

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

JEFFREY BARHAM)	
et al.,)	
)	
Plaintiffs,)	Case No.: 02-CV-2283 (EGS)
)	
v.)	
)	
CHARLES RAMSEY,)	
et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ MOTION FOR SANCTIONS AND RELATED RELIEF
FOR DISCOVERY ABUSE
PERPETRATED BY THE DISTRICT OF COLUMBIA**

I. Introduction

Plaintiffs are severely prejudiced by the District’s astonishing and widespread destruction of evidence in this matter.¹ The District has destroyed or lost critical and central documents and committed other discovery violations in complete disregard for its obligations under the Federal Rules of Civil Procedure and discovery orders in this case.

The District has destroyed or lost the Joint Operations Command Center “running resume,” which is the central repository of all acts taken and events observed and decisions made by law enforcement on September 27, 2002. While the District falsely claimed it never existed, the Barham plaintiffs were able to prove that there were no less than 12 hard copies of this electronically generated document provided to key command in the MPD, including then-Chief of Police Charles H. Ramsey, and there were no less than two redundant electronic data file or data base back-ups created. All are destroyed or lost and unavailable to Plaintiffs. The loss or *destruction occurred after Sergeant Douglas Jones satisfied a request from the MPD Office of General Counsel for delivery of the running resume to*

¹ To the extent that any forthcoming motion for discovery sanctions from the Chang plaintiffs documents or reveals a discovery violation not encompassed herein that prejudices the Barham plaintiffs, the Barham plaintiffs join in any such request for related relief.

it for litigation purposes in connection with this case. In its investigation into a pattern and practice of constitutional violations against protestors by the MPD, the Judiciary Committee of the Council of the District of Columbia also requested the J.O.C.C. running resume. While promising its production, the MPD instead provided a different document with a similar name rather than produce the J.O.C.C. running resume. The Council was never given this crucial document nor told it was destroyed or withheld. The running resume is the key to all claims. It is gone, and the prejudice is massive.

The District's radio runs produced to plaintiffs had erased or missing from them critical minutes when arrest decisions were being made and conducted. Gaps occurred not just in one recorded police channel, but across multiple different recorded police channels. The District has not accounted for these erasures or gaps, which were uncovered after intensive discovery efforts by Plaintiffs. In response to a discovery order ordering an accounting, the District submitted a materially false sworn statement to the Court regarding the radio runs.

After more than three and a half years of withholding by the District, the plaintiffs' intensive discovery efforts uncovered the existence of substantial MPD secret spying files on protestors. These materials and thousands of other pages of material were only finally provided to the Plaintiffs in the last days of discovery, prohibiting plaintiffs from using these materials in the years of discovery undertaken or to explore the contents of the materials themselves.

This lawsuit presents truly extraordinary circumstances. The District of Columbia municipality and its policymakers, to include the Chief of Police and final policy maker Charles H. Ramsey, engaged in unconstitutional policies and practices that caused the false arrest of well over a thousand protestors, journalists, bystanders, legal observers and other interested persons in the Nation's Capital during a period of multiple years encompassing the Barham mass false arrest.

In April, 2000, Chief Ramsey and others commanded the unconstitutional mass false arrest of nearly seven hundred peaceful persons in connection with the April, 2000 International Monetary Fund / World Bank demonstrations. See Becker v. District of Columbia, Civil Action No. 01-0811 (PLF / JMF)

(docket entry no. 323) (applying the Circuit Court ruling in Barham, recommending entry of summary judgment in favor of plaintiff class and denying the motion of Charles H. Ramsey and Assistant Executive Chief Terrence Gainer seeking qualified immunity).

In this case, Chief Ramsey and Assistant Chief Peter Newsham commanded the unconstitutional mass false arrest of nearly four hundred peaceful persons who were observed by each to be merely milling about within a public park in connection with or at the time of the September, 2002 International Monetary Fund / World Bank demonstrations. See Barham v. Ramsey, 338 F.Supp.2d 48 (D.D.C. 2004), aff'd, 434 F.3d 565 (D.C. Cir. 2006) (finding mass arrest to be unconstitutional, denying qualified immunity to Chief Ramsey and Assistant Chief Peter Newsham). See also Carr v. District of Columbia, Civil Action No. 6-0098 (ESH) (D.D.C. June 17, 2008) (finding mass false arrest in connection with the January 2005 Presidential Inaugural to be unconstitutional).

The plaintiffs have engaged in extensive discovery, which after five years of litigation caused the District of Columbia municipality to concede liability for the common law false arrest of the plaintiffs. No other defendant has so conceded and the District has not conceded municipal liability under 42 U.S.C. §1983. Liability for punitive damages, including against the municipality and each individual defendant has not been conceded.

All outstanding issues of liability, including for municipal liability and for punitive damages, are fact-intensive evaluations. Plaintiffs are severely prejudiced, however, by the District's extraordinary discovery violations and failures as well as loss or destruction of relevant materials.

The following discovery related relief is sought herein:

- Adverse inferences encompassing the scope of information compiled in the Joint Operations Command Center running resume data compilation, which the District of Columbia has destroyed, lost or rendered unavailable;
- Adverse inferences encompassing the radio runs or recorded police channel communications, as sanctions for the violation of the Court's October 30, 2007 discovery order, for submission of the materially inaccurate sworn Declaration of Denise Alexander, and for the failure to preserve and account for police communications;

- A judicial order precluding the municipality from undertaking to defend plaintiffs' claims of municipal liability under 42 U.S.C. §1983, in light of the negligent or intentional destruction of the J.O.C.C. running resume which recorded municipal and command decisions, orders and bases and the discovery violations pertaining to the radio runs, and in light of the record herein;
- Reasonable attorneys fees and expenses incurred by plaintiffs in the conduct of litigation in support of the claims of municipal liability under 42 U.S.C. §1983;
- Reasonable attorneys fees and expenses incurred by plaintiffs in having to conduct arresting officer depositions in the fall of 2007, which may not have been needed at all had the District of Columbia properly preserved and produced the Joint Operations Command Center running resume data compilation, and also as sanctions for failing to timely produce the field arrest records;
- A judicial order precluding the District from relying upon or using the thousands of pages of discovery materials improperly withheld for years and then produced literally on the last day of discovery and preceding week;
- Reasonable attorney's fees and expenses incurred in the advance of this motion and for depositions and the extensive discovery related to the District's failure to preserve or timely produce documents, data or recordings; and
- Any and all other relief deemed just and appropriate by this Honorable Court in light of the repeated losses or destructions of critical evidence, the need to deter similar misconduct, the prejudice to plaintiffs and the prejudice to the judicial system.

II. Plaintiffs are Entitled to the Issuance of Adverse Inferences Encompassing the Scope of Material Compiled in the Now-Destroyed Joint Operations Command Running Resume

The running resume is the information backbone of the Command Center. It has critical and indispensable operational importance to the MPD irrespective of litigation, recording as it does the information flowing to and from command officials and documenting command decisions and the body of information known to officials on which decisions are made. By policy it is required to be maintained for no less than three years. It is remarkable, even unbelievable, that the MPD could "lose" all of the many hard and computer copies of the running resume.

Under any circumstances, it constitutes "gross indifference or reckless disregard" for the running resume data compilation to have been destroyed after notice of litigation. But here there are even more extreme circumstances.

The running resume in this case was destroyed *after* MPD Sergeant Douglas Jones had satisfied an official legal request from the MPD Office of General Counsel (OGC) for delivery of the running resume to the OGC in connection with this litigation.

The running resume was destroyed even though, less than a year after the mass arrest, the Council of the District of Columbia demanded production of the running resume by *subpoena duces tecum*. The District responded by producing a document with a similar name and referring to it as the command center running resume. The District never advised the Council of the extraordinary claim that the running resume was lost or destroyed. With the Council's subpoena issuing only a few months after the mass arrest, such a claim would have appeared very dubious on its face. Instead, the Office of Attorney General (OAG) and MPD inaccurately advised the Council that they had produced the document, when they had not, and the Council conducted its investigation into police misconduct without benefit of the crucial running resume and without ever knowing that what was denominated as a running resume, in fact, was not the J.O.C.C. running resume.

Notwithstanding notice of litigation being served *less than thirty days* from the mass arrest, neither the District of Columbia OAG nor the MPD implemented a litigation hold directing the preservation of relevant materials and the removal of such materials from the course of routine destruction in the ordinary course of operations.

The need for deterrence and sanction is extreme. This motion comes on the heels of a sanctions finding against the District of Columbia for the failure to produce the J.O.C.C. running resume (and indeed, the now-proven false denial that one ever existed) in litigation arising in connection with an April, 2002 mass arrest of demonstrators.

In Bolger v. District of Columbia, Civil Action 03-00906 (JDB), the District refused and failed to produce the running resume to plaintiffs who were also subject to a mass false arrest, and are represented by the same counsel as are the Barham plaintiffs. The District claimed in Bolger that the running resume did not ever exist. However, when deposed, Sgt. Douglas Jones testified that he had sent

the running resume not once, but *twice*, to the OGC which had claimed in Court hearings that such never existed. In Bolger, Jones was able to recover his transmittal e-mail of the running resume to MPD Deputy General Counsel Ronald Harris, at which time the MPD “found” that not only had the running resume existed, but it had been in the possession of the OGC all along. Sanctions issued against the District for its withholding and delay in production. In the instant case, however, the running resume is not recoverable. The destruction is complete.

There is sufficient evidence present from which a reasonable juror could find that there was malice or the specific intent to destroy the running resume. Such a finding is not sought here, nor is one necessary for the purposes of an adverse inference. In seeking such sanctions, plaintiffs present the Court herein with a thorough record² establishing the existence of the running resume, the comprehensive nature of information compiled in the running resume, the evidence that loss or destruction was accompanied by the requisite “gross indifference or reckless disregard” and a detailed and footnoted record establishing the relevancy and basis for each adverse inference.

A. The J.O.C.C. Running Resume Data Compilation Was a Comprehensive Store of Contemporaneously Recorded Information Relating to the Mass Arrest and Related Police Decisions, Knowledge, Information and Intent

The scope of destruction is extraordinary. This is not a situation, as arose in the seminal spoliation case of Battocchi v. Washington Hospital Center, 581 A.2d 759 (D.C. 1990), involving loss or destruction of one important piece of paper or information. In Battocchi, sanctions issued for the failure to preserve a single note written by an attending nurse just after a delivery regarding which physician malpractice was alleged.

Here, what has been lost is the entire J.O.C.C. database of command center generated and field reported information pertaining to the Pershing Park mass arrests as well as all of the many copies of this data. This encompasses countless pieces of information contemporaneously recorded from top

² Plaintiffs do not seek to unnecessarily burden the record with volumes of record evidence. However, plaintiffs recognize that the record must be sufficient both for the U.S. District Court to rule in plaintiffs’ favor and for the appellate court to affirm such a ruling.

command officials and scores of additional sources, including field and intelligence units as well as outside agencies, deployed in connection with the Pershing Park mass arrest and the protests generally.

The destruction or disappearance of the running resume deprives plaintiffs of a vast compilation of data supporting every element of every claim asserted by plaintiffs, to include claims for municipal liability and for punitive damages against both individuals and the municipality. The prejudice to plaintiffs is as severe as the scope of destruction is vast.

1. Background on the Joint Operations Command Center

The Joint Operations Command Center is a multi-agency command center physically located at the headquarters of the D.C. Metropolitan Police Department which is activated during times of emergency/crisis, free speech demonstrations and special events for which significant or (as in this case) full mobilization of MPD personnel may occur.

The command center consists of a large open area with massive 50” display screens on the walls for display of the running resume, video feeds and other information. Operational “desks” or stations, which are equipped with communications equipment and computer access, are throughout the center. Each station has a specific operational function (e.g., Command Desk, Deployment Desk, Regional Operations Command or “ROC” Desks, Special Services Desk, Intelligence Desk, Communications Desk, Traffic Desk, etc.) or else is assigned to an outside agency (e.g., the U.S. Park Police, the Federal Bureau of Investigation, the U.S. Capitol Police, the U.S. Secret Service, the military and Washington Metropolitan Area Transit Authority). Computer Aided Radio Dispatchers are also located in the J.O.C.C. The J.O.C.C. is normally staffed by legal counsel from the Office of the Attorney General and the U.S. Attorney’s Office. See, gen’ly, Ex. 1, Dep. of Douglas Jones at 8:11 – 16:14.

The running resume of the Joint Operations Command Center is the J.O.C.C.’s information backbone. It is a data compilation in which is contemporaneously recorded all command decisions and all information flowing to and from MPD command officials in the Joint Operations Command Center from a multitude of sources. It has been lost, destroyed or rendered unavailable.

2. All Significant Demonstration or Police Related Information Was Compiled Within the Now-Destroyed Running Resume

Within the running resume is compiled all important decisions, events, significant police observations of demonstrator activity, police deployments and related information that arises in connection with the underlying demonstration event(s) for which the J.O.C.C. is activated.

“Essentially it is the - - it is a compilation of everything that occurred during the day; movement of people, movement of officers, decisions made by commanders, things that were decided at certain times on how to handle certain situations. It is a [contemporaneously compiled] log of the events of the day.”

Ex. 2, Dep. of Jeffrey Herold, Nov. 16, 2007 at 176:1 – 6.

All significant information is to be passed through or entered into the running resume. Id. at 177:4 – 9. “The running resume captures a significant amount of information that is highly detailed. . .” Id. at 178:5 – 9; See also Ex. 3, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Jeffrey Herold, Sept. 12, 2007) at 40:6-12 (Running resume data compilation is “A log of significant events by time The command center would monitor activities as they occurred and make note as to what was occurring and where.”).

According to the 1996 revision of the Mass Demonstration Manual, which was in effect in September, 2002, the following information is to be compiled within the running resume:³

- All demonstration related events “that could be considered significant”;
- All uses of force;
- All “Tactical orders issued to personnel”;
- All “Orders [to CDU Commanders] received from higher authority”;
- All “Significant acts on the part of demonstrators”; and
- All “Incidents involving mass arrest.”

See Ex. 5, Mass Demonstration Manual at 33, DC 01875.

³ The 1996 revision of the Mass Demonstration Manual uses nomenclature referencing a predecessor log used by the MPD, the Commander’s Mass Demonstration Event Log, which has been replaced by the J.O.C.C. running resume.

This was attested to by Charles H. Ramsey in his “Written Deposition of Charles H. Ramsey,” which was transmitted to the D.C. Council by MPD General Counsel Terry Ryan. Ramsey attested that “The Mass Demonstration Event Logs were not used for the listed events [including the September, 2002 IMF/WB protest]. Commander’s Mass Demonstration Event logs have taken the form of the running resumes produced by the Department’s Joint Operations Command Center.” See Ex. 4, MPD 05815, MPD 05803-05804.

Compiled within the now-destroyed running resume was detail of all personnel in the field and “what they were doing,” from the most mundane information such as “CDU 21 is taking their lunch break now” to the most significant. Ex. 6, Dep. of Alfred Broadbent at 40:20 – 41:5; See, id. at 35:3 – 36:4 (running resume would include “[i]f there is any kind of civil disobedience occurring in the city, any situations where police are put in a situation where they have to use force, any situations where citizens or police are injured, any destruction of property, and any intelligence that may be coming in from the field.”).

According to Assistant Chief of Police Alfred Broadbent, who was Commander of the J.O.C.C. during the Barham events, the running resume “[t]ended to be *too much* information” for him to review personally as events occurred. See, id. at 41:15 – 16 (emphasis added). Consequently, Broadbent assigned multiple assistants in the J.O.C.C. whose job was to constantly monitor the running resume and inform him of decisions needed and actions to be taken based on information in the running resume. See, id. at 41:15 – 19; Ex. 7, J.O.C.C. Activation Procedures manual at 1107. (J.O.C.C. Commander’s Executive Aide charged to “constantly review” the running resume to “[i]nform JOCC Commander or Assistant Commander of decision[s] needed”).

The scope of information found in the running resume and consequently the scope of information destroyed or lost by the MPD was comprehensive.

3. All Command Decisions Were Recorded on the Now-Destroyed Running Resume

Command Desk personnel entered and compiled information in the running resume to document all command actions, decisions and informational bases. See Ex. 7, J.O.C.C. Activation Procedures manual at 1107 (primary responsibility of the J.O.C.C. Executive Aide was to “[d]ocument decisions or other command desk actions in running resume.”); Ex. 2, Dep. of Herold, Nov. 16, 2007 at 176:1 – 6 (is a compilation of “decisions made by commanders, things that were decided at certain times on how to handle certain situations”).

Such now-destroyed data is obviously at the heart of any and all of plaintiffs' claims. The Pershing Park mass arrest was a top-down command decision. It was not an action initiated by low officer levels. The mass arrest decision and all attendant consequences, practical and legal, initiated from command decision making. Municipal liability, municipal and individual claims for liability and punitive damages are all established through information in the running resume.

The initiation of command decisions and the decision making bases and known/available information is fundamental to plaintiffs' claims for relief including for punitive damages. The MPD would not have destroyed or allowed destruction of this massive store of data were it not adverse to their defense. Based on the incomplete information known to or discovered by plaintiffs, the J.O.C.C. running resume database was likely *extremely* adverse to the defense and, in all likelihood, conclusive to establishing all of plaintiffs' claims.

Had the running resume been provided, it would have obviated - - or substantially lessened - - the need for or the scope of the depositions of arresting officers.

4. All Significant Information Flowing Between Field Units, MPD Desks, Outside Agency Desks and the J.O.C.C. Command Desk Was Compiled in the Now-Destroyed Running Resume

The running resume constitutes the data backbone of the Command Center - - it is a recorded data feed of information from the operational desks, which are in direct communication with their field units, to the Command Desk. Likewise, in the reverse direction, the Command Desk uses the running resume to communicate information and orders back to the operational desks to be acted upon and passed on, where appropriate, to field units.

The MPD and outside agency operational desks located in the command center compiled into the J.O.C.C. running resume all significant information those desks received from the field units for whom they were responsible or with whom they were in communication. See, e.g., Ex. 1, Dep. of Jones at 15:11 – 16 (Intelligence units in the field called into their command center using cell phones); Id. at 28:15 – 30:4 (each civil disturbance unit commander was required to report on the hour or half-hour any

information they needed to share with the J.O.C.C.; the field units would telephone into the Regional Operational Command “ROC” desk and the information would be entered into the computer into the running resume).

The operational desks would use the running resume as “the normal communication channel” of all information to and from the Command Desk.⁴ Even where information was of such urgency that it had to be communicated verbally to the Command Desk, that information was still required to be immediately thereafter entered into the running resume.⁵

The running resume was also the normal means by which MPD and outside agency operational desks were able to monitor the important events that were being handled through or by other desks. It provided a snapshot or bird’s eye view of data with the ability for a user to “drill down” or view more specific detail of entries of interest.⁶ The running resume was the main way, for example, that the U.S.

⁴ See, e.g., Ex. 7, J.O.C.C. Activation Procedures manual at 1109 (Group System running resume serves as the “normal communication channel” between the three ROC desks to the Command Desk, during emergencies the desks may notify the command officials verbally but only with follow-up entry into the running resume); *id.* at 1110 (running resume is “normal communication channel” between the Special Services Desk and the Command Desk); *id.* at 1112 (Traffic Desk is to review and prioritize traffic-related information into the running resume); *id.* at 1113 (Deployment Desk is to update the running resume with information regarding deployment and available personnel); *id.* at 1114 (running resume serves as the “normal communication channel” between Intelligence Desk and Command Desk); Ex. 6, Dep. of Broadbent at 40:10 – 19 (confirms that in September, 2002, the running resume was the “normal means of communication” between the Regional Operation Command desks to J.O.C.C. command officials).

⁵ See, e.g., Ex. 7, J.O.C.C. Activation Procedures manual at 1109 (“Normal communication – Group System resume serves as communication channel to Command Desk. Emergency communication – Notify Command Desk immediately through verbal communication and follow-up with entry into Group System [running resume]”).

⁶ The March 21, 2002 revision of the Joint Operations Command Center Activation Procedures manual is replete with references to the primary function of the running resume, reflecting that:

- The main video stations in the JOCC shall display the running resume, *see* Ex. 7, JOCC Activation Procedures manual at 1102;
- “The JOCC shall provide the command and control function by monitoring, coordinating, recording and reporting essential police operations” related to the event. *Id.* at 1103;
- The Assistant JOCC Commander is responsible to “[m]onitor running resume and inform JOCC Commander of decisions needed and actions taken.” *Id.* at 1106;
- The Command Desk Executive Aid is “[p]rimarily responsible for categorizing and prioritizing the Group System running resume” and shall “[c]onstantly review Group System running resume.” *Id.* at 1107;
- For the three Regional Operations Command desks, the “running resume serves as [the normal] communication channel to [the] Command Desk.” *Id.* at 1109;
- The three ROC desks are responsible to “Receive information from ROC and update Group System running resume.” *Id.*;

Park Police desk received information in the J.O.C.C. See Ex. 6, Dep. of Broadbent at 22:21 – 23:19 (at least one station was for U.S. Park Police); Ex. 8, Dep. of U.S. Park Police Lieutenant Mark Haudenschild at 44:8 – 46:6 (monitoring the running resume on his computer was the “main way that I got information in the J.O.C.C.”).

5. Over a Dozen Hard Copies of the J.O.C.C. Running Resume Data Compilation Were Distributed Through Command and/or Legal Channels; Multiple and Redundant Electronic Copies Were Stored on Computer Media; and a Primary Copy Was Maintained and Accessible Within the Command Center; Yet Every Single Copy Has Been Destroyed or Lost

The MPD internally undertook measures to maintain duplicate and redundant copies of the running resume, efforts that protected against the possibility of inadvertent destruction of data which performs a critical function within the MPD regardless of litigation.

In this respect, the comprehensive nature of the data loss is stunning.

The underlying computer data file was stored redundantly, with an identical copy on each of two separate computer servers. Ex. 1, Dep. of Jones at 23:2 – 24:7; See gen’ly, id. at 21:20 – 26:2.

According to Sgt. Jones, at the time of the command center activation “at least a dozen” hard copies of the September 27, 2002 running resume were distributed to command offices and “likely” also to the MPD’s Office of General Counsel. Id. at 21:21 – 25:6, 44:14 – 46:10; See Ex. 6, Dep. of

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- For the Special Services Desk, the “Group System resume serves as [the normal] communication channel to [the] Command Desk.” Id. at 1110;
 - The Special Services Desk is responsible to “Receive information from Special Services Units and update Group System running resume.” Id.;
 - The Traffic Desk is responsible to “Review and prioritize traffic related information in running resume.” Id. at 1112;
 - The Deployment Desk is responsible to “Review deployment bucket [of the running] resume.” Id. at 1113;
 - For the Intelligence Desk, the “Group System [running] resume serves as communication channel to Command Desk.” Id. at 1114;

The Intelligence Desk is responsible to “[r]eview and monitor outside agency bucket [of the running] resume” and to “[m]onitor news accounts and enter information into resume” and to “[m]onitor Netview and enter information into running resume (especially bomb threats, suspicious packages, hazardous materials, **and demonstrations**)” and to “[m]onitor Intelligence Operations bucket [of the running resume] and bring[] to the attention of Executive Aide or Assistant JOCC Commander new and relevant information” Id. (emphasis added).

Broadbent at 41:20 – 42:21 (hard copies produced for distribution every twenty four hour period during command center activations); see also Ex. 9, Declaration of Thomas L. Koger at 11.

According to J.O.C.C. Commander and Assistant Police Chief Alfred Broadbent, copies of the running resume “should have” been kept by his office. Ex. 6, Dep. of Broadbent at 42:10 – 15.

William Ponton, former Chief of Staff for then Chief of Police Charles H. Ramsey, attested that “whenever the command center is activated, they send a copy of the running resume” to the Office of the Chief of Police. Ex. 10, Dep. of William Ponton at 65:16 – 67:1 (“Generally, a copy is sent up to the Chief’s Office.”); Ex. 11, Dep. of Charles Ramsey at 225:4 – 10 (receiving a copy of the running resume in the Chief’s office “would be part of what we normally would do.”).

The MPD has asserted that Chief Ramsey did not preserve the hard copy delivered to his office precisely because an “official” copy was required to be preserved by or in the Command Center. See Ex. 10, Dep. of Ponton at 70:3 – 9, 67:20 – 22.

B. An Adverse Inference Is Mandatory and Warranted for the Destruction of the J.O.C.C. Running Resume Data Compilation

An adverse inference instruction for the destruction of the J.O.C.C. running resume data compilation is mandatory where such destruction or loss was made or allowed with gross indifference to or reckless disregard for the relevance of the evidence to plaintiffs’ claims. See Rice v. United States, 917 F. Supp. 17, 20 (D.D.C. 1996), citing, Battochi v. Washington Hospital Center, 581 A.2d 759, 766 – 67 (D.C. 1990).

“[T]he adverse inference doctrine embraces negligent (in addition to deliberate) destruction of evidence.” Mazloun v. District of Columbia Metropolitan Police Dept., Civil Action No. 06-0002 (JDB), January 16, 2008 Memorandum Opinion at 16; See also More v. Snow, 480 F.Supp.2d 2d 257, 275 (D.D.C. 2007). In this case, however, the destruction was not merely negligent.

This Court has recognized three elements required to establish need for an adverse inference:

“(1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a ‘culpable state of mind’; and (3) the evidence that was destroyed or altered was ‘relevant’ to the claims

or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it.”

Mazloum v. District of Columbia Metropolitan Police Dept., Civil Action No. 06-0002 (JDB), January 16, 2008 Memorandum Opinion at 14.

1. The District of Columbia Had An Obligation to Preserve the J.O.C.C. Running Resume Data Compilation

The first requisite element, a duty to preserve, is well established upon notice of likely litigation. This duty is sufficiently obligatory as to require affirmative intervention to prevent the routine destruction of relevant materials as might occur in the ordinary course of operations, i.e., a “litigation hold.” Disability Rights Council v. WMATA, 242 F.R.D. 139, 146 (D.D.C. 2007); Arista Records, Inc. v. Sakfield Holding Co., 314 F. Supp. 2d 27, 34 (D.D.C. 2004) (finding “a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested in discovery, and/or is the subject of a pending discovery request.”).

The District of Columbia concedes that it had notice of likely litigation within thirty days of the mass arrest, specifically on October 24, 2002 when the Judiciary Committee of the D.C. Council held a hearing on the subject. Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 26:15 – 18.

The notice of likely litigation, however, arose even earlier. On October 15, 2002, the District was served with the summons and complaint in Chang v. United States, Civil Action No. 02-02010 (docket entry no. 2). Even on September 27, 2002, at the scene of the mass arrest, Chief Ramsey was fielding questions about the illegality of the arrests as arrestees were still being loaded onto busses. Ramsey responded, “Ma’am that’s why we have courts. They got their day in court. We’ll be there too.” See Media Ex. A, Video Clip (to be submitted as a “bulky” exhibit). The sheer magnitude of the mass arrest, itself, and immediate attendant controversy placed the District on notice that someone, at least one arrestee if not all, would bring suit. See, e.g., Manny Fernandez and David A. Farenthold, “All Sides

Brace for World Bank Protests,” *Washington Post*, Sept. 26, 2002 at B1 (even in the lead up to the protests there was media discussion of complaints of “unconstitutional police practices” during mass demonstrations); Jonathan Turley, “Un-American Arrest,” *Washington Post*, Oct. 6, 2002 at B8.

This is borne out by the fact that, according to MPD Inspector James Crane, *within one week of the mass arrest and in anticipation of likely litigation*, MPD Deputy General Counsel Ronald Harris began collecting records related to the Pershing Park mass arrest for litigation defensive purposes. See Ex. 13, Rule 30(b)(6) Dep. Of District of Columbia (D.C. designee James Crane) at 49:20 – 50:1 (within one week of the mass arrest Deputy General Counsel Ronald Harris “called me up, and it was shortly after the protest and said he’d like to, in advance of any litigation, he wanted to get copies” of the day’s recorded police communications). Harris, while taking copies for his office, did not request or direct the preservation of the underlying police communications by the Communications Division. Id. at 110:12 – 113:5 (no “litigation hold” issued; took no steps at preservation beyond giving Harris the copies that he had requested).

2. By Allowing the Loss or Destruction of the J.O.C.C. Running Resume, the District of Columbia Acted With Gross Indifference to or Reckless Disregard for its Relevance to Plaintiffs’ Claims for Liability and Punitive Damages

An adverse inference is mandatory where destruction or loss is made or allowed with gross indifference to or reckless disregard for the relevance of the evidence to plaintiffs’ claims. See Rice v. United States, 917 F. Supp. 17, 20 (D.D.C. 1996), citing, Battochi v. Washington Hospital Center, 581 A.2d 759, 766 – 67 (D.C. 1990).

This standard is easily met and, indeed, is well surpassed in this case.

i. Sergeant Douglas Jones Satisfied an “Official” and “Legal” Request from the MPD Office of the General Counsel for Transmittal of the Running Resume to the OGC

On an uncertain date, potentially as many as three years after the mass arrest, Synchronized Operations Command Center Director Neil Trugman approached Sgt. Douglas Jones with an “official” and litigation related request from the Office of General Counsel for the running resume. See Ex. 1,

Dep. of Jones at 28:22 – 30:2. Trugman conveyed that the OGC request was made in connection with litigation, *id.* at 29:13 – 16, specifically about the Pershing Park mass arrest. *Id.* at 29:17 – 22.

The running resume computer data file was at that time not only still in existence but was “very easy” for Jones to retrieve, which he did. *Id.* at 30:6 – 31:6.

Jones satisfied the OGC request by generating a hard copy of the running resume and additionally by writing on a piece of paper the precise location (or “path”) on the MPD computer server of the running resume data file. Jones handed the hard copy of the running resume and the file path location to S.O.C.C. Director Trugman the next morning. *Id.* at 30:10 – 31:6, 25:9 – 26:2 (“I gave him a piece of paper with the path, with the location, the directory of the actual [running resume] report for the September [2002] IMF.”)

There is no indication or evidence of any follow up that necessarily would have occurred had the OGC request gone unsatisfied or had not been responded to.

In other words, *not only was the running resume possessed by the MPD, it was possessed by its counsel for the purposes of this litigation.* Even should the OGC deny present or past possession of the running resume, which does not dissipate the inference from the Jones testimony that the OGC was in possession of it, the fact that the OGC requested it at a time when it was in existence establishes that the *OGC knew it was relevant and still allowed it to be lost or destroyed.*

The running resume is *the* central data repository about police and command actions and information that day. It would be among the very first documents that diligent MPD counsel would seek out for review “in anticipation of litigation.”

It is existentially axiomatic that the running resume existed at the time that Jones provided it in response to the OGC legal request. It is now destroyed. At some point in time *after* Jones satisfied the legal request from the OGC for the running resume the hard copy Jones sent on to the OGC and all other copies were rendered lost or destroyed or otherwise unavailable. At some point in time *after* Jones

provided the data file or the computer path location to the data file in response to the OGC request, the underlying data file was rendered inaccessible.

The accuracy and credibility of Sgt. Jones' sworn testimony is unassailable. He has a confirmed track record of demonstrably honest testimony establishing the existence of the running resume and its possession by the Office of General Counsel in the face of OGC denials.

ii. The OAG Presented False Assertions to Avoid Producing the Running Resume Fully Contradicting Itself in Two Cases Before this Court

The situation is virtually identical to the situation as occurred in Bolger v. District of Columbia, Civil Action No. 03-906 (JDB) arising in connection with protestor arrests in connection with the April, 2002 IMF/World Bank Spring Meetings. The operative distinction, though, is that in Bolger ultimately the J.O.C.C. running resume was independently recovered by Jones. The Barham running resume data file is unrecoverable.

In the Bolger proceedings, the D.C. Office of the Attorney General represented that there could not possibly have ever been a J.O.C.C. running resume from April 2002 because "no command center logs (or running resumes) were created until *after September, 2002.*" See Ex. 14, Letter dated July 31, 2006 from OAG attorney Carl Schifferle to Mr. Messineo (emphasis added). In other words, the explanation for the failure to produce the running resume to Bolger plaintiffs in discovery was that running resumes *were first created after September, 2002.*⁷ Yet in the Barham class action, the OAG reported that there could not have possibly ever been a September, 2002 J.O.C.C. running resume based on the completely contradictory and equally false claim that the MPD had *stopped producing them by*

⁷ See Ex. 15, Letter Dated June 1, 2006 from Ms. Lee to Mr. Messineo ("You are alerted that the production does not include running logs from the Command Information Centers because no such documents were created during the April 2002 protest."); Ex. 14, Letter dated July 31, 2006 from Mr. Schifferle to Mr. Messineo ("no command center logs can be located . . . According to [Sgt. Nancy Cumberland], no command center logs (or "running resumes") were created until after September 2002."); Ex. 16, February 15 Transcript of Discovery Conference in Bolger at 19 (Ms. Holly Johnson: "I know plaintiffs' counsel is involved in many very similar cases and has conducted very similar discovery with the District. Many of these documents that he believes exist, don't."). Attorneys for the OAG assert that their representations were based on representations from the MPD that running resumes were not produced until after September, 2002.

September, 2002. See Ex. 17, July 18, 2007 e-mail from Thomas Koger to Mr. Messineo (“running resumes were no longer generated by the MPD as of Sept. 2002.”).

Plaintiffs deposed Sgt. Douglas Jones in connection with the disappearance of the running resume in Bolger. Jones testified in connection with Bolger litigation that he had satisfied not one, *but two*, separate requests from the MPD Office of the General Counsel for the April, 2002 running resume. Ex. 18, Rule 30(b)(6) Dep. of the District of Columbia in Bolger (D.C. designee Douglas Jones, March 26, 2007) at 22:9 – 23:14; Id. at 26:22 – 27:8.

Issuing sanctions for discovery misconduct against the District, Honorable Judge John D. Bates found the District’s excuses unavailing as to why the running resume remained disappeared even after the *second* receipt by the OGC of a copy from Jones. Bolger v. District of Columbia, Civil Action No. 03-0906 (JDB), March 17, 2008 Memorandum Opinion (docket entry no. 150) at 11. Judge Bates also found that “The District makes absolutely no attempt to explain how the running resume disappeared after Jones produced it the first time. . .” Id. at 10.

As soon as Jones was able to independently recover the J.O.C.C. running resume and transmittal e-mail, the MPD was able to “find” the same materials in the possession of Deputy Counsel Ronald Harris.

Jones’ testimony was not only accurate and credible, it was proven conclusively to be so. His testimony in this case is equally reliable.

Just as in Bolger where the OGC denied receiving a copy of the running resume, in Barham the District again denied possessing a copy of the running resume. Just as in Bolger where the OGC requested (twice) through the J.O.C.C. and Sgt. Jones a copy of the running resume, in Barham the OGC requested through the J.O.C.C. and Sgt. Jones a copy of the running resume. In Bolger, the OGC’s denials of having possessed the running resume were false. In Barham the OGC’s claims of not having possessed the running resume are completely undermined by the testimony of Sgt. Jones. The record

evidence and all reasonable inferences support a conclusion that not just the MPD, but the OGC specifically, was in possession of the running resume.

iii. The District of Columbia Has Been Sanctioned for Discovery Misconduct Consisting of Its Failure to Produce and Attempted Disappearance of the Running Resume in the Bolger Case

On March 17, 2008, in Bolger v. District of Columbia, Civil Action No. 03-0906 (JDB), the Honorable Judge John D. Bates sanctioned the District of Columbia in what the Court described as “a clear case of sanctionable discovery misconduct” arising out of the District’s effective disappearance of, the failure to acknowledge the existence of and the failure to produce the J.O.C.C. running resume generated in connection with Spring, 2002 International Monetary Fund / World Bank protests. See Id. at 12; See also, Bolger v. District of Columbia, Civil Action No. 03-0906, August 20, 2008 Memorandum Opinion (docket entry no. 175) (awarding \$91,207.04 in monetary damages as sanctions, and reserving the order on adverse inferences until closer to trial).

Judge Bates ruled that “The facts before the Court. . . demonstrate that the imposition of sanctions is amply justified. It is clear that the District not only should have known about the existence of the running resume, but individuals within the District did know about the running resume. . .” Bolger v. District of Columbia, Civil Action No. 03-0906, March 17, 2008 Memorandum Opinion (docket entry no. 150) at 10 (emphasis in original).

Judge Bates did not need to specifically find bad faith or intentional misconduct by the MPD and its counsel in order to issue the Bolger sanctions. Judge Bates found “This is a clear case of sanctionable discovery misconduct, even if only the result of extreme negligence rather than bad faith or intentional misconduct.” Id. at 12.

The fact that this is a recurring problem, however, evidences intentionality as well as the need for sanction and deterrence.

iv. The MPD Lost or Destroyed the Barham Running Resume Despite the Fact that it Was Obligated to Produce the Running Resume Pursuant to the July 15, 2003 Subpoena Issued by the Council of the District of Columbia.

On April 28, 2003, the Judiciary Committee of the Council of the District of Columbia approved “an investigation into the policies and practices of the Metropolitan Police Department in handling demonstrations based on police actions that appeared to violate the U.S. Constitution starting in April 2000 and continuing into early 2003.” See Ex. 19, March 24, 2004 Report on Investigation of the Metropolitan Police Department’s Police and Practice in Handling Demonstrations in the District of Columbia (“Council Report”) at 2.

The Council authorized the issuance of subpoenas and demanded production of all “operational documents . . . related to the handling of demonstrations” during a specified period encompassing September 27, 2002. See Ex. 20, July 15, 2003 subpoena duces tecum.

The MPD was generally non-responsive to the Council’s demands for records. See Ex. 19, Council Report at 6.

The Judiciary Committee issued another subpoena duces tecum demanding operational documents by specific reference, including “SOCC/JOCC print-outs for the April 2000 and September 2002 IMF/World Bank protests.” See Ex. 21, September 29, 2003 subpoena duces tecum.

In specific response to the demand for all “operational documents,” on October 6, 2003, General Counsel Terrence Ryan advised the Committee that

“Pursuant to your request, we are today producing documents related to the spring and fall 2002 IMF/WB protests. We are producing the fall 2002 IMF/WB operations manual. We will produce the spring 2002 IMF/WB manual as soon as we receive and review it. You have also requested ‘operational documents’ including CDU lists and assignments, SOCC/JOCC activity printouts (“running resumes”), Mass Demonstration Event Logs, and operational plans. . . . The ‘running resumes’ will be made available to you after they have been gathered and reviewed. We anticipate producing them to you within the next few days.”

Ex. 22, October 6, 2003 letter from General Counsel Terrence D. Ryan to Judiciary Committee Chair Kathy Patterson (emphasis added).

Documents were submitted in response to the September 29, 2003 subpoena with the involvement of Deputy General Counsel Ronald Harris. According to a declaration by Harris, he did not represent in the accompanying transmittal memorandum that the September, 2002 J.O.C.C. running resume could not be found. Instead, he produced a different document with a similar name, the Intelligence Section running resume, and referred to it in his transmittal correspondence “as the SOCC/JOCC resume[.]” See Ex. 23, Decl. of Ronald B. Harris at 2, ¶5. There is no indication that the Council ever knew that this was not the September, 2002 J.O.C.C. running resume.

v. The District of Columbia Unreasonably Failed to Implement a Litigation Hold that Would Preserve and Prevent the Destruction of the Running Resume in the Ordinary Course of Operations

In order for a mandatory adverse inference to issue, plaintiffs need not present evidence supporting a finding that the running resume was in the possession of the OGC or that it was not produced or preserved notwithstanding a specific demand by subpoena issued by the D.C. Council. Plaintiffs have presented such evidence, but “smoking gun” evidence is not required.

The requisite standard is satisfied by the fact that upon notice of likely litigation the District of Columbia failed to initiate a “litigation hold” to prevent the destruction of relevant documents. See U.S. ex Rel. Miller v. Holzmann, Civil Action No. 95-1231 (RCL), March 9, 2008 Memorandum Opinion at 5 n2 (unreasonable for government counsel to fail to issue litigation hold on destruction of documents); Disability Rights Council v. WMATA, 242 F.R.D. 139, 146 (D.D.C. 2007) (litigation hold mandatory).

The District concedes there exists “no documentation that a [litigation hold or document retention] letter was issued.”). Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 28:14 – 33:6; Id. at 101:15 – 17 (“I don’t believe there were any documents issued specifically directing personnel not to destroy any records for that time period.”).

Plaintiffs distinguish below between the insufficient and untimely document collection efforts of the MPD Office of General Counsel and the insufficient and untimely document preservation efforts of the D.C. Office of the Attorney General.

The District of Columbia asserts that it is the formal policy of the OAG to “make written notification to agencies regarding such matters.” Id. at 29:1 – 3. However, the District concedes that it has looked for a litigation hold or document retention letter and it has not located any. Id. at 32:3 – 7; Id. at 28:21 – 22 (“There was no documentation that a letter was issued.”); Id. at 29:7 – 8 (“A letter or memorandum could not be located.”); Id. at 33:4 – 6 (does not know if such practice was followed in this instance).⁸

According to the District of Columbia, the first belated claimed efforts at document *collection* by the MPD Office of General Counsel first took place on or after July 15, 2003, approximately ten months after the mass arrest, and were ostensibly in response to the D.C. Council’s multiple subpoenas. Id. at 40:8 – 41:1, 62:7 – 11. Such efforts did not even directly request that recipients preserve from destruction all relevant documents. The OGC only asked for recipients to send specified material to counsel. See, Ex. 24, July 28, 2003 Memorandum from General Counsel Terrence D. Ryan.

Although the OGC appears to have collected some scope of records from within the MPD, such efforts were not in writing, were half-hearted, lacking in diligence and were not reasonably calculated to result in comprehensive collection of all records then available. Even though the purported OGC collection policy is to make written request for documents through the MPD, the only written OGC

⁸ The District nevertheless insists that a document retention letter surely must have issued from the D.C. Office of the Attorney General to the MPD and also to its Office of General Counsel. The District’s unsubstantiated insistence is based on the claimed practice by the Office of the Attorney General to make a “notification for action” to the police department and to the general counsel at the police department. Id. at 29:1 – 3 (“it is the policy of the Office of the Attorney General to make written notification to agencies regarding such matters.”).

The District, however, is unable to state the nature of the “action” that written notification is provided. At first, the deponent characterized the notification would inform agencies to take “Action as stated in the order.” Id. at 30:2 – 5. When asked for the substance of the referenced “order,” the deponent requested a break to confer with counsel. Id. at 30:6 – 14. After a ten minute conference, the deponent returned and advised that she wished to strike the term “order” from her prior testimony, and that the notification contained merely a “request.” Id. at 30:19 – 21. The deponent attested that the District could not represent what, in fact, was in such written request from the OAG but contended that the general practice was that “notification or request is made to the agency requesting that [unspecified] information be forwarded to their office pending further litigation.” Id. at 31:4 – 10.

The District spokesperson then expressly disclaimed testifying that the notification was a “document retention letter.” Id. at 36:3 – 9.

Ultimately, the District of Columbia spokesperson concedes that even though the District claims that “it is the practice of the Office of the Attorney General to make notification,” that the District does not know whether that practice was followed in this instance. Id. at 32:19 – 33:6.

Even assuming such a “notification” practice did exist, the District is completely vague as to what the notification consists of, although it is clear that it does not consist of an “order” to do anything in particular.

request for document collection is limited to one narrow category of documents: after-action reports.⁹ See Ex. 24, July 28, 2003 Memorandum from General Counsel Terrence D. Ryan. For other records encompassed by the Council’s subpoenas, including those encompassing the J.O.C.C. running resume, the District asserts that Deputy General Counsel Ronald Harris merely made “a verbal request” to unspecified person or persons. See Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 133:22 – 136:3. Given the substantial detail and breadth of the July 15, 2003 subpoena and also the September 29, 2003 subpoena, neither is conducive to being effectively conveyed through “a verbal request.” See Ex. 21, July 15, 2003 subpoena duces tecum from D.C. Council; Ex. 21, September 29, 2003 subpoena duces tecum from D.C. Council.

With respect to document preservation efforts taken at the initiative of the D.C. Office of the Attorney General, the first of any such efforts is also asserted to not have been in writing. According to the District of Columbia, *one year* after the mass arrest in September, 2003, Assistant Attorney General Thomas Koger made an oral request of MPD General Counsel Terrence D. Ryan that records be preserved. See Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 141:2 – 142:10 (was September, 2003); 82:8 – 83:17 (same); Ex. 9, Koger Decl. at 2 – 3 (as of August, 2003 no efforts had been made by the OAG to recover or preserve the running resume). This is in violation of the stated policy of the OAG, which is to issue a retention letter as soon as possible upon notice of anticipated litigation. Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 35:15 - 37:5. The OAG’s belated and verbal efforts were obviously not calculated to impose a litigation hold on the destruction of all relevant documents upon notice of litigation.

⁹ If collection or preservation letters actually issued from the OGC throughout the MPD, those letters would have gone to no less than 20 MPD sub-divisions. This would include each of the seven Police Districts, the Operational Services Division, the Office of Professional Responsibility, Special Services Command, Office of the Superintendent of Detectives, Intelligence Unit, Office of Organizational Development, Office of Quality Assurance, Communications Division, Special Operations Division, Institute of Police Science, Prisoner Control and Information Technology. See Ex. 24, July 28, 2003 Memorandum from General Counsel Terrence D. Ryan.

3. A Reasonable Fact-Finder Would Conclude that the J.O.C.C. Running Resume Data Compilation Was Relevant to Plaintiffs' Claims

The final of the three factors prerequisite to the mandatory issuance of an adverse inference is a showing that a reasonable fact-finder could conclude that the J.O.C.C. running resume data compilation would have supported plaintiffs' claims.

The evidence of the relevancy of the running resume is indisputable and overwhelming. It has been lost forever to plaintiffs.

Because of the District's destruction, at a trial defense witnesses may be free to provide oral testimony without being cross-examined or confronted with the body of information compiled in the running resume. Plaintiffs are at a severe disadvantage compared to where they would be in the presentation of evidence had the running resume not been destroyed.

The claims so affected by the loss or destruction of the running resume include:

- Fourth Amendment and common law false arrest liability (including the presence or absence of probable cause) with respect to the municipality and as to each individual defendant;
- First Amendment liability (including whether unconstitutional motivation was a substantially motivating factor in the decision to arrest, an analysis distinct and independent from probable cause) with respect to the municipality liability and as to each individual defendant;
- Municipal or Monell liability for constitutional violations under 42 USC §1983 (including whether the false arrests were caused by an unconstitutional policy or practice *or* were approved or ratified by an MPD policymaker such as Chief Ramsey);
- Individual liability for constitutional violations under 42 USC §1983; and
- Punitive damage liability against both the municipality¹⁰ and the individual defendants.

¹⁰ This case presents the exceptional circumstances necessary for an award of punitive damages against the municipality. See Daskalea v. District of Columbia, 227 F.3d 433 (D.C. Cir. 2000).

The case presents unconstitutional municipal policy and practice that have caused over one thousand false arrests. The willful and reckless unconstitutional course in this case was caused not by lower or mid-level officers, but was caused by and through the direct participation, command and approval of the MPD Chief of Police Charles Ramsey. The Chief and the municipality willfully swept protestors off of public space with intentional and reckless disregard of the clearly established First Amendment protected right to free speech in Washington, D.C. The District manufactured a sham investigation into which the Chief of Police himself directly intervened - - in violation of Departmental guidelines - - to delete and weaken adverse investigatory findings. Punitive damages are also justified by the pattern of subsequent litigation abuse and document destruction that a reasonable juror could find constitutes unscrupulous efforts to limit compensation, accountability and loss.

The destruction or loss of the running resume data compilation deprives plaintiffs of relevant evidence related to practically every material fact and issue. A non-exhaustive selection¹¹ of affected issues follows below, including:

- Proof that Chief Ramsey actively approved¹² the mass false arrest;
- Proof that at the time of the arrests Ramsey knew that arrests were being made “without ordering them to disperse and awaiting their response”;¹³
- Proof that Ramsey arrived at Pershing Park by no later than 9:15 a.m.;¹⁴

¹¹ Plaintiffs have included in the associated footnotes and exhibits substantial documentation establishing that these issues and the expectation that relevant data would be found in the running resume is not conjectural.

¹² Originally, in sworn testimony before the D.C. Council, Chief Ramsey categorically denied being a part of the mass arrest decision making process. See February 25, 2003 testimony before the D.C. Council’s Judiciary Committee, quoted in, Ex. 19, Council Report at 59.

Ramsey continues in deposition to dispute or deny that he approved the decision to arrest. Ex. 11, Dep. of Ramsey at 29:18 – 22; Id. at 35:12 – 22.

By documenting his approval of the arrest, the running resume would establish that Ramsey did, as he has admitted on occasion, approve of the decision to execute the mass arrest and supported that decision “100 percent.” Id. at 34:20 – 35.

Ramsey seeks to minimize his involvement in the arrests, contending that a failure to override the decision of a trusted Assistant Chief can be interpreted as nothing more than mere passive and tacit approval. See, e.g., Dep. of Ramsey at 30:6 – 14; But see, Ex. 19, Council Report at 96 (D.C. Council Judiciary Committee finds that “Once it became clear that the mass arrests made at Pershing Park on September 27, 2002, were and would remain controversial and bring criticism to the Williams Administration, Chief Ramsey and his immediate subordinates sought to minimize the chief’s own role in the decision and the outcome.”).

The running resume, were it produced, would support the Judiciary Committee of the Council of the District of Columbia’s finding that “Chief Ramsey is responsible for the arrests at Pershing Park, though he initially testified before the Judiciary Committee that he was not a part of that decision.” Ex. 19, Council Report at 59.

The running resume, were it produced, would support, as also found by the Council investigation, that Chief Ramsey’s statements about his approval or non-approval of the mass arrest have been evasive and false and an apparent effort to cover up his role. Id. at 78 (“The investigation and release of the final [MPD internal] report were marked by evasions and misstatements by senior officials including Chief Ramsey, giving rise to the appearance of an attempt to cover up Chief Ramsey’s role in ordering the Pershing Park arrests.”).

¹³ Ramsey originally admitted under oath that at the time of the arrests he knew that they were being made “without ordering them to disperse and awaiting their response.” Ex. 25, Declaration of Charles H. Ramsey at 5, ¶ 18. He thereafter recanted that testimony, attempting to create a dispute of material fact.

The running resume, were it produced, would evidence the absence of a dispersal or clearing order and establish that at the time of the arrest, Ramsey knew and had ready access to know that no dispersal or clearing order had issued. See Ex. 2, Dep. of Herold, Nov. 16, 2007 at 179:14 – 20 (orders to disperse should be captured on the running resume).

¹⁴ The time of arrival establishes how extremely long Ramsey was at the scene observing people moving freely in and out of the park before he approved the mass arrest order. Ramsey denies arriving by 9:15 a.m., and places his arrival around 10:00 a.m. See Ex. 11, Dep. of Ramsey at 63:14 – 17, 256:5 – 20; But see Ex. 19, Council Report at 52 – 53 (“[B]y approximately 9:15 a.m., a full half hour before the decision to make a mass arrest was made, Chief Ramsey . . . had arrived at Pershing Park.”).

The arrival of the Chief of Police is itself a significant command event, establishing a new hierarchy of on-scene authority. Even Ramsey himself concedes the possibility that the fact and time of his arrival at the park would have been noted on the running resume. See Ex. 11, Dep. of Ramsey at 258:6 – 9. When Ramsey did arrive on the scene of earlier mass arrest situations which he also commanded, his arrival was documented by an assistant to Chief Jordan who was charged with documenting significant events. See Ex. 26, After Action Report, IMF Detail September 26 through October 1, 2002, Area

- Proof of a sham MPD investigation,¹⁵ that Chief Ramsey directed changes be made to the MPD’s investigation report that undermined its adverse findings by substituting new and false findings that would be flatly contradicted by the MPD’s knowledge base as established by the running resume;¹⁶
- Proof that Assistant Chief Newsham and Chief Ramsey made/approved the decision to mass arrest as many protestors as could be rounded up even before the time of Newsham’s arrival at Pershing Park and regardless of observed circumstances or conduct;¹⁷

III (“0747 COP Ramsey on the scene” at Vermont & K, “0752 Arrest order given,” “0832 COP Ramsey on the scene” at the 900 block of 12th St. NW, “0837 About 70 arrests effected.”).

¹⁵ Evidence of a sham investigation supports liability for punitive damages. See, McCrae v. Daka, 839 A.2d 682, 701 (D.C. 2003) (plaintiff entitled to the “constitutional maximum” in punitive damages, where record reflected sufficient evidence of malice or reckless indifference due to corporate defendant’s conduct of a sham internal investigation into plaintiff’s complaints of misconduct), citing, Blackmon v. Pinkerton Sec. & Investigative Servs., 182 F.3d 629, 635 – 37 (8th Cir. 1999) (“malice or reckless indifference” to plaintiff’s right found where corporation conducted investigation that was “inadequate” and “half-hearted”), Baty v. Williamette, Inc., 172 F.3d 1232, 1244-45 (10th Cir. 1999) (sufficient evidence of “malice or reckless indifference” where management conducted sham investigation and condoned harassment), Jackson v. City of Albuquerque, 890 F.2d 225, 229 (10th Cir. 1989) (punitive damages justified where defendant conducted sham investigation); Bruso v. United Airlines, Inc., 239 F.3d 848, 861 (7th Cir. 2001) (abuse of discretion to disallow punitive damages where there is evidence of a sham investigation to discredit complainant and protect management).

¹⁶ The Judiciary Committee of the D.C. Council found that “At the direction of Chief Ramsey and in violation of MPD general orders, changes were made to the investigative report after it was completed by the Office of Professional Responsibility. The changes served to weaken criticism of the Department and the nature of the arrests.” Ex. 19, Council Report at 76. “Chief Ramsey instead directed that his opinions take the place of the findings of the investigating officials.” Id.

“The investigation and release of the final report were marked by evasions and misstatements by senior officials including Chief Ramsey, giving rise to the appearance of an attempt to cover up Chief Ramsey’s role in ordering the Pershing Park arrests.” Id. at 78. A few examples follow below:

Originally, the investigation found that bike protestors had been “escorted” by police. After Ramsey’s intervention, the language was changed to “followed” and “monitored.” See Ex. 27, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Matthew Klein) at 97:8 – 99:18, 103:6 – 104:1. The running resume would be expected to reflect the assignment and deployment of a police escort which allowed their ride to proceed.

Originally, the investigation found that the MPD had, in fact, *directed* bicyclists into Pershing Park. Id. at 103:6 – 104:1, id. at 99:19 – 100:9. After Ramsey’s intervention, the language was changed to “monitored” or “allowed.” Id. at 99:19 – 101:9, 104:12 – 105:13.

The municipality now concedes that it is accurate to find that the bicyclists were escorted along their route, id. at 106:16 – 19, and that they were directed into the park by police, id. at 107:18 – 21, 106:20 – 107:2. The running resume would establish that Ramsey knew at the time he directed these changes that they were false and not supported or contradicted by the running resume, but proceeded to weaken the report regardless in order to manufacture a sham.

Ramsey directed the deletion of the investigatory finding that “there was a strong possibility that persons were already in the park and had not committed any illegal acts prior to the arrival of police units, who proceeded to block off the area and prevent anyone from leaving.” Id. at 110:1 – 18; Id. at 145:19 – 147:20 (deletion of original admission that there was some number of improper arrests); Id. at 151:20 – 153:3 (deletion of finding that none of the arresting officers could provide testimony that the persons they had arrested for failure to obey had, in fact, failed to obey). The municipality concedes that the original language was accurate. Id. at 110:19 – 112:7. The running resume would evidence that this original finding was supported and/or documented.

The running resume, by establishing Ramsey and the MPD’s base of knowledge, would establish that changes directed by Ramsey in violation of Departmental orders were intended to create a weakened and sham investigatory report that would avoid accountability for the MPD as well as Ramsey personally.

¹⁷ The running resume would document and evidence the timing of command decisions and field deployments, including the fact that the MPD predetermined to mass arrest those at Pershing Park *even before Newsham had arrived to the park* and regardless of circumstance or the existence of probable cause. That the decision and the command to contain

- Proof of the chronology and timing of the decision to execute a mass arrest, as reflected in the timing and deployment of mass arrest buses;¹⁸
- Proof that the MPD has fabricated the claim of widespread misconduct in the vicinity of Pershing Park, as reflected in the absence of such reports in the contemporaneously recorded running resume;¹⁹

protestors and others in the park was made prior to Newsham’s arrival at the park underscores how wanton and malicious was the intention and how the containment decision and order was in deliberate indifference to and in reckless disregard of the constitutional rights of those who happened to be at the park. These circumstances are all relevant to punitive damages against the municipality, Chief Ramsey and Assistant Chief Newsham.

The destruction of the running resume, however, leaves the defendants free to manufacture denials without concern that they will be confronted with the data contemporaneously recorded in the running resume. This particular theory of liability is neither conjectural nor speculative. Newsham’s Assistant Area Commander on September 27, 2002 was Commander Joseph Griffith, see Ex. 28, Dep. of Joseph Griffith at 8:17 – 22. Commander Griffith - - who was himself at Pershing Park - - attests that Newsham ordered the containment of persons within Pershing Park even before Newsham arrived at the park. Id. at 61:12 – 62:7. There was no ambiguity to Newsham’s containment order. Griffith understood the order to mean to “hold them in the park,” id. at 62:8 – 10, to “encircle them,” id. at 82:13, such that they “wouldn’t be free to go” or leave the park, id. at 83:2 – 13. Griffith is unaware of what caused Newsham to order that the protestors and others be contained in the park. Id. at 63:2 – 9. According to Griffith, Newsham told him “contain them there, I’m on my way.” Id. at 65:16 – 18. As Griffith observed the scene, it was “relatively calm,” id. at 65:16 – 66:3, and “uneventful,” id. at 84:16 – 18. This is all before even the arrival of Newsham to the scene. A reasonable juror can find that the whole mass arrest was pre-determined.

Consistent with this, at 9:11 a.m. the Tact-2 dispatcher relays a message from J.O.C.C. command to a field unit which had inquired about police tactics. The J.O.C.C. command message explains that police “are trying to cut them off” to prevent protestors from leaving the area of Freedom Plaza (a reference used to encompass both Freedom Plaza, *per se*, and Pershing Park). See Media Ex. B, TACT-2 excerpt. There appears to be related radio communications at the same time that have been deleted or lost or removed from the audio cassettes produced in discovery, so plaintiffs are now deprived of the entirety of these critical communications.

¹⁸ See Ex. 6, Dep. of Broadbent at 192:13 – 21 (running resume would document deployment of mass arrest buses). Such information about mass arrest bus deployment is typically recorded on the running resume, as reflected in the 2001 Inauguration J.O.C.C. running resume. See Ex. 29, 2001 Inauguration J.O.C.C. running resume at 000886 (“1116 prisoner control being sent to 14th Street & K St NW for approximately 300 demonstrators; mass arrest expected DNP/OPR”); 000889 (“14th & K Code One, CDU 24 & CDU 23 at 1130 hours, Mass Arrest. Prisoner Control responding at 1132 hours. . .”).

¹⁹ As reflected in the following selections from the 2001 Inaugural, the running resume typically contains extensive details establishing the lawful conduct of protestors based on police observations. See Id. at 000874 (MPD Intelligence dispatched to protest by persons associated with National Organization for Women, signs reported to state “Down with Thompson”); 000874 (MPD Intelligence reports 25 persons at 1st and Constitution NE “protesting against the nomination of John Ashcroft”); 000874 (reports seven subjects wearing black masks and hoods “carrying Anti-Cheney / anti-war signs”); 000874 (“25 demonstrators on the scene making banners and signs. Some of the demonstrators are dressed in all black.”); 000875 (“Intell 52 reports that there are approximately 40 protestors at 22nd & F Streets NW”); 000875 (“Intell 84 reports that there are approximately 20 protestors in the 600 blk of 22nd Street NW. ESU-1 is taking photographs”); 000875 (“Intell 84 reports that the protestors are disbursed [sic] and there are approximately 12 anarchists heading towards Pennsylvania Ave.”); 000875 (“50 JAM [Justice Action Movement] demonstrators moving north on 21st towards Pennsylvania Ave.”); 000876 (“NEW BLACK PANTHER (nbp) group will meet 14th and “U”); 000876 (“Justice Action Movement Planning a Demonstration 01-19-01, 1230 hrs, 21st St NW & H St NW at the Smith Hall”); 000878 (“Protestors area of interest include Freedom Plaza and the Justice Department located at 9th and Pennsylvania Ave., NW where they will pass out welcome packets.”); 000879 (“approximately (60) demonstrators have been dropped off at 12th and G Street, NW, wearing black and orange scarfs with pirate hats”); 000879 (Demonstrators for Stanton Park are setting up); 000879 (“14th & Penn over 300 demonstrators”); 000879 (“Chief Jordan reports 400 JAM demonstrators at 14th and U Street NW”); 000879 (“demonstrators are marching to the Freedom Plaza”); 000879 (“approximately 120 demonstrators from 14th & U St. NW are marching peacefully south on 14th St. N.W.”); 000880 (“150 individuals moving S/B from Franklin Park. Prior intel indicated this group is made up of anarchists, radical and has preached ‘direct actions’ FBI/PP”); 000880 (“Demonstrator Update: 600 IAC demonstrators at Freedom Plaza. 600 – 800 Million Voter March demonstrators at Dupont Circle. As of 1000, only 15 NOW

- Evidence of unconstitutional biases, including that the protests were targeted in part because of the perception that persons associated with anarchism were present;²⁰
- Proof and evidence of the actual deployment and conduct of police,²¹ including the deployment of police from staging areas to Pershing Park²² and documentation of what command official(s) ordered police to do in Pershing Park;²³

demonstrators at Navy War Memorial. FBI/USPP”); 000880 (“600 demonstrators in street [that is blocked off for the parade] at 14th and Penn Ave. Individuals in the front carrying black balloons (as per previous intel). Individuals from Franklin Park merged into this group. Includes members from “Free Mumia” and New Black Panther Party. FBI/ISPP”); 000882 (“Intelligence reporting 100 pro-choice/anti-Bush protestors at Navy Memorial”; 000883 (“CDU 34 & 14 to respond to 14th & K Streets at 1546. Reports of regrouping of protestors”); 000885 (“approximately 100-150 demonstrators at 3rd and C St. NW. Near the Labor Department (Chanting jail to the thief”); 000886 (“Metro Transit Police report protestors on the platform at Metro Center heading out of the city, orderly group”); 000897 (“50 demonstrators at the west entrance of Union Station. At 2228 hours, USSS/IDCC reports that some of the demonstrators have moved inside Union Station to a public area, so far they have been cooperative MACC reports that the group has several cameras with them, but there is no intel @ this time that they plan to disrupt the event. USSS/JAF”); 000898 (2245 hours – further information from Commander Lanier at Union Station indicated that of the 50 demonstrators at the west entrance, most of them ran off, but about 10 did go inside and they are reportedly interviewing each other on videocamera. Amtrak Police are monitoring from inside.”); 000900 (“14th & Penn Over 300 demonstrators”); 000900 (“0923 hrs, Chief Jordan reports 400 JAM demonstrators at 14th and U Street NW. At 0935 demonstrators are marching to the Freedom Plaza. . . . 0956 hours/approximately 120 demonstrators from 14th & U St. NW are marching peacefully south on 14th St. NW per CR 600. Chief Jordan, reported Commander Lojacan is walking a group of demonstrators to a permanent location. (CA). 10:00 a.m.”); 000901 (“0920 hrs: USPP reports 200 demonstrators in Dupont Circle and more coming. Permit obtained for Million Voter March. FBI/USPP”); 00903 (“Intelligence reporting 35 protestors kneeling down at 7th & Penn NW”).

²⁰ The running resume typically includes references to persons in stark political terms, particular for those targeted as “anarchists.” See *Id.* at 000867, 0147 entry; 000875 (“Intel 84 reports . . . approximately 12 anarchists heading towards Pennsylvania Ave”); 000874 (“25 demonstrators on the scene making banners and signs. Some of the demonstrators are dressed in all black.”); 000867 (“600 anarchists believed to be in town for ‘Blac Block’ Action”); 000880 (“150 individuals moving S/B from Franklin Park. Prior intel indicated this group is made up of anarchists, radical and has preached ‘direct actions’ FBI/PP”); 000881 (“15- 20 Anarchist at 14th and K Street NW joining a group of approximately 200 – 300 Anarchist.”); 00882 (“Group of 50 or less marching eastbound on Constitution Avenue. Some are anarchist dressed and wearing gas masks. . . Group entering the Ellipse at southwest egress. There is a permitted site in the Ellipse.”); 000883 (“Anarchists speaking amongst themselves reference tiki torches, lighting, and putting out. NO CONFIRMATION.”); 000883 (“Reports of anarchists exiting the Glenmont Metro Station (last on red line at Georgia Avenue) to board various buses, 26 observed, parked at that location. Anarchists heard to say that heading towards New York [State] and Connecticut [State].”); 000883 (“FBI Intel team observed approximately 45 anarchists gathering at 15th and I Streets NW. FBI/JTTF”); 000886 (“4 demonstrator ‘Street Medics’ at 14th & Penn with earpieces and cell phones. Medics wearing large red cross on back and front with words “street medic.” 40 demonstrators dressed in all black walking southbound on 14th street into larger group FBI/USPP”).

²¹ The J.O.C.C. running resume is the “best source of information” as to what units were assigned, to where each was assigned, and what each did. Ex. 2, Dep. of Herold, Nov. 16, 2007 at 171:19 – 172:3.

For example, the 2001 Inauguration running resume contains staffing details down to the officer for every District. See, Ex. 29, 2001 Inauguration running resume at 000890 (“6D 01-20-01 2nd watch patrol: 2-Sgt., 14-Ofc., 1-Station Sgt. 4-Station Ofc., (admin) 1-Comdr, 1-Capt. 2-Sgt., 10-Ofc. CDU detail, 1-Capt., 4-Lt., 13-Sgt., 111-Ofc. 1-L/D Ofc. Non-CDU plt.65=1-Lt., 1-Sgt., 20-Ofc. Plt.66=1-Lt., 2-Sgt.,16-Ofc. Plt.67=1-Lt.,2-Sgt.,16-Ofc.”).

²² According to Jeffrey Herold, the J.O.C.C. running resume would be the only document memorializing the deployment of police from staging areas to Pershing Park. See Ex. 2, Dep. of Herold, Nov. 16, 2007 at 117:22 – 118:17.

²³ The J.O.C.C. running resume would be the only document memorializing which command official actually ordered police to Pershing Park. *Id.* at 167:5 – 172:2.

- The use of force against protestors, in particular the force used against the first protestors to be moved onto arrest buses, which was perpetrated to send a violent and intimidating message to potential arrestees;
- Objections by command officials, including the bases for such objections, as conveyed to Peter Newsham and/or Chief Ramsey;²⁴
- Proof that the MPD directed protestors into Pershing Park with the goal of containing the protestors for purpose of arrest.²⁵

With respect to common law claims against the District of Columbia, the absence of probable cause and the liability for these claims was finally conceded. As such, the District of Columbia is liable for compensatory damages attributable to the false arrest and painfully contorted confinement of nearly four hundred people. However, these claims could have been established or been forced to be conceded much earlier and without the need for depositions of arresting officers had the running resume simply been preserved and produced. Plaintiffs seek recovery, as sanctions, of reasonable attorney's fees and costs associated with the post-July 2007 depositions of arresting officers.

²⁴ The running resume would document the basis that the J.O.C.C. Commander, Alfred Broadbent, gave when he recommended to Peter Newsham that arrests not be made. This information informs the state of Ramsey and Newsham's knowledge at the time of arrest and would evidence that they executed these mass false arrests with such state of mind justifying punitive damages.

According to Broadbent, he asked three questions: 1) Were demonstrators hurting anyone? (which Newsham answered in the negative), 2) Were officers being injured? (which Newsham answered in the negative), and 3) Was property being destroyed? (which Newsham answered in the negative). Newsham's response in the negative to all three questions, according to Broadbent, factored into his recommendation that there not be arrests. Ex. 6, Dep. of Broadbent at 95:10 – 96:17. Police witnesses color their explanation of this communication and dismiss it, claiming that the real motivating reason behind Broadbent's objection to the mass arrest was that police lacked sufficient resources at that particular moment. *Id.*; Ex. 30, Dep. of Peter Newsham at 213:8 – 216:3 (“I don't have a recollection of Chief Broadbent indicating to me not to make the arrests for any other reason than the fact that he was stretched for resources because of arrests that were occurring in other parts of the city.”).

Likewise, CDU Coordinator Jeffrey Herold also objected to command officials that he did not know of any basis for the mass arrest. Herold cannot recall to whom he made such objections, but that may very well be reflected on the running resume.

²⁵ The running resume would be expected to reflect the herding or moving of protestors by police, as is reflected in the 2001 Inauguration running resume. *See* Ex. 29, 2001 Inauguration running resume at 000880 (documenting at 2001 Inaugural Parade, “Approximately 500 demonstrators at 14th St and Penn Ave. . . [U.S. Park Police Horse Mounted Unit] to move them into Pershing Park. . .”); 000881 (at 2001 Inauguration, “Protestors moved and secured at Memorial Street Park, NE bounded by First St & Penn St NW”); 000900 (at 2001 Inauguration, “0956 hours/approximately 120 demonstrators from 14th & U St. NW are marching peacefully south on 14th St. NW per CR 600. Chief Jordan, reported Commander Lojacon is walking a group of demonstrators to a permanent location.”).

The MPD internal investigation - - before it was improperly modified at the directive of Chief Ramsey - - found that the MPD had *directed* bicyclists into Pershing Park. Ex. 27, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Matthew Klein) at 103:6 – 104:1, *id.* at 99:19 – 100:9. After Ramsey's intervention, the language was changed to “monitored” or “allowed.” *Id.* at 99:19 – 101:9, 104:12 – 105:13. The municipality - - although not Chief Ramsey nor Assistant Chief Newsham - - nevertheless concedes that it is accurate to find that the bicyclists were escorted along their route, *id.* at 106:16 – 19, and that they were directed into the park by police, *id.* at 107:18 – 21, 106:20 – 107:2.

With respect to claims of municipal liability for constitutional false arrest, the evidentiary record has been substantially impaired by the destruction of the running resume. Under 42 U.S.C. § 1983, in addition to compensation for the underlying injuries, plaintiffs would be entitled as prevailing parties on the constitutional false arrest claims for an additional award of reasonable attorney's fees and costs. As sanctions for the destruction of the vast scope of evidence in the running resume related to municipal practice, and in light of the record herein, plaintiffs move the Court to preclude the municipality from asserting a defense against the municipal liability claims. See Moore v. Chertoff, Civil Action No. 00-0953 (RWR/DAR), December 17, 2008 Memorandum Opinion (docket entry no. 601) (precluding government from defending against individual and class claims of discriminatory non-promotion in light of discovery failures). The reasoning and analysis applied in the Moore case is well applied in the instant case. Plaintiffs also move for an award of reasonable attorney's fees and costs associated with the advance of constitutional false arrest claims against the municipality. To the extent this or any request overlaps with or duplicates the attorney's fees relief independently sought in connection with the post-July 2007 depositions of the arresting officers, or other relief sought herein, plaintiffs do not seek double recovery for the same services. There are, however, independent bases for monetary and evidentiary sanctions with similar effect.

With respect to claims for punitive damages against the municipality, the plaintiffs have considered requesting that the Court enter default in favor of plaintiffs or rule that punitive damages against the District of Columbia be found as a matter of law. Plaintiffs, while reserving the right to later request such relief, move the Court for lesser sanctions. Plaintiffs seek the issuance of evidentiary adverse inferences as to the information reasonably expected to be found within the J.O.C.C. running resume. Although the scope of evidentiary inferences would be broad, the scope would have a one-to-one relationship with and be proportionate to the scope of the underlying destruction. It would also leave the ultimate issue of liability for punitive damages, exceptional particularly when sought against a municipality, to the jury.

III. The District of Columbia Has Destroyed the Master Recordings of the Recorded Police Communications and Has Produced Recordings of Questionable Integrity That Reflect Erasure at Critical Minutes of Orders and Arrests in Pershing Park Across Multiple Different Police Channels

In violation of the duties of preservation, the District of Columbia destroyed the master recordings of the September 27, 2002 police radio channel communications. The authenticity and integrity of the remaining radio communications produced in discovery is disputed.

By discovery Order dated October 30, 2007, the District of Columbia was ordered “to account for any technical difficulties, questions regarding authenticity, or unaccounted for periods of time in the produced audio tapes.”

The District has failed to comply with this order to account for the apparent irregularities in the recordings produced to plaintiffs. If anything, the contradictory and inaccurate representations by the District’s representatives in response regarding authenticity only reinforce the inference that the tapes produced by the District are not full and complete and authentic copies of the recorded police radio communications.

Because the District has improperly destroyed the master recordings and has failed to comply with the Court’s Order to account for the recording irregularities, plaintiffs hereby move the Court to issue adverse inferences encompassing the substance of the radio runs or recorded police channel communications. This egregious misconduct - - including the extraordinary submission to the Court of the false affidavit of Denise Alexander - - also provided additional bases for other relief requested, including the disallowance of a defense to be asserted against municipal liability claims.

Such relief is authorized under Rule 37(b)(2)(C) and the Court’s inherent authority.

The background of the underlying violations is described in greater detail below.

A. In Violation of Discovery Obligations, the District Failed to Implement a Litigation Hold and Perpetrated or Allowed the Destruction of the Master Set of Recorded Police Channel Communications

The District of Columbia never ordered a “litigation hold” or specific directive to protect against the destruction of the September 27, 2002 master recordings of police communications. Ex. 13, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee James Crane) at 110:12 – 113:5; Ex. 12, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee Deloris Hunter) at 28:14 – 33:6; *Id.* at 101:15 – 17 (“I don’t believe there were any documents issued specifically directing personnel not to destroy any records for that time period.”). The master recordings originally in the Communications Division are understood to have been destroyed in the ordinary course of operations or to be lost or unavailable.

B. The Recordings of Police Communications Produced in Discovery Do Not Appear to be Complete Authentic Copies of the Original Transmissions and Appear to Have Been Edited and/or Reflect Data Loss

As discussed in greater detail below, the recorded police communications produced to plaintiffs appear to have been edited or to reflect data loss at the critical minutes of the arrests in Pershing Park. It is useful, however, to understand the chain of custody of the tapes and their deficient condition.

Although the District never implemented a litigation hold - - and as a consequence, the master recordings have been destroyed - - the substance of those recordings was immediately recognized by the MPD Office of the General Counsel as having critical relevance to this litigation.

Within *one week* of the mass arrest and “in anticipation of litigation,”²⁶ Assistant General Counsel Ronald Harris requested from the Communications Division a set of audio cassettes constituting copies of the recorded police communications for “at least a 24-hour period of September 27.” Ex. 13, Rule 30(b)(6) Dep. of District of Columbia (D.C. designee James Crane) at 51:9 – 52:7.

²⁶ Given this extensive effort to collect for litigation defense purposes the then-existent records, including reaching out to the Communications Division for a set of recordings, it is a reasonable expectation and inference that at this same time the diligent defense counsel from the Office of the General Counsel would also have reviewed the Joint Operations Command Center running resume. According to Sgt. Jones, it “likely” would be sent to the OGC as a matter of standard operating procedure, so no specific request may have been required to receive a copy. It is also uncontraverted that at this time, the J.O.C.C. running resume existed and was accessible.

The District is unable to represent how many audio cassettes were produced to the OGC in satisfaction of this legal request. “I don’t have an exact number. It’s a lot because he wanted all the zones.” *Id.* at 50:6-8. A zone is another way of referencing a radio channel. *Id.* at 45:8–11.

There were no less than 17 zones that were recorded that day.²⁷

Presuming a 120 minute audio cassette tape length,²⁸ 24 hours of recorded transmissions (i.e., 12 cassettes) from each of 17 zones would require 204 cassette tapes.

Inspector Crane is certain that 24 hours of recordings (i.e., 12 cassettes) were produced to the OGC for the Citywide channel but does not recall whether that or a different number of recordings were produced for the other channels. *Id.* at 51:22 – 52:7. If 24 hours of the Citywide channel was produced and only eight hours (an arbitrary number selected as an example) of each of sixteen other channels was produced, that would require 76 cassettes.

Nothing remotely approaching these quantities has been produced.

Crane recalls it took between one week to 10 days for the Communications Division to make all of the recordings for Harris. *Id.* at 57:6 – 10. Out of the six persons assigned to the Communications Office, “four out of six worked on it [the Harris request] for a week to complete those requests.” *Id.* at 57:18 – 58:4.

On February 2, 2004, the Barham plaintiffs demanded production of all recordings related to the September 27, 2002 protests or arrests including specifically “all ‘radio runs’ for September 27, 2002” and “[a]ll stored recordings of . . . audio or information feed into or from any law enforcement command center.” See, Ex. 31, Plaintiffs’ First Set of Requests for Production to the District of Columbia at 8, Request 10.

²⁷ The zones include seven channels, one for each of the 7 District patrol zones in 2002. *Id.* at 44:4 – 7. Patrol zones are typically referenced by the District number, i.e., the “1D” channel or “2D” channel, etcetera up through channel “7D.” Each of the seven Districts also has a tactical zone or a tact channel. *Id.* at 44:7 – 10. These are referenced, for example, as “1D tact channel” etcetera up through the “7D tact channel.” There is also a citywide zone channel and a corresponding citywide tactical channel or zone. *Id.* 44:10 – 12. There is also a zone or channel for the “Special Operations Division” or SOD. *Id.* at 53:4 – 10.

²⁸ The initial production of tapes by the District was on 120 minute tapes, with sixty minutes of potential recording on each side of a two sided tape.

Although the Office of General Counsel was in possession of tapes, they were not immediately produced. On October 28, 2004, the District produced a partial and non-systematic set of recorded police communications on cassette. See Ex. 32, October 28, 2004 letter from Mr. Koger to Barham plaintiffs' counsel. A total of ten tapes were produced. Each cassette was identified with a specific channel and the two hour period that was supposed to be on the tape. There were no cassettes whatsoever constituting communication from the Citywide or the Citywide-Tact channels. There were no tapes from the Special Operations Division, Tact-1 or Tact-2 channels for even the period of 8:00 a.m. – 10:00 a.m. during which time the mass arrest was initiated. The Tact-2 channel was also missing 10:00 a.m. – noon.

At the time, Plaintiffs' counsel (which did not then know of the Harris request) understood this to constitute all of the tapes in the possession of the MPD.

Depositions of records custodians took place (after a period of lengthy stay of proceedings lifted) in the fourth quarter of 2007. Plaintiffs pressed for answers as to why the production was non-comprehensive. Plaintiffs also pressed for an explanation as to why the tapes that had been produced appeared to not be authentic and true copies of the original communications given that the tapes which purported to contain 120 minutes of recordings typically were blank on the second or "B" side and in total contained typically only 45 to 60 minutes of selected communications, and also included significant gaps that reflected editing, deletion or at the very least data loss.

Deletion or apparent data loss was found on different audio cassettes at the most critical period between 9:15 a.m. and 10:15 a.m. – just when the mass arrest decisions were considered, made and implemented. On the 2D channel, the recording gap was from 7:17 a.m. to 10:05 a.m. On the 1D channel, there was a 24 minute recording gap between 9:35 a.m. and 9:59 a.m. On the Tact-1 channel there was a 23 minute gap between 9:41 a.m. and 10:04 a.m. On the Tact-2 channel, there was a 53 minute recording gap between 9:19 a.m. and 10:12 a.m. See Plaintiffs' Motion to Compel the Production of Running Resumes and Recorded Police Channel Communications by the District of Columbia (Barham docket entry no. 338) at 12 – 18.

The District provided no substantive answers in response to plaintiffs' inquiries, other than to state that it could provide no technical explanation for such circumstances. Plaintiffs' counsel specifically asked the District whether there was compression of periods of radio silence that would account for the fact that far less than 120 minutes of real-time recordings were on each 120 minute long tape. The District's counsel responded that was not the case.

A deposition of the custodian of records for the Office of Unified Communication on September 12, 2007 did not resolve these issues.

On September 28, 2007, a few hours after the Barham plaintiffs sought (and had been denied) consent from the District of Columbia for a motion to compel production of the radio runs, the District's counsel reported "that several additional tapes have been locate [sic], but it will take into early next weeks t [sic] ascertain the times and channels with greater clarity." See Ex. 33, September 28, 2007 e-mail from Mr. Messineo; Ex. 34, September 28, 2007 e-mail from Mr. Koger.

There has never been an explanation as to why these "additional" tapes had never been previously produced or "located," given that according to the District's account the only undestroyed recordings of police channel communications were in the possession of the MPD Office of General Counsel, in the custody of Deputy General Counsel Ronald Harris, since just after the mass arrest. See, Ex. 13, Rule 30(b)(6) Dep. of District of Columbia (DC designee James Crane) at 50:13 – 52:12 (the audio tapes were made in response to Mr. Harris' request); Id. at 60:22 – 61:4 (copies provided to plaintiffs were "exact copies of the audiotapes that were provided to Mr. Harris"); Id. at 110:12 – 113 :5 (only preservation taken by Communications Division of police communications was to deliver a set of September 27, 2002 tapes to Ronald Harris).

C. The District Failed to Comply With This Court's October 30, 2007 Discovery Order; The District Submitted to the Court a Sworn Affidavit That is Flatly Contradicted by the District's Sworn Deposition Testimony

By Order dated October 30, 2007, in response to articulated concerns regarding the failure to produce all recorded police communications and the questionable authenticity and integrity of those that

were produced, and the Barham plaintiffs' Motion to Compel the Production of Running Resumes and Recorded Police Channel Communications by the District of Columbia (docket entry no. 338), the Court ordered

“that defendants shall supplement their production of recorded police channel communications to account for any technical difficulties, questions regarding authenticity, or unaccounted for periods of time in the produced audio tapes.”

October 30, 2007 Order (docket entry no. 351).

Rather than supplementing with the requested accounting, the District of Columbia instead prepared and submitted a materially false declaration under oath from Denise Alexander, who attested that “there is nothing unusual or deficient” about the transmissions or recordings. The District declarant attested that she and others had reviewed the tapes that plaintiffs represented to the Court as reflecting deletion, editing or loss of data and as containing recording gaps. Ex. 35, Decl. of Denise Alexander at 2. The District represented that Ms. Alexander and the other examiners “did not detect anything technically deficient with the recordings.” Id.

In an effort to explain the apparent losses of data, the District represented through the sworn Alexander declaration that the tapes that had been produced to plaintiffs were in fact not complete copies of the transmissions from the master, but reflected a *selection* from the master of transmissions deemed by the District to be relevant. “When the tapes were first prepared, a Dictaphone system was used to *segregate the relevant transmissions* from the master recording.” Id. (emphasis added). According to this account, the selection process is why there was less than one hour of recorded material on cassettes purporting to contain a two hour range of transmissions and also why on some 120 minute cassettes there purported to be transmissions for more than a 2 hour range of air time.

On December 12, 2007, plaintiffs conducted a Rule 30(b)(6) records deposition of Commander James Crane on the subject of “the existence and condition of any . . . audiotapes related to the events of September 27, 2002, including radio transmissions. . .” Crane was the supervisor of the MPD office that

had produced the audio cassettes at the time of production. Ex. 13, Rule 30(b)(6) Dep. of District of Columbia (DC designee Crane) at 10:13 – 14.

Through Crane, the District testified that each 120 minute audio cassette *should* contain approximately 120 minutes of radio transmissions. Id. at 86:6 – 88:5, 89:18 – 90:13. These were real time recordings.

Crane testified that when the audio tapes were first prepared that the office did not “segregate the relevant transmissions” or selectively edit transmissions from the master recording, as represented in the District’s sworn declaration provided to this Court through Denise Alexander. Id. at 89:10-15, 103:16 – 105:21.

Crane was provided a copy of the Alexander declaration and directed to her notation reflecting that there purported to be 154 minutes of radio transmissions, from 9:26 a.m. to 12:00 noon, on just 60 minutes of tape, side A of a single audio cassette. Id. at 92:16 – 93:8. Notwithstanding that the District’s sworn declaration from Alexander represented that there was nothing technically deficient with the tape, Crane conceded that this was clearly incorrect. Id.

Crane was presented with one of the tapes containing an approximately 50 minute recording gap (during the mass arrest decision period) that reflected apparent deletion, editing or loss of data. The District had previously represented to this Court, through Ms. Alexander, that there was nothing deficient with this particular tape. After being played the tape, and upon inquiry from plaintiffs’ counsel, Crane admitted that this and other such recordings were deficient, either technically deficient or through human error. Referring to the recording gap, Crane admitted “I believe that there is an issue that not all the recordings are present. . . . I do recognize there’s an issue with the lack of recordings.” Id. at 103:5 – 14.

As referenced above, the Court’s October 30, 2007 Order directed the District to account for all absent periods of time on the audio tapes. The District’s sworn declaration through Alexander was to

constitute that full accounting. Clearly, the District failed to comply with the Order in this respect. Its materially inaccurate response only confirms that authenticity and completeness is in genuine question.

D. The District Provided “New” and Longer Recordings Despite Claiming that Only One Set of Recordings Existed; There Still Remain Critical Time Gaps, Data Loss or Erasures of the Minutes Where the Arrests Were Being Ordered and Executed

After the Crane deposition, the District of Columbia then produced to Barham counsel a new set of audio cassettes. Inexplicably, even though there is represented to exist only one set of audio recordings in the possession of Ronald Harris or the OGC and that plaintiffs had received exact duplicates, on this new set there are new transmissions, including within some of the largest recording gaps.

Even as supplemented, the production of tapes evidences editing or data loss. These tapes purport to be real-time, i.e., that 2 minutes of actual air time will play on two minutes of tape.

On the Tact-2 tape, at 9:12 a.m, there is no less than 31 seconds missing from the tape. Only 29 seconds after the dispatcher reports the time as 9:12 a.m., she reports it having jumped to 9:14 a.m. See Media Exhibit B-1. This occurs at a point of critical communications, just as the field unit and dispatcher are discussing communication relayed specifically from the J.O.C.C. command, in which MPD Command advises that “police are trying to cut them off” and that a group of protestors had been “leaving Freedom Plaza” and were prevented by police from doing so. See Media Ex. B-2. For MPD command to be acknowledging at this relatively early time that it was trapping protestors or preventing protestors from leaving is significant, yet the absence of no less than 29 seconds at the time of this exchange suggests there has been a deletion or loss that pertains to this subject.

On the same Tact-2 tape, the time as reported by the dispatcher does not reflect the proper orderly advance of time sequentially. At least one transmission is out of place in time. A 9:14 a.m. transmission is followed by a 9:15 a.m. transmission and then by a 9:19 a.m. transmission and then is followed by another 9:14 a.m. transmission. See Media Ex. B-3. This raises questions as to whether

there has been editing. As above, the District's own declarant Denise Alexander had sworn in her affidavit that there had been editing and selection from the master.

Also consistent with editing, there is only 13 minutes and 39 seconds of time recorded on the tape between the time announcement of 9:02 and the time announcement of 9:22, twenty minutes later. See Media Ex. B-0.²⁹ Absent editing or data loss, there should be 20 minutes recorded material for 20 minutes of time passage. Here there is only 13 and a half minutes of recorded material for 20 minutes of time passage. Six to seven minutes of transmissions are unaccounted for, in this period alone on this one particular channel, again at the critical moments of the Pershing Park arrests.

E. As Appropriate Sanctions, The Court Should Issue Adverse Inferences for the Recorded Police Channel Communications, Which are Now Missing or of Disputed Integrity

By Order dated October 30, 2007, the Court ordered the District to account for the deficiencies and gaps in the produced recordings. Instead, the District has presented a sworn declarant and a sworn deponent who are not consistent even on the basic question of whether there has been any editing.

Had there been preservation of the original master analog recordings, plaintiffs could inspect the master or make a copy from that master. But it has been destroyed by the District.

Plaintiffs request that, as sanctions for the failure to implement a litigation hold to prevent destruction of the original master data and for the failure to substantively comply with the October 30, 2007 Order requiring a full accounting for deficiencies, in light of the record evidence of the incompleteness and lack of integrity of the radio communications production, that the Court issue adverse inferences encompassing the radio runs or recorded police channel communications. As the recorded police channel communications are plainly relevant to issues of liability, if not to all issues and claims, their loss and destruction - - including consideration of the remarkable submission of the false

²⁹ Media Exhibit B-0 is an ongoing unedited period of Tact-2 recorded communications which, according to the dispatcher's time announcements, span the time period of 9:02 a.m. through 9:22 a.m. on this particular channel. Media Exhibits B-1, B-2 and B-3 are all excerpts from within this period on this same channel and, therefore, constitute excerpts of data that can also be found in Media Exhibit B-0.

affidavit of Denise Alexander - - support also the requested order precluding the defense against municipal liability claims.

IV. The District Should Be Precluded From Using or Referencing Documents Produced for the First Time At or After the Close of Discovery

Requests for Production were served upon the District in January, 2004 by the Chang plaintiffs and on February 2, 2004 by the Barham plaintiffs.

On the last day (November 16, 2007) and during the last week of discovery, the District produced over 3,000 documents and items in response to these requests. While some number of this 3,000 was documents previously produced in discovery, the majority were produced for the very first time. This material was improperly withheld by the District for more than three and one half years.

The production of this massive store of materials on the last day or days of discovery precluded their use by plaintiffs during discovery, obviously. Scores of depositions were taken without benefit of this information, leaving plaintiffs unable to confront or cross-examine witnesses with the material and depriving plaintiffs of being able to plan depositions or discovery with benefit of this material. In the last months of 2007 alone, more than 40 depositions were conducted by plaintiffs, all without benefit of this material.

The most concerning of the produced documents are the intelligence records that were maintained by Assistant Chief Alfred Broadbent.

In the Barham plaintiffs' first set of requests for production, propounded on February 2, 2004, they demanded production of the "Broadbent files" as described below:

[Request for Production No. 64]

Copies of all documents and files maintained within the MPD that document or record the events/occurrences that take place in connection with political protests or which document or reflect all the preparations and actions undertaken by law enforcement in connection with major demonstrations.

By way of illustration, and not limitation, this request is intended to encompass the documents contained within files and binders, including at least one 5 ring binder, that are maintained by Chief Alfred Broadbent. Chief Broadbent testified at a D.C. Council hearing that he maintains files and a 5 ring binder to document "all the things" the MPD does for major demonstrations, and also testified to the existence of binders in which he records for historical and other purposes

“everything that takes place in an event.”

Ex. 31, Plaintiffs’ First Set of Requests for Production to the District of Columbia at 15-16.

The District Responded:

Defendant objects to this Request upon the bases set forth in the general Objections set forth above.

Defendant further objects to this Request upon the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and vexatious.

Defendant also objects to this Request insofar as it is redundant and duplicative of another Request within this set of Requests.

Defendant additionally objects to this Request insofar as it is redundant and/or duplicative of Requests propounded by plaintiffs’ counsel in other litigation against the District and refers plaintiffs to the records and materials received by their counsel from the District of Columbia, its agents, employees, officers, and officials in other cases prosecuted in whole or in part by the Partnership for Civil Justice and/or the National Lawyers Guild.

Defendant further objects and withholds from disclosure under a claim of privilege otherwise responsive materials or portions of responsive materials to the extent they are protected from disclosure by the law enforcement privilege, the deliberative process privilege, the attorney-client privilege, the work product doctrine, prosecutorial privilege, and/or the national security privilege.

Subject to, notwithstanding and without waiving these objections and assertions of privilege, Defendant responds that, in addition to unprivileged responsive documents previously filed with the Court, additional unprivileged responsive materials have been provided to plaintiffs’ counsel.

Ex. 36, Defendant District of Columbia’s Response to Plaintiffs’ First Set of Requests for Production of Documents to the District of Columbia, Response to Request 64.

After a lengthy stay of proceedings, the deposition of Alfred Broadbent proceeded on October 19, 2007. The first approximately twenty minutes of that deposition was focused on establishing the existence, content, number of volumes and current location of the Broadbent binders. Broadbent provided some information, but indicated that many more details would be known by Lieutenant Michael Pavlik, who was Broadbent’s aide and who managed the files. Pavlik was scheduled to be deposed on November 15, 2007, one day before the close of discovery.

The night before the Pavlik deposition, Broadbent's voluminous records suddenly began to be produced by the District of Columbia. They continued to be produced for the next number of days, completing on Monday November 19, 2006 after discovery closed.

A total of 1,727 pages were produced, labeled consecutively as bb-1 through bb-1727.

Among these documents were the MPD's intelligence or secret spy files, which document that the MPD infiltrated protest organizing meetings routinely. They contain reports from undercover agents and plain clothed agents and informants providing unconfirmed reports of statements by persons perceived by the agents to be activists or potential protestors. There are dozens and dozens of names and pseudonyms and unconfirmed reports of statements attributed to these persons, reported in a period encompassing June 5, 2002 through September 27, 2002, relating to the September 27, 2002 protests and a range of other protests and political activities during that period.

Some of the unconfirmed statements may be sought to be used by the defense to cast the speakers in a negative light, although it is not clear whether such statements were actually made, whether any of the asserted speakers ultimately even came to the September 27, 2002 protest or whether the asserted speakers were other undercover law enforcement agents. There is a basis for believing or considering that at least one or more of the persons who are reported to have made statements as "protestors" were or are, in fact, police agents themselves. In other words, that the police have generated a false intelligence record, reporting police undercover / informant statements as that of genuine protest organizers. Minimally, from a litigation fairness perspective, were these records to be sought to be used in any way by the defense in a trial of this matter - - or were any adverse statements attributed to protestors sought to be repeated by police "witnesses" - - substantial discovery would be necessary to establish the true identity of each purported speaker.

Plaintiffs have had no opportunity to depose or examine the reporting undercover agents regarding what they wrote or their biases as officers seeking to establish or manufacture a "record" of acts to justify some adverse action to disrupt protests. Plaintiffs have not had the opportunity to depose

the alleged speakers themselves or any others present at the time. Plaintiffs have not been allowed to engage in the extensive discovery into the identity of all the police operatives that appear to have saturated protest organizing meetings.

The protestors' meetings typically contained multiple law enforcement agents and informants. Despite this substantial infiltration, no evidence was gathered of actual or intended criminal conduct such that any warrants were sought or secured.

It appears that at least some of the law enforcement agents, in fact, engaged in disruptive activity including making provocative statements to engage in acts of violence. This is a typical tactic of the MPD and other law enforcement, as has been revealed in discovery in other protest litigation.³⁰

Clearly agents did not even know who else were law enforcement in the room. With some agents engaged in provocative conduct, with their identities as law enforcement concealed from even other agents in the room, the situation appears to arise where law enforcement may be "reporting" conduct and statements of other law enforcement as if they were being made by actual protestors.

The statements and conduct of persons - - not even class members - - about various protests in the approximately four month period in advance of the September 27, 2002 mass arrest has little or no relevance whatsoever to the events of September 27, 2002 and would appropriately be the subject of a motion *in limine*. None of the defendants relied upon any document identified in the "bb" range in support or explanation of any actions taken on September 27, 2002. There is no reason to believe that any individual defendant has ever even seen the documents in the "bb" range.

No defense deponent has relied or referenced these documents as the basis of knowledge or for any action. It would be legally baseless, to say the least, to justify the arrest of 400 people in Pershing Park on the basis of alleged statements made by others at prior meetings. Even Peter Newsham, who vaguely references "intelligence" forecasting possible bad acts by protestors does not rely on any of

³⁰ In other litigation, undersigned counsel uncovered the existence of the MPD's illegal spying operation in which officers were placed on long term assignments posing as political activists including infiltrating meetings even in people's homes. Law enforcement was reported, in sworn deposition testimony, to have proposed dangerous illegal activities, which were soundly rejected by the actual political activists.

these documents. The preclusion of the introduction of these documents, or reference to their contents, would not in any way impair the proceedings. However, the possible inclusion or reference *will* require substantial resources in follow-up discovery.

The instant motion is not a motion *in limine*, but is a motion for preclusion based on the failure to timely produce the documents.

Pursuant to Fed.R.Civ.P. 37(c), plaintiffs move that defendants be precluded from using or referencing all documents within the range of bb-1 through bb-1727 as a sanction for the withholding of these materials and failure to timely produce these. Where any documents in that range are duplicates of documents (such as flyers or articles or administrative documents) which the District may have also had and produced at an earlier date, nothing in the Order will prevent those original productions of documents from being used at a trial to the extent that any such materials are otherwise admissible.

In the alternate, plaintiffs move that for a period of 120 days plaintiffs only be authorized to initiate and take discovery related to the information contained in the documents bb-1 through bb-1727, and that the defendants be ordered to pay all associated and reasonable fees and expenses.

The scope of information contained in the late-produced intelligence records is vast. No discovery has been afforded on their content and specific subject matter.

V The District Should be Sanctioned for Withholding the Field Arrest Records

There was no substantial justification for failing to timely produce the documents in the bb range. Were the defendants to claim innocent error, plaintiffs would take issue with such explanation particularly given the larger pattern of discovery misconduct by the District.

At many points in the discovery period, the District appeared to be engaged in a running of the clock strategy that included the delayed disclosure or failure to disclose documents and recordings, including failing to turn over the Pershing Park arrest records until October 4, 2007. It is astonishing that the District did not produce these straight away.

During the fall of 2007, plaintiffs were forced to conduct more than 40 depositions, including of arresting officers in Pershing Park. As the depositions of arresting officers proceeded, it was necessary for plaintiffs' counsel to have each officer's field arrest records. Plaintiffs' counsel repeatedly demanded that the District produce the field arrest records. The District obfuscated and falsely claimed that plaintiffs had everything that the District possessed.

When asked by plaintiffs' counsel to please identify what bates stamped documents the District claimed were Pershing Park field arrest records, the District flatly refused. Deposition after deposition of arresting officer proceeded without plaintiffs even having the field arrest records each officer had filled out. Plaintiffs diligently asked each officer whether they had filled out field arrest records (typically answered in the affirmative) and did they know where the records were today (typically answered in the negative).

Depositions proceeded like this until October 2, 2007 at the deposition of arresting officer John Hansohn.

Hansohn testified that he *had* seen his field arrest records two years after the events and *they were in the possession of the attorneys from the then-Office of Corporation Counsel* who showed them to him at a meeting at their offices in connection with this litigation. Ex. 37, Dep. of Hansohn at 43:5 – 45:8. Hansohn presumed the OAG counsel still had the records.

Suddenly, two days after this testimony, the OAG produced to Barham counsel not just Hansohn's records but approximately 5,000 pages of field arrest forms and related records. They were a jumbled mess, with many duplicates and even quadruplicates mixed in throughout. The OAG refused to produce the same to the Chang counsel and also, in an apparent effort to create confusion about the time of production, refused to bates stamp them.

Plaintiffs seek reasonable fees and costs related to the District's failure to timely produce these records, including efforts related to arresting officer depositions.

