 7.

Response:

Plaintiff lacks knowledge as to the accuracy of this statement.

10. None of the emails located by the USCP in response to Plaintiff's second requested category of information were created or kept to memorialize or record any official action by the USCP. Joyce Decl. ¶ 12.

Response:

Disputed, as the statement contains argument and a legal conclusion which should be disregarded by the Court.

11. The emails that the USCP located in response to Plaintiff's second requested category of information, insofar as they concern the security of the Capitol on January 6 at all, primarily concern Inauguration preparations, concerns and condolences regarding officer injuries and fatalities, personal correspondence about Chief Steven Sund's resignation and Acting Chief Pittman's elevation, and fencing. Joyce Decl. ¶ 12.

Response:

Plaintiff lacks knowledge as to the accuracy of this statement.

12. When the USCP takes an official action, it has existing processes in place to memorialize that action that do not consist of sending or receiving emails. Joyce Decl. ¶ 8.

Response:

Plaintiff disputes the relevance of this statement, but lacks knowledge as to its accuracy.

13. The USCP's camera security system, including footage recorded by it within the Capitol and sought by Plaintiff, is solely for national security and law enforcement purposes. Joyce Decl. ¶ 14.

Response:

Disputed, to extent that the camera security system could be used for purposes other than those intended.

14. Access to video footage from the USCP's camera security system is limited to narrow circumstances and strictly controlled by USCP policy. Joyce Decl. ¶¶ 14-15 & Exs. C, D.

Response:

Plaintiff lacks knowledge as to the accuracy of this statement generally, but disputes its relevance to the unique circumstances relating to the events of January 6, 2021 and the subsequent use of the video footage.

15. The USCP has not made any public disclosures of video footage from January 6 from its camera security system. Joyce Decl. ¶ 17.

Response:

Plaintiff lacks knowledge as to accuracy of this statement, but disputes its relevance as USCP has made video footage available to others, including for use in court proceedings, who may have made the footage public.

16. There are currently pending criminal investigations and prosecutions of individuals involved in the events at the U.S. Capitol on January 6, 2021. Joyce Decl. ¶¶ 10, 16.

Response:

Undisputed.

17. There are currently pending congressional investigations into the events at the U.S. Capitol on January 6, 2021. Joyce Decl. ¶¶ 10, 16.

Response:

Undisputed.

18. The USCP has strong interests in maintaining the confidentiality of the requested email correspondence, which include enabling the free flow of information among USCP officials and between those officials and the Capitol Police Board and congressional stakeholders; ensuring that the USCP's security methods, techniques, and responses during an incident such as January 6 are not revealed to the public; and preserving the integrity of ongoing congressional and criminal investigations. Joyce Decl. ¶¶ 9-10.

Response:

Undisputed that USCP has some interests as described in this statement. Plaintiff disputes that these interests outweigh the significant public interest in release of the requested records.

19. The USCP has strong interests in maintaining the confidentiality of the requested video footage, which include adhering to its strict policy limiting disclosure of any video footage to narrowly prescribed circumstances; ensuring that certain sensitive security details about the layout of the Capitol are not revealed to the public; and preserving the integrity of ongoing congressional and criminal investigations. Joyce Decl. ¶¶ 14-15, 18, 20.

Response:

Undisputed that USCP has some interests as described in this statement. Plaintiff disputes that these interests outweigh the significant public interest in release of the requested records.

**PLAINTIFF'S FURTHER STATEMENT OF FACTS IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF PLAINTIFF'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

1. The requested video footage depicts events of extraordinary public interest.
2. The requested communications relate to events of extraordinary public interest.

Respectfully submitted,

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/s/ James F. Peterson

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Counsel for Plaintiff

January 21, 2022

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,

v.

U.S. CAPITOL POLICE,

Defendant.

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Case No. 1:21-cv-0401 (FYP)

PROPOSED ORDER

Having considered the parties' respective motions for summary judgment, the oppositions, and all the pleadings herein:

It is hereby ORDERED that Defendant's motion for summary judgment is denied and Plaintiff's cross motion is granted.

SO ORDERED.

Dated: _____.

U.S. District Judge