IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.) CIVIL NO.:
) 21-0401-ACR
Plaintiff,)
vs.)
)
Capitol POLICE,)
) August 15th, 2023
Defendant.) Washington, D.C.
_____) 1:30 p.m.

Transcript of Motions Hearing
Before the Honorable Ana C. Reyes
United States District Judge

APPEARANCES:

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For the Defendant: Michael A. Zee, Esquire
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Also Present: Thomas A. DiBiase, Esquire
Thomas Fitton

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P R O C E E D I N G S

THE CLERK: This is civil action 21-401, Judicial Watch, Incorporated versus United States Capitol Police, et al.

Will the parties please come forward and identify themselves for the record.

MR. BEKESHA: Good afternoon, Your Honor. Michael Bekesha, on behalf of Judicial Watch. Along with me at counsel table is Tom Fitton, president of Judicial Watch.

THE COURT: Hi, welcome gentlemen.

And that's Bekesha?

MR. BEKESHA: Bekesha.

THE COURT: Okay.

MR. ZEE: Good afternoon, Your Honor. Andrew Zee from the Department of Justice, Civil Division, on behalf of the defendants. With me at counsel table are Marcie Berman, also with DOJ, and Mr. Thomas DiBiase of the United States Capitol Police.

THE COURT: Hi. Welcome, everyone.

All right. Mr. Zee, can I see you for a moment, please?

MR. ZEE: Yes.

THE COURT: All right. So I received your update from yesterday, which was an additional declaration that was submitted in a companion -- well, not a companion, but I guess

a different FOIA case. And Judicial Watch is not the plaintiff in that case; correct?

MR. ZEE: That's correct, Your Honor.

THE COURT: Okay. Are you guys following that case? Do you know anything about that case?

MR. BEKESHA: Not anything more than what was filed yesterday and looking at the docket at 6:00.

THE COURT: Okay. Well, I would suggest that you guys follow that case.

Okay. So I have a number of questions about the declaration, because the declaration states that the U.S. Capitol Police, I guess is in the process of determining whether some of the footage is security information under 2 U.S.C. 1979 and -- but that wasn't briefed in any of your papers. And as you know, I'm sure from Judge Howe's *Leopold* decision, that if we're dealing with 1979, I'm in a different world than I thought we were all in. It's a little unfair to those guys to sort of spring that on them at the last minute.

So my first question is, are you all making an argument that this is subject to 1979, either the emails, which also apparently contain security information if you look at paragraph 7, and some other paragraphs of the declaration that you all submitted with your summary judgment motion, although you did not make the 1979 argument. So either with respect to any of the emails or any of the footage, are you

making a 1979 argument in this case?

MR. ZEE: Your Honor, we acknowledge that we did not make that argument in the briefing as to the footage or in the briefing as to the emails with respect to all of the footage.

We are prepared to present that argument today. We believe that with the declaration in the record now formally in this case, there is a factual, basis based on Mr. DiBiase's declaration, to present that argument and for this Court to rule on that argument.

THE COURT: Okay. Well, that's totally unfair to those guys. Right? I mean, like, this was filed -- this declaration was filed on July 25th. The briefing on this has been done forever. This hearing has been on the books for since before -- I don't know, when did we -- it's been on the books for a couple weeks at least. And I assume Mr. Bekesha is going to tell me that he wants time to brief and argue that.

Right? Or no, or do you not care?

MR. BEKESHA: Yes, Your Honor. I mean, it's more complicated but yes, Your Honor, we would want time.

MR. ZEE: And we recognize that, Your Honor, and certainly we apologize to the Court.

THE COURT: No, it's fine. Like, you know, people get busy, you guys have a lot to do. I'm not concerned about it. It's just I'm not going to make them argue it just today

and not give them any other options.

MR. ZEE: Absolutely understood. And we're prepared, if the Court wishes, to submit -- to submit additional briefing on this issue and of course to give Mr. Bekesha an opportunity to respond if that's the direction the Court wants to go.

Certainly the intent was not to -- not to surprise or not to catch or trap counsel just today with this. I think to take a step back on this particular issue, the treatment and the consideration of the collective amount of footage has, candidly, evolved since this case originally arose.

THE COURT: Well, let me ask you this: Why are you all still talking about whether or not -- I mean, based on the declaration from 20 days ago, this case has been pending for quite a while, through no fault of anyone's, but you said that you're in discussions with the police Board about officially designating the footage. It's been two years. What's going on?

MR. ZEE: Well, I think --

THE COURT: Because a lot of people have asked for this footage. It's not like, you know, they're the first people asking for it.

MR. ZEE: Yes, Your Honor, that is absolutely true. I think the first issue that we'd like -- that the Capitol Police -- that we want to make clear upon the Court is that

this is really the most voluminous request for this kind of footage. The Capitol Police is not in the habit as our executive agencies of dealing with broad requests under the FOIA, for obvious --

THE COURT: We've got poor Mr. James Joyce off by himself dealing with this. No, I know.

MR. ZEE: So I think, as I said earlier, that --

THE COURT: By the way, is his name really James Joyce?

MR. ZEE: His name is James Joyce, yes. Jimmy Joyce, he goes by, I believe.

THE COURT: I hope he's a Joyce fan.

MR. ZEE: He is -- that, I don't know, Your Honor, but --

THE COURT: You know what's interesting, so these guys know I'm a big physics fan, and the -- you all may know this, but the proton is actually -- and then the -- and within the nucleus is not anymore, and hasn't been for a while, considered the smallest particle. The proton is actually made up of other particles. And they're called quarks that they're made up of. And the name quarks came from Ulysses. Someone just sort of opened it up and saw the word "quarks" and liked it, and so now we have quarks that make up protons from Ulysses. But, I digress.

MR. ZEE: I'll have to remind my father, who's a

theoretical physicist himself.

THE COURT: Is he?

MR. ZEE: Yes.

THE COURT: Where does he work?

MR. ZEE: He is at the University of California Santa Barbara.

THE COURT: Get out. What kind of work does he do?

MR. ZEE: He's a particle physicist, quantum theorist. He does a variety of different topics.

THE COURT: I'm reading this book by Leonard Susskind, which is excellent, on particle physics right now. It's really quite good. But I don't know any math, unfortunately, so --

MR. ZEE: Makes it challenging.

THE COURT: -- I understand it like on the dummy level. Do you know what kind of work he does specifically?

MR. ZEE: I shouldn't probably opine on that while on the record in this court, but I'd be happy to --

THE COURT: All right. Well, tell your dad that the Court was really interested in what kind of work he did and that you didn't know, but please email everyone in my chambers because I'm really now quite fascinated as to what he does.

MR. ZEE: I'd be happy to apprise the Court by those mechanisms after this hearing. Thank you.

THE COURT: Okay, great. Sorry. Go ahead.

MR. ZEE: So, Your Honor, I just want to clarify our position, because admittedly, I recognize that this may be -- it may appear, and it may, in fact, be last minute on the eve of this hearing.

So there's a distinction in -- we are prepared to argue today, as I said, either in this hearing or in future briefing, that there's a factual basis presently in the record, and particularly in paragraph 14 of Mr. DiBiase's declaration, where he states that the Capitol Police Department treats the collection of footage from the January 6th -- you know, that's requested in this case as security information. We think that that alone is sufficient for the entirety of the requested footage to qualify as security information under the statute.

I would point out that the statute doesn't require an affirmative designation, unlike, for example, classified information in the Executive Branch which does require an actual affirmative act by a classification authority. That's not required.

Notwithstanding that, it is true that the Capitol Police has been in discussions with the Capitol Police Board, and I'm being -- I'll fulfilling, as best I can, my duty of candor to the Court --

THE COURT: Sure.

MR. ZEE: -- that the Capitol Police Board has been

in discussions on this question of whether to actually formally designate this material as security information. Which does have certain effects. It's an actual formal declaration, which is then, as it was in the case before Judge Howell, that this Court is likely familiar with, it can be manifested in either a Board order or a Board record of some sort.

That has not yet occurred. That continues to be discussed. I've been authorized to say that that is, in fact, been added to the agenda for the next Capitol Police Board meeting, which I believe is scheduled to occur tomorrow. I can't forecast what that vote will be or what that decision will be, I should say, or whether there will even be a decision at this time.

But I want to just make clear, to the extent I haven't already, that we think, from our standpoint, an actual formal or affirmative designation of material as security information is not required under the statute. What's -- in our view, information either is or isn't security information as Congress defined it.

THE COURT: Well, are you going to argue -- are you arguing that any of the emails are security related? Because if you look at paragraph 7 of Mr. Joyce's declaration, which I had a moment ago. Sorry, I take that -- so if you look at -- do you all have paragraph 7 of his declaration?

MR. ZEE: Of the Joyce declaration?

THE COURT: Yes.

MR. ZEE: Yes, I have it.

THE COURT: These emails instead consist of, for example, correspondence regarding situational security updates, recommendations on security measures for the Capitol and members of Congress, and then other types of information which may or may not be security related.

And then -- I think those are the ones that I saw. Well -- and then paragraph 12, there are emails relating -- inauguration preparations and fencing might be -- insofar as any of these emails can be considered a concern to security of the Capitol.

I mean, I guess if their requests are for security emails, then by the nature you might argue that they're security related. But again, that's just nowhere in your papers.

MR. ZEE: It is absolutely correct that we have not presented the argument that any of the emails are security information under the statute.

THE COURT: Do you plan to? Do you want to? My question here is, am I going to kick all this and make you all rebrief this. That's where we're heading.

MR. ZEE: Right. I would welcome that opportunity to the extent that that's helpful for the Court. I think that

we would, at minimum, be hap- -- we will present briefing on, at minimum, the footage, and matching up Mr. DiBiase's recent declaration, or alternatively, a fresh declaration that he files in this case, if necessary, to the legal argument under the statute of why we believe that regardless of what the Board may or may not do in the future, that the footage, in its entirety, constitutes security information that's not subject to disclosure.

THE COURT: Well, let me ask you this about the security footage. Some of the security footage has been, as I understand it, provided to the government and defendants, and has been used in judicial proceedings; right?

MR. ZEE: That's correct.

THE COURT: Some of it.

MR. ZEE: That's correct.

THE COURT: I don't know how much of it. Let's just say an hour, but I've just totally made that up; right. But let's say that's an hour of it that are part of judicial records; right.

MR. ZEE: Yes.

THE COURT: Do you all know, does the USCP know which footage has been used in judicial proceedings?

MR. ZEE: I don't know that the USCP has a running log of the footage. It can -- I believe that it's certainly ascertainable and available to it, but I don't know --

THE COURT: I mean, the question is, if they sent you a request, because, frankly, I think they have major public records problems even before we get to the security 17 -- 1979 issue; right. So they have serious public records issues on both the emails and the security coverage, which I will discuss with them.

But the one thing I think they're on pretty firm ground on is, to the extent any of the footage has been part of a judicial record at any of the January 6 cases, for example, then under the *Wildlaw Fund* case No. 2, it's clear that they're entitled to those. And so if they were to send you a request that was not overly broad that just said all video footage that has been used in judicial proceedings, would you have any argument that that shouldn't be turned over?

MR. ZEE: I think -- I think the first argument that we would make to that type of request, which I do understand, would be that that's available to plaintiff or, frankly, any requester through a pre-existing system that this Court has set up, as I understand it, in the --

THE COURT: I'm new, so inform me.

MR. ZEE: The U.S. Attorney's -- our colleagues in the criminal division of the United States Attorney's Office for the District of Columbia, I believe at the Court's direction, and this arose during the pandemic, that access --

there was significant interest, media interest in video footage that was being used in criminal prosecutions of criminal defendants arising out of the January 6th Capitol attack.

And so to the extent that footage was used in trials, it I think by all accounts therefore became a public -- excuse me, a judicial record and was therefore under the Hubbard test, and barring certain unusual exceptions, you know, extenuating circumstances, would be available to the public and the media as a judicial record.

And there is a pre-existing order to that effect which enables organizations to petition for access --

(Discussion sotto voce.)

THE COURT: Go ahead.

MR. ZEE: Petition for access to a database that has been set up, again by our colleagues in the United States Attorney's Office, to enable, you know, media organizations who are granted that access, successfully petition to just -- I'm not sure the mechanics, but download, access, view those footage --

THE COURT: Do you know anything about this?

MR. BEKESHA: We haven't used the system, but we know it's available.

THE COURT: Okay. So if I said to you guys, you're out of luck except for things that have already been used in a

judicial proceeding, I could say just go do that thingamajig that he just mentioned.

MR. BEKESHA: Yes.

THE COURT: Okay. All right. That makes my life easier.

Go ahead.

MR. ZEE: Yeah. And I want to be clear on that, there is a requirement, as I understand it, that an organization like Mr. Bekesha's would petition for access. There's a threshold determination of whether they're a bona fide organization. I'm not sure on the details of that, but that --

THE COURT: I'm sure a lot of people would question whether or not Judicial Watch is a bona fide organization, but I don't. My guess is that they would qualify.

MR. ZEE: Yeah, I'm sure this Court's view on that matter would -- it's not my decision. It's a decision that's made outside the four corners of this case.

THE COURT: I'm just teasing you all, you know; right?

Go ahead.

MR. ZEE: No, Mr. Bekesha's laughter at -- yeah, he's --

THE COURT: He and my former law firm -- they have my former law firm have gone back and forth for a while.

MR. ZEE: Okay.

THE COURT: But go ahead.

MR. ZEE: So I -- that would be my initial response to the Court's hypothetical, you know, if they were to refashion their request for a far narrower -- far narrow suite of footage, that would be the -- that would be my initial response. It's certainly far less burdensome since there's a system already set up than for the Capitol Police to try to pore through the 14,000 hours to identify --

THE COURT: Is it 14,000 hours?

MR. ZEE: It's 14,000 hours between the time period requested, which is 12:00 p.m. to 9:00 p.m. collectively. There's approximately 14,000 hours because of the number of cameras obviously.

THE COURT: Oh, wow.

MR. ZEE: It's a nine --

THE COURT: Did you know that?

MR. BEKESHA: Yes.

THE COURT: You really want 14,000 hours of video footage?

MR. BEKESHA: Minus the 17 hours they've already designated security footage.

THE COURT: You need to do better things on your Friday nights.

Okay, go ahead.

MR. ZEE: So if the Court would like, I'm happy to address some of the public records.

THE COURT: I have -- you're doing well on the public records. I have questions.

But can we both -- can we all agree, Mr. Bekesha, can we all agree that the *Larson-Dugan* exception applies and that under that exception, I'm basically combining the merits question of whether or not it's a public record with the sovereign immunity question?

MR. ZEE: Your Honor, with respect, we think this Court has the opportunity to decide that the *Larson-Dugan* exception does not apply. We've presented that argument. We recognize that --

THE COURT: Doesn't the D.C. Circuit tell me I have to?

MR. ZEE: Our position is that the D.C. Circuit assumed, but did not decide that question in W --

THE COURT: Well, is that because they're suing the agency, as opposed to the individuals?

MR. ZEE: No.

THE COURT: No?

MR. ZEE: They've cured that problem by now suing 00 by now adding the individuals in their amended complaint.

The argument that we -- the proposition that was assumed, but not decided by the D.C. Circuit in what I'll call

WLF 2, Washington Legal Foundation 2, is that the existence of a common law duty, as opposed to a statutory or a constitutional duty, is it is alone sufficient to pierce sovereign immunity and entitle the plaintiff to avail itself of the *Larson-Dugan* exception.

That question was -- the argument that we're presenting on that topic was not presented by the government in *WLF 2*. The only argument that the government presented in *WLF 2* was that there was no common law duty. And that's why, in *WLF 2*, the D.C. Circuit addressed the merit -- you know, merged the inquiry on the merits with the jurisdictional --

THE COURT: But Judge Howell has decided all these under *Larson-Dugan;* right?

MR. ZEE: Yes, Judge Howell has essentially rejected this argument.

I would point out -- I'd be remiss not to point out that this issue, this very question -- the specific question that I'm identifying here, whether a common law duty is itself sufficient to -- a common law duty alone is adequate for a plaintiff to take advantage of the *Larson-Dugan* exception, that is -- it has been briefed before the D.C. Circuit.

THE COURT: Right. That's the one my clerk told me is pending right now.

MR. ZEE: *Leopold* versus Manger, yes.

THE COURT: That's *Leopold* case, so that's up.

MR. ZEE: That is up, and that -- well, we can't know what the Court of Appeals will do, but it may well.

THE COURT: You never know.

MR. ZEE: It may well.

THE COURT: Let's pretend that I'm not going to be the first to tell Judge Howell that she's wrong. If the D.C. Circuit wants to do that, they're welcome to, but I'm not going to that.

MR. ZEE: Yeah. Absent a ruling in our favor on the sovereign immunity, Your Honor, we -- our position is that -- of course the Court then goes to the two-step test that the Court announced in *WLF 1* on whether to order a disclosure, and our position is that on all of the requested materials, the plaintiffs -- plaintiffs have both steps of the test, but more importantly at the first step.

I would also point out that with respect to category -- I believe it's category 2 or request 2 for the emails between the Board and Executive Branch agencies, that that request is effectively -- or is superseded by the Freedom of Information Act in that those emails can be requested from the Executive Branch agencies directly.

THE COURT: But you don't get to tell them where they get to go for their documents.

MR. ZEE: We don't --

THE COURT: But they could go get those through the

Executive. But it's not a defense for you all to say you can go to FOIA to get them through the Executive, as opposed to us through the common law right, because then they could go to the Executive and the Executive could say to them don't go through us through FOIA, go to the USCP through your common law rights.

MR. ZEE: Well, I think the Court -- the D.C. Circuit --

THE COURT: I mean, if they were smart, they would do that, but --

MR. ZEE: I think the D.C. Circuit has said that where there is a statutory right to obtain the documents, it does supersede the common --

THE COURT: And what decision is that?

MR. ZEE: That's *Center for National Security Studies versus Department of Justice*, Your Honor.

THE COURT: What's the case cite?

MR. ZEE: Let me -- allow me to look it up for you. It's a D.C. Circuit decision.

MR. BEKESHA: Your Honor, I don't mean to interrupt but based on the amended complaint, we're no longer seeking the emails.

THE COURT: Well, then let's stop talking about those.

MR. ZEE: It's 331 F.3d 918.

THE COURT: Well, this makes me feel better as to why I wasn't up to speed on any of this. Thank you. All right. So he's not asking for those emails anymore.

So the second category of emails is gone; right?

MR. BEKESHA: That's correct.

THE COURT: So we're just talking about the first category of emails.

MR. ZEE: The first category of emails, which is the internal emails of the Executive team.

And I apologize, your Honor, the briefing was --

THE COURT: It's fine. It's fine. Don't worry about it.

MR. ZEE: Posture where the briefing was submitted and adopted -- anyway.

THE COURT: Yeah. It's fine.

MR. ZEE: With respect to the first category of emails, we are not making that superceded argument because --

THE COURT: No, none of those emails, the first emails, I think there's like 200-something emails, none of them were sort of final agency emails; right? They're all preliminary-type emails?

MR. ZEE: Precisely, Your Honor. Our position, and this is set forth in Mr. Joyce's declaration, he describes in categories what these emails -- he's reviewed the emails, and he identifies the general categories into which they fit. And

he attests that none of them fall into what could be considered of the public records definition. So basically at step one of the D.C. Circuit test, these emails don't meet that test.

I'd also point out that in various common law right-of-access precedence, far more formal, what I will call formal documents have been deemed not to be public records. And that's in *WLF 2* itself, that's in *Tagin (phonetic)*.

THE COURT: No, no, I got it.

Mr. Bekesha, could I talk to you for a little bit. And I just want to pick up there. So one of the things you've asked for is a Vaughn index. But given the Joyce declaration, I mean, what are you going to get from a Vaughn index that you don't already have?

MR. BEKESHA: Regarding the emails, we think specifically there's just not enough information in that paragraph 7.

THE COURT: But what information would you get from the -- I mean, they are internal emails. I mean, what more information would a Vaughn index give you that would turn them into sort of final agency-type public records?

MR. BEKESHA: Well, to the extent the Capitol Police chief was letting the Board know what steps the Capitol Police were taking, which may fall under situational security updates, that would be a final action that was being taken by

Capitol Police.

THE COURT: A situational -- how is that -- I mean --

MR. BEKESHA: An update --

THE COURT: Even if -- I mean, *WLF* is pretty broad in the kind of things that were not public record in the sense that they weren't sort of final decisions. So, for example -- let me just get the language here.

So, you know, documents that are preliminary and advisory, and that's at *WLF 2*89 F.3d 905. *Leopold* written -- USCP written directives such as internal memorandum and guidance for USCP employees were not public records because they were intended to establish other, more formal guidance. Only after considering that more formal guidance would USCP officials take official action or make official -- or make official -- an official decision. And that's at 2022 WL 4355311 at 9.

And again, *WLF* at 905, emails addressing day-to-day security concerns -- well, that's -- no, sorry. Again, we're going back to preliminary and advisory.

We also have *Musgrave*, 2022 Westlaw 4245489 at 9, a Senate report on CIA interrogation was not a public record because it was a preliminary and advisory step to gather information pertinent to committee's task. *Schiff*, 474 F.Supp.3d at 316, congressional subpoenas are preliminary.

I mean, the list goes on and on. I just -- I don't see anything in his declaration that would say if he got more information, it would be something that was sort of final agency action.

MR. BEKESHA: Well, I think, Your Honor, the difference is that the Executive team of the Capitol Police were making decisions, and they could be informing the Capitol Police Board of the decisions they were making. It wasn't as though --

THE COURT: Yeah -- and if the Capitol Police Board issued a final report, then maybe that would be a public record. But sort of the information that goes into that report is clearly not sort of what *WLF 2* and sort of a lot of these other cases have contemplated.

MR. BEKESHA: But that's only if the purpose of the communications were to issue a report. And our position is that if Capitol Police Executive team, say the Capitol Police chief was communicating with the Capitol Police informing the Board, informing the Board about what steps the Capitol Police were taking on January 6th, he was --

THE COURT: As it was happening?

MR. BEKESHA: As it was happening, it was providing them with the decision of the agency, of the Capitol Police, of what was -- was updating them, was telling him what steps were going to be taken.

THE COURT: Do you have a case --

MR. BEKESHA: He wasn't communicating with them so they could write a report. So it wasn't advisory or investigatory. It was him informing them, keeping them up to date in what was taking place.

THE COURT: Okay. Well, all the cases that I saw that you cited involve, so far as I can tell, the relevant cases involved judicial records. So do you have any case that would support what you just said? Because I haven't seen it.

MR. BEKESHA: No, Your Honor.

THE COURT: Okay. Well, at least --

MR. BEKESHA: We focused a lot more of our time on the video recordings.

THE COURT: Okay. All right. Well, that's helpful. Thank you.

Yeah, I just -- I mean, you don't have anything that challenge -- you don't challenge the declaration as somehow being misleading; right? I mean, you're not telling me that you have a reason to believe that there's something else that's not being described that's being withheld; right?

MR. BEKESHA: No, Your Honor, we just think a few of the categories, there could be more information that could be provided that would give the Court and us a fuller picture.

But, for example, you know, draft documents and

statements, that's a sufficient description. That would be a draft. That would fall outside of the scope of a public record.

THE COURT: Okay. Well, let's just go through these. Correspondence regarding situational security updates.

MR. BEKESHA: That very potentially could be a head of the -- the chief of police updating the Board on what actions the police were taking. So that could be.

THE COURT: But even if that were the case, you don't have a case that says that you would get that.

MR. BEKESHA: No, Your Honor. There are very few cases in this realm.

THE COURT: Well, I mean, I think there's a lot of cases, they just don't say what you want them to say.

Recommendations on security measures for the Capitol members of Congress. Do you need anymore specificity there?

MR. BEKESHA: No, Your Honor.

THE COURT: Okay. Updates and recommendations on police personnel issues. Do you need --

MR. BEKESHA: Again, because of the word "updates," not "recommendations," it doesn't seem as though it's preliminary and advisory, Your Honor.

THE COURT: Okay. Scheduling for upcoming USCP meetings and conference calls. You don't want that. That's

not going to --

MR. BEKESHA: That's probably not, Your Honor, a public record.

THE COURT: Updates about news media reports. That's not going to be it; right?

MR. BEKESHA: But that would be the same.

You know, and the other thing to point is the beginning of the sentence, it's, "For example," so we don't know if there are other categories of records.

THE COURT: Well, that's a fair point. I mean, if there are -- I mean, that's a fair point I'm going to ask you to follow up on. So this is a notable "for example."

MR. BEKESHA: So, Your Honor, we're really just asking at this point for more information. We're not saying these records must be disclosed today. It's that we didn't think --

THE COURT: No, understood.

MR. BEKESHA: We didn't think there was sufficient evidence or information here to allow us to make the arguments we'd want to make before Your Honor.

THE COURT: Okay. Well, I mean, I just -- look, poor Mr. Joyce, right, like I just don't want to make him go off and have to do a full Vaughn index on 271 emails since it seems like most of them aren't going to be relevant even by your own admission.

MR. BEKESHA: And, Your Honor, I don't know if the Justice Department would agree, but, you know, we tend to be pretty reasonable in FOIA cases and public documents cases.

THE COURT: I can't imagine -- I'm telling you right now, the Justice Department is not going to agree that you've been reasonable. I will bet all kinds of money on it.

(Statements unheard by reporter.)

MR. ZEE: -- many cases.

THE COURT: He is reasonable?

MR. ZEE: I have found him to be --

MR. BEKESHA: So if Your Honor were to order the Department to --

THE COURT: I am going to -- I am going to order this.

MR. BEKESHA: -- provide more information, I think we could work through potential categories and exclude documents we would not need a Vaughn index on.

THE COURT: Okay. Well, I am -- since I'm going to give you more briefing on the security information question on 1979, you're going to get that, but then he's also going to get more information, especially on this "for example."

I don't -- you guys work out something that makes sense. I don't want you guys to have to identify every single email. I don't want a big, drawn-out process. But whatever more information you want based on what he has just told you

he agrees is probably not a public record, you don't have to deal with any of that. But I do want to make sure that this "for example" isn't hiding some stuff, inadvertently or advertently. Does that make sense?

MR. ZEE: So I understand, are we awaiting a request from the plaintiff or the plaintiff --

THE COURT: You guys are going to meet and confer.

MR. ZEE: Confer, okay.

THE COURT: You're going to figure out what more detail he wants. He's going to be reasonable, because you're telling me he's a reasonable guy. But the main thing you're going to go back to Mr. Joyce on is say when you say "for example," why is there that "for example"? Are there any categories here -- are there any emails that don't fit into the categories that you've listed.

MR. ZEE: I understand.

THE COURT: That's the main thing he's entitled to.

MR. ZEE: I understand.

THE COURT: Does that make sense?

MR. BEKESHA: Yes, Your Honor.

THE COURT: All right. Now, with respect to the footage, here's my -- I mean, I'm happy to do the -- I'm happy to have the argument I planned to have on the public records. I have to say I don't think they're public records, because I

don't think that they were being maintained or they were being created and maintained for the purposes of keeping them. They were -- just happened to be on at the day of sort of extraordinary events. It was a historic event, but that doesn't make them public records, that just means cameras happened to be on.

Now, your argument is, yeah, but they're keeping them and they're maintaining them. Yes, but not because that's what they planned to do or that's why they were sort of being created. They're being maintained because they have to be because of all this litigation that's going on. So I don't think that turns them into a public record.

MR. BEKESHA: With respect to that, your Honor, it's very similar to a judicial record. There's some records that -- a newspaper article, for example, or even the videotapes, but newspaper article, newspaper article is not a public record until it's entered into the Court record, into the judicial process.

So our position is you're right, the raw footage of all surveillance footage, you know, generally speaking, is not public records.

THE COURT: Okay.

MR. BEKESHA: However, they became public records. The public records were created when, after January 6 occurred, the Capitol Police made the decision to pull those

records out of the system that they normally used, out of the normal process, and essentially preserve them so that they could be used by Congress, can be used by the Justice Department, and, you know, most likely will be preserved for other reasons down the road because as your colleagues have said, members of Congress have said, this was one of the darkest days in American history, colleagues of yours, members of Congress have called it an insurrection. This definition --

THE COURT: Well, it was an insurrection.

MR. BEKESHA: A lot of people have called it -- this bench has called it an insurrection. I guess my point is that these records are being treated differently from the normal course, and that's when the public records were created. And since then, they've been maintained in a way to memorialize or record actions, official actions that were taken that day of Capitol Police, as well as memorializing and recording matters of legal significance, all to which is broadly conceived.

And these tapes are, you know, they are unusual. And if you're looking for, Your Honor, with, you know, all candor, if you're looking for the case, there isn't a case.

THE COURT: No, I know, because all of yours are judicial cases.

MR. BEKESHA: They are, Your Honor. And all the cases related to public records outside of the judicial cases

don't really fit what these are. But it's because of the unique stature of these tapes and the events of January 6th that make these tapes different and makes them public records.

THE COURT: So *W* -- so if you go to *WLF 2*, the issue that I have, and, you know, this might be -- let me just make sure I have the right -- so I'm just looking for the case cite. I'm looking for the page cite, but what I'm looking at is that *WLF 2* says the records must be kept and -- created and kept, and that's *WLF 2*89 F.3d at 905. And I'm not sure where in there it is. I can try to find it for you. But it says --

MR. BEKESHA: I have it, Your Honor.

THE COURT: Thank you.

Okay. A public record is a government document created and kept for the purpose of memorializing or recording an official action.

And I mean, I may be placing too much emphasis on the "and," but it doesn't say created or kept, it says created and kept. And clearly, these records were not -- I mean, we can all agree that -- you might say I'm overreading the "and" there, and that's quite possible. I have to think about that, and I have been thinking about it. But we all agree that the video was not created to maintain as a public record; right? I mean, they just happened to be on that day and something extraordinary happened to happen. They would have been on

that day if everything had gone as it had gone -- as it should have gone.

MR. BEKESHA: Your Honor, the records were created when they were pulled from the general system onto where they're being saved now. It's like making a photocopy. The creation of the public record was when they realized these were important and needed to be preserved.

So we're not saying the creation of the tape, like when the video camera was on and it was recording and it does whatever it does -- technology's a wonderful thing -- and gets on a tape. I mean, I don't know if these are actually tapes that we're talking about. But my point is, it was when the copy was made or when it was moved from one system to another.

That's what we're looking at as the creation. When the Capitol Police decided that this nine-hour period was so important, you know, so essential to be preserved because of the uniqueness of the situation and of that day, that they were being kept. They were created and they were kept.

So we're not talking about the general tapes. We're talking specifically about what took place here.

THE COURT: Okay. Well, talk to me a little bit about -- even assuming I agree with you, and I have to tell you right now, I don't agree with you, but you've given me something else to think about, and he's given me a lot else to think about that I haven't even heard about yet. Even

assuming I would agree with you that the video is public records and it's not security related under the statute, why is there a public interest in 14,000 hours of videotape of the Capitol, which would show, I would imagine, all kinds of security issues and layouts and all kinds of things that people who might want to invade the Capitol again would want and that people who want to secure the Capitol would not want out there. Like why does your interest in having that outweigh the interest of the Capitol being protected?

MR. BEKESHA: I think we've always said that if there's situations or certain cameras or certain angles that need to be redacted or off limits or pulled out, that we don't generally --

THE COURT: But you want them to watch 14,000 hours of security footage to redact that for you?

MR. BEKESHA: Well, I think they know where their cameras are and what hours come from which cameras; right. A camera in the lobby of the Capitol that anybody walking in the front door and looks up and can see the camera, and if that's nine hours of video there, for example, you know, what security information would be on there that anybody walking into the Capitol couldn't see of the camera above and see that it's filming this area. There's probably not just one camera in the lobby, there's probably 15. So 15 times 9 -- Your Honor, I went to law school so I didn't have to do math,

but --

THE COURT: I went to law school so I didn't have to do theoretical physics. That's his dad's job.

MR. BEKESHA: Exactly.

So I mean, I guess, you know, there are things that may be off limits. I mean, we said right up front that we thought the security information was 17 hours of the 14,000. We have never asked for -- I think we made clear that, you know --

THE COURT: Can I ask why do you want 14,000 -- I know it's not really my job, but I'm just curious, like why do you want 14,000 -- 17 hours of security footage?

MR. BEKESHA: I think --

THE COURT: I mean, I guess it is my job. Why is it in the interest -- why is it in the public interest that you have this?

MR. BEKESHA: Well, I mean, it's in the public interest. I mean, an image is worth a thousand words. Everybody's talking about January 6th. Everybody talks about what happened that day. So the public should see what happened in its entirety. Not the clips that were presented during an impeachment trial. Not the clips that are being released as part of the criminal proceedings. Not the clips being released by --

THE COURT: They're not partisan criminal -- stop.

They're not partisan criminal proceedings. We're not getting into that language in here. They are criminal proceedings. But go ahead.

MR. BEKESHA: I'm sorry, I thought that's what I said.

THE COURT: You said partisan criminal proceedings.

MR. BEKESHA: I didn't, Your Honor.

THE COURT: Okay. I apologize. I thought you said partisan. Go ahead.

MR. BEKESHA: No, Your Honor, I said criminal -- I think I said part of criminal proceedings.

THE COURT: Okay. I misunderstood. Go ahead.

MR. BEKESHA: My -- I lost my train of thought there.

There are bits and pieces being picked out, and the public, you know, has -- there's a public interest in seeing all the tapes, seeing all the footage, seeing what happened that day. Let the public decide what to think of it. If everybody's talking about it, and not everybody has seen what everybody's talking about, then how can individuals, how can the public make their own judgments?

THE COURT: Well, you know there's a lot of footage out there already; right?

MR. BEKESHA: There is, Your Honor.

THE COURT: I mean, from -- from people who were in the Capitol, from judicial proceedings. I mean, it's not just from the Capitol Police footage that you get the cameras, that you get the footage.

MR. BEKESHA: That's correct, Your Honor. And, you know, oftentimes when there is a police-related shooting, you know, it is the public's interest to see body camera footage, as well as the cell phone footage of a witness, as well as the security footage of the businesses nearby, because the public wants to see, you know, did the police officer have a right or, you know, feel the need to shoot somebody that may or may not have been unarmed. And so having lots of different angles and lots of different videos is not something unusual. This is not a request --

THE COURT: Yeah, but 14,000 hours is unusual. I mean, my problem -- like, look, it seems to me that you're going to get a lot further in this if you're able to, in some way, narrow down your request in a way that maybe they can fine as reasonable. Maybe not, I don't know.

MR. BEKESHA: I mean, Your Honor, the problem is we don't have any of that information. So, for example, if there is a camera in a back hallway in the Capitol where no one went to that day, that's nine hours of tape that we -- the public doesn't need to see because there's nothing on that tape. I don't know if there's nine hours of that, or 9,000 of that,

right, we don't know that.

Again, being -- you know, our interest is to get the footage available, make the footage available to the public. We can be reasonable in our request if we -- you know, if the argument is we can't produce the 14,000 and 9,000 of those hours are just blank hallways, then tell us that. And then we can narrow our request to just the a thousand dollars that are left.

I mean, I'm just spitballing here because we don't know and we haven't been told. There's no Vaughn index, there's no discovery, there's nothing for us to argue against, and so we're stuck arguing for it all because we don't have the information.

THE COURT: Okay. I mean, THAT'S not an unfair point.

MR. BEKESHA: So yes, if there's a way to narrow, we can absolutely do that, but we would need information for that; otherwise, I'm just making stuff up standing here.

THE COURT: Fair enough. All right.

Could I see you again, sir.

MR. ZEE: Yes.

MR. BEKESHA: Did you want to address the security information issue?

THE COURT: I'm going to have you guys brief that. I'm not going to do that on the fly.

Okay. The security statute, how does that dovetail with your sovereign immunity argument? Here's why I'm asking. Because I am transforming your -- I was going to transform your summary judgment motion into a 12(b)(1) because you were making a sovereign immunity argument, which under lots of case law gets transformed into a 12(b)(1). It doesn't change anything practically, it just is a different name.

But the question is, do I have do that if you're going to make -- well, let me put it to you this way. Here's what we're going to do. You guys are going to get -- you guys have bought yourselves a new round of briefing. I'm going to probably deny both of the motions without prejudice. And I'm going to have you renew your motion as a 12(b)(1) to make the sovereign immunity argument on the public records. And then you can make the security argument as an alternative or your primary -- I don't care what you do, but if you're going to continue to make the public record -- if you're going to continue to make a sovereign immunities argument, it has to be as a 12(b)(1).

MR. ZEE: Understood.

THE COURT: As opposed to a Rule 56.

MR. ZEE: Understood.

THE COURT: I have no idea if your security statute is a sovereign immunity argument or a different kind of argument or a merits argument, I don't know. If it's

sovereign immunity, you may get as part of the 12(b)(1); if it is merits, have a 12(b)(1) plus a Rule 56. Does that make sense?

MR. ZEE: Yeah. My view standing here today, Your Honor, is it would be a Rule 56 because it would be dependant on factual information, a factual basis for the --

THE COURT: No. Well, 12(b)(1) could be fact-based. The 12(b)(1) can go outside the pleadings. It's just because it's sovereign immunity, it's not supposed to be on the merits, and summary judgment is a merits decision.

MR. ZEE: Right. Just so I'm clear, Your Honor, with respect to sovereign immunity, is the Court asking us to rebrief the sovereign immunity argument, which I understood the Court to be rejecting, the idea that --

THE COURT: No, no, no, I --

MR. ZEE: Or the merger -- yeah.

THE COURT: For my internal purposes, I'm denying both of your motions without prejudice.

MR. ZEE: Okay.

THE COURT: But you get to add -- you get to rebrief it however you want to rebrief it. I'm going to apply the *Larson-Dugan* exception while *Leopold* is still on appeal. If you want to argue both things again so that you preserve your rights, you can do whatever you want, I don't care. I'm just telling you how it's going to come out.

MR. ZEE: Sure.

THE COURT: I don't need you to rewrite things. I just need -- what I really need on your new round of briefing is for you to make the security-related argument, that's brand-new, that you haven't made before.

MR. ZEE: And we will, Your Honor.

THE COURT: Okay.

MR. ZEE: I think that will be made -- I think that can be made under Rule 12(b)(1) because it is presented under the auspices of a merged analysis with the merits under the *Larson-Dugan* exception.

THE COURT: Okay.

MR. ZEE: It could also be a Rule 56 in the alternative. We don't have to get --

THE COURT: Okay. So here's what we're going to do. I'm going to deny your Rule 56 without prejudice.

I'm going to deny your Rule 56, except that I'm going to grant it to the extent that I'm going to order you guys to meet and confer on additional detail on the emails, as we've discussed. So it's going to be a very limited grant on that.

Then I'm going to give you 30 days the file a 12(b)(1) motion. You're going to -- well, you're going to have 30 days to file a 12(b)(1) motion. You're going the find out tomorrow what the Board does, right, hopefully? If it

acts.

MR. ZEE: If it -- if there's action tomorrow, we will find out, yes.

THE COURT: Okay. You might want to tell whoever's talking to the Board tomorrow that the sooner they rule on that, the better it's going to be for everybody, because you've got 30 days on your 12(b)(1).

MR. ZEE: Understood.

THE COURT: You get however much time you want to oppose the 12(b)(1). How much time do you want to oppose the 12(b)(1)?

MR. BEKESHA: 30 -- probably 30 days.

THE COURT: You get 30 days.

And then you get 15 days to respond. Okay?

MR. ZEE: All measured from today?

THE COURT: All measured from today. We'll put in a minute order with all this later today.

MR. ZEE: Thank you.

THE COURT: And then we will probably all come back here.

In the meantime, if I were you, Judicial Watch, I would follow the FOIA case in front of Judge Mehta, because I think it has a lot of the information that you want, and you might be able to tag along or do something along there, or at least know what's happening in this case. You might want to

talk to those plaintiffs, I don't know, totally up to you, but you might want to follow it.

And we're all going to have to see what the D.C. Circuit does on *Leopold*. That briefing is complete in *Leopold*, do we know?

MR. ZEE: I do not know if the final brief has come in yet, Your Honor.

(Discussion off the record.)

THE COURT: Also if you actually want security camera footage, and we do have a process here, I would get going on that if I were you guys, because that's probably the quickest way you're going to get anything.

And I have to tell you, you know, right now I'm not inclined to grant you the security coverage under the public records exception. And he's probably going to give me another reason why I can't grant it to you, that's just -- be honest about where my head is right now. Okay.

All right. Anything else from anybody?

MR. ZEE: Not at this time.

THE COURT: You guys?

MR. BEKESHA: No, Your Honor.

THE COURT: Okay. All right. Thank you, everyone.

MR. ZEE: Thank you, Your Honor.

(The proceedings were concluded at 2:21 p.m.)

I, Christine Asif, RPR, FCRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

_____/s/_____
Christine T. Asif
Official Court Reporter

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