

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

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PARTNERSHIP FOR CIVIL )  
JUSTICE FUND )  
617 Florida Ave. NW )  
Washington, D.C. 20001 )  
 ) Civil Action No. \_\_\_\_\_  
Plaintiff, )  
 )  
v. )  
 )  
THE DISTRICT OF COLUMBIA )  
 )  
Serve: Muriel Bowser, )  
Mayor of the District of Columbia )  
1350 Pennsylvania Ave. NW )  
Washington, D.C. 20004 )  
 )  
Serve: Karl A. Racine )  
Attorney General )  
441 4<sup>th</sup> St. NW )  
Washington, D.C. 20001 )  
 )  
Defendant. )

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**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

[Freedom of Information Act, D.C. Code § 2-531, *et seq.*]

1. This action is brought under the District of Columbia’s Freedom of Information Act (“FOIA”), D.C. Code § 2-531, *et seq.*, as amended. Plaintiff, the Partnership for Civil Justice Fund (PCJF), seeks injunctive and other appropriate relief for the disclosure and production of specific information the D.C. Metropolitan Police Department (MPD) is obligated by law to record and maintain regarding police actions in the context of First Amendment activities. The records sought are specific to the MPD’s controversial

handling of demonstrations against the Trump administration on January 20, 2017, and are crucial to the public's understanding of, and ability to evaluate, the MPD's conduct.

2. Significantly, this information is being improperly and illegally withheld at the very moment when its release would inform the public and the D.C. Council in their evaluation of Peter Newsham's nomination to be Chief of Police.
3. As this pivotal moment in American life, when demonstrators are coming to the nation's capital to engage in cherished free speech activities in opposition to policies and programs of the Trump Administration and in defense of targeted communities, the importance of the District's police chief's conformity to constitutional and other legal obligations in the handling of free speech actions is at its apex.
4. Yet, having effectuated the first major mass arrest and mass use of chemical and other weapons since the D.C. Council's enactment of the First Amendment Rights and Police Standards Act (FARPSA), and thus triggering its record keeping obligations and public disclosure requirements, Interim Chief Peter Newsham and the MPD are refusing to make public those responsive records.
5. The D.C. Metropolitan Police Department and Interim Chief Newsham are standing in willful disobedience of their lawful obligations to disclose information under the D.C. FOIA and under the FARPSA, including defiantly stating a refusal to disclose information where such information is mandated by law that it "shall be made available to the public on request."
6. This defies the police accountability and transparency that the D.C. Council intended in its careful enactment of the FARPSA.

7. Much of the information requested involves records required under the FARPSA, codified at D.C. Code § 5-331.07, *et seq.*, put into place to ensure police accountability and compliance with constitutional obligations. The Council of the District of Columbia enacted the FARPSA, which took effect in 2005 after lengthy investigation and hearings into significant police misconduct, including that of then-assistant-chief Peter Newsham, regarding violations of fundamental free speech rights and matters of mass illegal false arrests, police cover-ups, police brutality and excessive and indiscriminate force, and illegal surveillance and infiltration operations, in the context of First Amendment activities.
8. The MPD's refusal to disclose the information requested violates the transparency requirements mandated under the FARPSA.
9. The public is entitled to access this information without any further delay in order to assess the conduct of the Metropolitan Police Department and Peter Newsham, who has now been nominated by the Mayor of the District of Columbia to be the permanent police chief.
10. The D.C. Council is holding hearings into Peter Newsham's nomination to be chief of police yet this information, which bears on his fitness to be chief, is being withheld by the police department that he commands at a time when it should be evaluated by the public and the D.C. Council.
11. Newsham's history with mass arrests is a matter of public record. The Partnership for Civil Justice Fund was class counsel and litigated the Pershing Park mass arrest case, on behalf of nearly 400 persons, in which the courts found Newsham could be held liable for the mass violations of constitutional rights. The courts dismissed his attempted

justifications as “nothing short of ludicrous.” *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006).

12. The federal court found that Newsham’s actions in conducting the sweeping arrest of nearly 400 demonstrators were without lawful basis and denied his request for qualified immunity, finding that “[n]o reasonable officer in Newsham’s position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park.” Demonstrators were illegally mass arrested and held for 24 hours or more hogtied in stress-and-duress positions. The D.C. Circuit described in ample detail “just how indefensible Newsham’s actions were.”
13. After a series of constitutional rights lawsuits brought by the PCJF exposed D.C. police misconduct, including mass arrests without particularized probable cause, improper use of police lines to kettle, trap and detain protesters, failure to provide dispersal orders and opportunity to comply, indiscriminate use of force and excessive force, and illegal MPD infiltration and provocateur operations, the D.C. Council undertook an investigation and held extensive hearings into this misconduct resulting in the FARPSA. Those lawsuits also resulted in damages of \$25 million to persons who suffered constitutional deprivations and additional equitable relief and changes in police practices.
14. The FARPSA mandates not only specific restrictions on improper and unconstitutional police conduct in the context of free speech activity, but certain record keeping obligations to ensure police accountability. Delineated requirements of proper police conduct under the FARPSA are explicitly applicable in situations where there are also acts of property damage or allegations of criminal acts being carried out by some persons in proximity to First Amendment activity.

15. These laws and requirements were put in place to ensure that the police properly distinguish between those for whom there is probable cause to arrest for criminal activity and others who are in proximity to such actions in conjunction with protected expressive activity, to ensure that the police do not engage in mass dragnet arrests devoid of particularized probable cause and without fair warning or notice.
16. They are also intended to ensure that the police do not engage in mass indiscriminate use of force, including specifically misuse of large-scale canisters of chemical irritants.
17. The January 20, 2017, mass dragnet arrest conducted by the MPD under the leadership of Peter Newsham swept up persons who had engaged in no illegal conduct, including journalists, for whom there was no probable cause to arrest.
18. On January 20, 2017, the MPD, under the leadership of Peter Newsham, deployed mass indiscriminate use of chemical irritants and other weapons against large groups of people.
19. The FARPSA and other obligations under which the MPD operates require: written reports by scene commanders within 48 hours following deployment of officers in riot gear, and further that such reports shall be made available to the public upon request; written reports by the scene commander to the Chief of Police regarding determinations to use large-scale canisters of chemical irritants within 48 hours after the event; written documentation of arrest warnings given; documentation of orders to disperse and the methods used to effectively communicate such orders; use of force reporting; and other information.
20. Evaluating Peter Newsham's conformity to the law in his handling of the January 20, 2017, demonstrations is of crucial importance in determining his fitness to be the permanent chief of the D.C. MPD. There are widespread concerns regarding what appear

to be facial violations of the FARPSA under his command and the disclosure of these public records are a matter of urgency.

21. As the Washington Post Editorial Board wrote on January 25, 2017, addressing the police handling of the January 20, 2017, demonstrations: “It is important that the information collected be shared with the public and that there is an independent review by the D.C. Council.”

### **JURISDICTION AND VENUE**

22. This Court has jurisdiction over this action pursuant to D.C. Code § 2-537(a)(1) (D.C. FOIA) and § 11-921 (civil jurisdiction).
23. Venue properly lies with this Court as the defendant is the District of Columbia Government, the actions forming the basis of the claim occurred principally within the District of Columbia and the agency records at issue are located in the District of Columbia.

### **PARTIES**

24. The PARTNERSHIP FOR CIVIL JUSTICE FUND (PCJF) is incorporated pursuant to the District of Columbia Non-Profit Corporations Act and is based and headquartered in the District of Columbia. The PCJF is a not-for-profit legal and educational organization. The PCJF works to ensure transparency or openness in government operations. It also works to ensure constitutional conduct within government practices, including police practices, affecting First Amendment rights in the District of Columbia and nationwide. Among the focuses of the PCJF’s work has been effectuating significant changes to the laws and policies governing police handling of First Amendment activities under which the MPD is legally required to operate to conform to constitutional obligations.

25. The DISTRICT OF COLUMBIA is a municipal corporation, subject to suit, that runs and constitutes the local government of the District of Columbia.
26. The DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT (MPD) is an agency within the executive branch of the District of Columbia government. The MPD is the primary law enforcement agency for the District of Columbia and is charged with upholding and enforcing laws pertaining to demonstrations, protests and public assemblies, and is subject to specific requirements under the FARPSA.

### **FACTUAL BACKGROUND**

27. On January 20, 2017, the MPD under Interim Chief Newsham conducted a large-scale mass arrest of hundreds of persons protesting against the incoming administration of Donald J. Trump at his inauguration. The arrests were conducted without particularized probable cause and included journalists, legal observers, and persons who were lawfully engaged in First Amendment protected activities. The MPD also trapped and detained large groups of demonstrators and subjected demonstrators to widespread use of chemical irritants and other munitions.
28. Rather than apprehend and arrest those individuals who the MPD assert they witnessed committing acts of vandalism and property damage, the MPD conducted a dragnet arrest of hundreds of persons based on proximity and engagement in expressive activity.
29. The FARPSA mandates steps that the police are to take when there is violence in conjunction with First Amendment activity, including how, and under what circumstances, a group may be handled as a group. This is to ensure that there are not sweeping mass arrests and that persons who are not engaged in illegal activity are not subject to deprivation of their constitutional rights solely because they are in proximity to

others who may violate the law. Among other things, the law requires dispersal orders and particular use of police lines to arrest identified persons for whom there is particularized probable cause for arrest.

30. By emailed letter to Interim Chief Newsham and the MPD Office of Communications / Public Information dated January 26, 2017, sent to peter.newsham@dc.gov and MPD.Press@dc.gov, and CCed to donald.kaufman@dc.gov of the MPD's FOIA office, the PCJF requested "the written report(s) by the scene commander(s) to the Chief of Police that were completed within 48 hours following the deployment of officers in riot gear for each location/scene of deployment on January 20, 2017, pursuant to D.C. Code § 5-331.16 (a)" and "the written report(s) by the scene commander(s) to the Chief of Police regarding his or her determination(s) to use large scale canisters of chemical irritant on January 20, 2017, and explaining his or her actions pursuant to 5-331.16 (b) ... We are requesting the reports for each scene/location where chemical irritants were used."
31. The letter included the text of D.C. Code. § 5-331.16, including the requirement that certain requested records "shall be made available to the public upon request" and asserting that those particular records were to be produced without delay and the need for FOIA processing.
32. The January 26 letter advised that if the documents were not available in electronic format for immediate email, the PCJF would send a courier to pick up copies.
33. On January 27, 2017, having received no response to the letter, the PCJF sent a follow-up communication stating, "As below, under D.C. Code § 5-331.16 the information requested must be made available to the public upon request, and under the law, these



written reports were required to be completed and submitted by January 22, 2017, five days ago.”

34. The PCJF’s January 27 email further raised concerns that the failure to make the requested material available “raises the question as to whether the MPD did not abide by its legal obligations” regarding these written reports. It further stated, “Given the gravity and magnitude of MPD’s actions against assembled demonstrators, journalists, legal observers and passers by, including the mass arrest conducted and the widespread soaking use of chemical irritants, as well as the determination to charge persons with felonies, these documents must be provided to the public without delay.”
35. On January 27, 2017, the PCJF received a reply from Peter Newsham stating, “Mara, we've received your request, and you will receive a response later today.”
36. Later on January 27, 2017, the PCJF received an unsigned email from “Press, MPD (MPD) <mpd.press@dc.gov>” stating, “[C]ontrary to the claim contained in your email, we are not aware of any riot gear or tactics employed at any First Amendment assembly on January 20. Accordingly, your inquiry will be interpreted as a request for reports related to the Department’s response to the criminal riot of January 20, and an appropriate response will be provided. ... I can find no basis for, and indeed the law you cite does not support your assertion that the records are to be made available for immediate production. Accordingly, your request has been referred to the Freedom of Information Act (FOIA) office and will be treated as a FOIA request, subject to all applicable exemptions.”
37. On January 27, 2017, the PCJF received a further email from Donald Kaufman, MPD FOIA Officer, acknowledging receipt of “your Freedom of Information Act request sent

January 26, 2017,” providing a FOIA Request Number and standard information about FOIA processing.

38. On January 27, 2017, the PCJF submitted a FOIA request to the Metropolitan Police Department seeking additional specifically identified records that the DC MPD would have been required to maintain in conjunction with its handling of the protests against the inauguration of Donald Trump on January 20, 2017.

39. The January 27, 2017, FOIA request sought:

- a. “audio and/or video recording or orders to disperse protest assembly, to have been made pursuant to D.C. Code § 5–331.07(e) (requiring multiple, where possible, and ‘at least one clearly audible and understandable order to disperse using an amplification system or device’).”
- b. “All written documentation of arrest warnings, including, but not limited to, the required “Arrest Warning” sheets detailing the date, time, location of warning issued, name of officer giving warning and additional information,” and including a sample form from the MPD’s Manual for Handling Mass Demonstrations, and stated that the request encompassed “any entry of such warnings on the Commander’s Mass Demonstration Event Log ( P D Form 759-B).”
- c. “If the Chief of Police implemented a procedure for documenting arrests in connection with a First Amendment assembly different than that set forth in D.C. Code § 5–331.10 (b), produce the determination made in writing by the Chief of Police to do so explaining and justifying such determination as required under § 5–331.10 (c)(2).”

- d. “Any PD Form 901-m (“Assembly or Demonstration Reportable Force Report”) executed in connection with January 20, 2017 events.”
  - e. “All documents reflecting briefings provided to commanders of outside law enforcement agencies who participated in demonstration related duties on January 20, 2017 regarding the requirements of the MPD’s Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations.”
  - f. “All documents reflecting the assignment of an MPD officer to each such outside agency. According to published reports, the District of Columbia enlisted 5,000 National Guard troops and another 3,000 officers from other agencies during the Inauguration,” and further noted the MPD’s settlement with the PCJF in the class action *Becker v. D.C.* matter, which states that “[i]n all situations in which, through mutual aid agreements or otherwise, the District of Columbia obtains the assistance of outside law enforcement agencies for demonstration related duties, the MPD shall brief outside agency commanders of the requirements of the MPD’s Standard Operating Procedures for Handling First Amendment Assemblies and Mass Demonstrations and shall assign an MPD officer to each such outside agency unit.”
40. The January 27, 2017, FOIA request reiterated the pending request for the first set of documents sought on January 26 as described above.
41. The PCJF filed a separate FOIA request on January 27, 2017, with the MPD and Executive Office of the Mayor (EOM) seeking a copy of documents related to, and including, reports from 2011 to the present prepared by the Metropolitan Police Department Chief of Police regarding the MPD’s investigations and preliminary inquiries

involving First Amendment activities. These reporting requirements were put in place as part of the Police Investigations Concerning First Amendment Assemblies Act of 2004.

42. The PCJF's January 26, 2017, request that the MPD chose to subject to full FOIA processing was assigned number 2017-FOIA-01663. The PCJF's two January 27, 2017, FOIA requests to the MPD were assigned numbers 2017-FOIA-01699 and 2017-FOIA-01696.

43. The records are not sought for commercial use.

44. The FOIA requests are made by the PCJF as an educational 501(c)(3) organization for the purposes of legal and scholarly research and for publication and dissemination to the public.

45. In its FOIA requests, the PCJF described its background in protecting First Amendment rights in the nation's capital and the public interests that it advances, including that:

The information is necessary in furtherance of the role of the PCJF as a watchdog to ensure accountability with legal requirements by the police, and to protect and defend the constitutional rights of those who wish to engage in political and associational activity protected by the First Amendment.

46. In its FOIA requests, the PCJF reviewed select history of its work, including acknowledgment by this Court in independent FOIA litigation of "its core function of conducting police oversight." (referencing *Partnership for Civil Justice Fund v. District of Columbia*, 2009 CA 000748 B, Superior Court of the District of Columbia, FOIA litigation securing the largest release of MPD General Orders and related materials).

47. The PCJF qualifies as a "representative of the news media" as that term is used in FOIA jurisprudence for fee purposes, as the PCJF is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work and distributes that work to an audience."

48. The PCJF additionally requested a fee waiver pursuant to D.C. Code § 2-532(b), where furnishing the information can be considered as primarily benefiting the general public.

**Communications regarding January 26, 2017, request - 2017-FOIA-01663**

49. On February 2, 2107, the PCJF received an email from “DC Government <thang.nguyen@dc.gov>” reiterating the tracking number previously identified in Mr. Kaufman’s January 27 communication, 2017-FOIA-01663, to the January 26, 2017, request for disclosure of information.

50. On February 16, 2017, the PCJF received an email from Donald Kaufman invoking a 10-day extension.

51. On February 17, 2017, the PCJF received an email from Donald Kaufman stating that the request seeking records -- that by law “shall be made available to the public upon request” -- was denied. Mr. Kaufman stated: “D.C. Official Code § 2-534(a)(3)(A)(i) protects from disclosure investigatory records compiled for law-enforcement purposes to the extent that the production of such records would, among other things, interfere with enforcement proceedings. We have determined that the requested records pertain to open investigations by the Internal Affairs Division of the Metropolitan Police Department. Disclosure of these records would interfere with any prospective enforcement proceeding as, among other things, such disclosure would assist the targets of the investigation in creating defenses and assist the targets or witnesses in the shaping of testimony. Therefore, under D.C. Official Code § 2-534(a)(3)(A)(i), the requested records are exempt from disclosure.”

52. The District of Columbia Government’s Freedom of Information Act Public Access Website lists the Request Status as “Closed.”

**Communications regarding January 27, 2017, request #1 - 2017-FOIA-01699**

53. On February 2, 2017, the PCJF received an email from “DC Government” <thang.nguyen@dc.gov> acknowledging the January 27, 2017, request and assigning the case number 2017-FOIA-01699.
54. On February 16, 2017, the PCJF received an email from Kimberly Robinson, FOIA Specialist, Freedom of Information Act (FOIA) Officer, invoking a 10-day extension.
55. It is nearly two months since the information was requested and 17 days since the final date by which information and records were due to be disclosed. The PCJF has received no further communication regarding this request and no materials have been produced.
56. The District of Columbia Government’s Freedom of Information Act Public Access Website lists the Request Status as “In Process.”

**Communications regarding January 27, 2017, request #2 - 2017-FOIA-01696**

57. On February 2, 2017, the PCJF received an email from “DC Government” <thang.nguyen@dc.gov> acknowledging the request and assigning the case number 2017-FOIA-01696.
58. It is nearly two months since the information was requested and 34 days since the final date by which information and records were due to be disclosed. The PCJF has received no further communication regarding this request and no materials have been produced.
59. The District of Columbia Government’s Freedom of Information Act Public Access Website lists the Request Status as “In Process.”
60. An identical request to the EOM resulted in documents being produced on March 9, 2017.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

61. The PCJF has filed a request dated January 26, 2017, and two additional requests dated January 27, 2017, with the D.C. Metropolitan Police Department seeking production of public records.
62. The statutory time period of 15 business days, plus a 10-day extension under unusual circumstances (as was invoked for two of the three requests), has expired. *See* D.C. Code § 2-532(c), (d) (providing response period including allowable extension). The D.C. Code mandates the District provide requested records or issue a determination that records will not be disclosed within the time provisions of subsections (c) and (d) of D.C. Code § 2-532.
63. As of the date of the filing of this complaint, no records have been produced, and with regard to two of the three requests, no determination to withhold records has been made. In one instance, the request has been denied in full.
64. D.C. Code § 2-532(e) provides
- Any failure on the part of a public body to comply with a request under subsection (a) of this section [D.C. Code § 2-532] within the time provisions of subsections (c) and (d) of this section shall be deemed a denial of the request, and the person making such request shall be deemed to have exhausted his administrative remedies with respect to such request. . . .
- D.C. Code § 2-532(e).
65. Accordingly, the District of Columbia has categorically denied all three FOIA requests and the PCJF has exhausted its administrative remedies.
66. Pursuant to D.C. Code § 2-537(a)(1), having exhausted administrative remedies under D.C. Code § 2-532(e), the PCJF is authorized to institute proceedings for injunctive or declaratory relief in the Superior Court of the District of Columbia.

## **COUNT ONE**

### **(Failure to produce public records in accordance with the D.C. Freedom of Information Act and the First Amendment Rights and Police Standards Act)**

67. The preceding paragraphs numbered 1 through 66 are incorporated by reference as if set forth herein.

68. The District of Columbia has unlawfully denied the PCJF's January 26, 2017, request for information, and its two January 27, 2017, requests for information submitted to the MPD under the FOIA, including the PCJF's fee waiver request (to the extent any fees might be asserted by the agencies).

69. The District of Columbia has denied PCJF's request for a public interest fee waiver or unlawfully applied provisions of the D.C. Code disallowing assessment of certain or all fees, to the extent the agencies might assert applicable fees under the D.C. FOIA.

70. The District of Columbia has unlawfully withheld all responsive public records subject to release under D.C. Code § 2-532.

71. The District of Columbia has unlawfully withheld all responsive public records subject to release under D.C. Code. § 5-331.16 (a).

## **PRAYER FOR RELIEF**

72. WHEREFORE, PCJF respectfully requests that this Court grant it the following relief:

- a. Declare that the denial of the PCJF's requests, including any requests for fee waiver or non-applicability of fees, are in violation of D.C. Code. § 5-331.16 (a) and the D.C. FOIA;
- b. Enjoin the District of Columbia from withholding any records encompassed by the January 26, 2017, request: 2017-FOIA-01663; January 27, 2017, request #1: 2017-FOIA-01699; and January 27, 2017, request #2: 2017-FOIA-01696;



- c. Order that the District of Columbia produce the requested records within ten (10) business days;
- d. Award PCJF reasonable attorney's fees and costs incurred in this case pursuant to D.C. Code § 2-537(c); and
- e. Grant such further relief as the Court may deem to be just and appropriate.

March 23, 2017

Respectfully submitted,

/s/ Mara Verheyden-Hilliard  
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