

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

RAYMING CHANG, <i>et al.</i> ,)	
Plaintiffs,)	
v.)	Civ. Action No. 02-02010 (EGS)(AK)
UNITED STATES, <i>et al.</i> ,)	
Defendants.)	
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JEFFREY BARHAM, <i>et al.</i> ,)	
Plaintiffs,)	
v.)	Civ. Action No. 02-02283 (EGS)(AK)
CHARLES H. RAMSEY, <i>et al.</i> ,)	
Defendants.)	
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**NOTICE BY PLAINTIFFS PERTAINING TO LATE DISCLOSED DOCUMENTS
FROM DEFENDANT DISTRICT OF COLUMBIA¹**

At 4:00 p.m. on Wednesday, July 22, 2009 – more than five years after discovery requests were issued, twenty months after general discovery closed in these cases² and less than a week before the Court’s hearing – the District of Columbia hand-delivered to counsel for the

¹ See also, Motion for Sanctions in *Chang* (Dkt. No. 418) and Motion for Sanctions and Related Relief in *Barham* (Dkt. No. 439), filed January 16 and 17, 2009, respectively.

² The general cut-off for discovery was November 16, 2007. Following this date, the parties still had a limited amount of remaining discovery to complete, due to late productions, scheduling conflicts, and necessary follow-up to discovery that occurred right before the initial deadline. Some of this discovery occurred between November 16, 2007 and January 30, 2008, when a stay was entered in the case. Once the stay was lifted on January 7, 2009, this limited remaining discovery resumed and was completed on March 16, 2009.

parties an envelope containing a cover letter,³ a CD containing 1,350 pages of documents and a DVD which included the footage from at least four video recordings of the events leading up to and during the arrests on September 27, 2002. There was no advance notice that more documents had been found, were being processed or would be forthcoming.

According to the District, these documents have been in the possession of counsel all these years but “appear to have been misplaced as the document storage area for these cases has been repeatedly relocated” for the past five and a half years. *See* Exhibit 1.

There is no indication in the cover letter that any of these materials were previously produced by the District.

Although counsel for the Plaintiffs have not been able to review, much less understand, all of these materials, the cursory examination of the material shows that the evidence was not only relevant and responsive to Plaintiffs’ discovery requests made more than five years ago but should have been easily identifiable as such.⁴ It is obvious that this material, including videotapes of the actual arrests, were responsive to document requests, discovery motions and orders that stretch back almost five years in these cases.

For example, some of the documents seem to disclose the location during the arrests and the role of various individual defendants, a hotly contested issue in these cases. A document

³ *See* Production Letter from District, attached hereto as Exhibit 1.

⁴ For example, three of the videotapes were labeled (1) “IMF/WTO 9/27/02 ESU K. BOONE; (2) WTO/EMF 9/27/02, and (3) “LMF Protest 9/27/02.”

Bates labeled “Prosec 00055,”⁵ attached as Exhibit 2, contains unidentified handwriting which apparently states:⁶

Chief Jordan – Move out of street
Might have been people on street
Manner of Dress – No suits + ties –
Did not hear order –
Arrested after Chief decided to make arrests –

These notations are significant and directly relevant to the allegations underling the unlawful arrests. Another document, dated November 12, 2002, from Stacy L. Anderson, lists the names of three former or current *Chang* Plaintiffs, and requests that “officers with personal knowledge of the individuals and their offenses need to come to the Office of the Corporation Counsel and paper the cases below.” (See Prosec 00009, attached as Exhibit 3.) Although specifically referring to named Plaintiffs, this document was not produced previously and *Chang* Plaintiffs were unaware – and obviously could not conduct discovery regarding – of such a request by the Office of the Corporation Counsel.

The new material also includes communications between witnesses and Defendants in this litigation. For example, Plaintiffs’ discovery requests sought all communications and emails involving Defendant Peter Newsham that were related to the mass arrest in Pershing Park. He also was asked about communications with other parties and witnesses.

Yet, the new production includes previously unproduced email communications from Newsham to other witnesses specifically in preparation for court proceedings at which police witnesses were expected to give testimony to support prosecutions, providing them with his

⁵ The documents bearing a Bates stamp prefix of “Prosec” are “materials relating to prosecutorial efforts measures prepared for and undertaken relating to the September 27, 2002 mass arrests.” See Exhibit 1.

⁶ *Chang* Plaintiffs sent an email to District counsel, requesting the identity of the author of the handwriting on this and other pages. The District has not yet been able to identify the author of the handwriting.

narrative of events in writing. This narrative was also provided to witnesses testifying under oath in the two above captioned cases. Since Newsham was already aware of the investigations into the unlawful arrests, such communications with other actual and potential witnesses, such as Asst. Chief Broadbent, are problematic, particularly when it involves a narrative that contradicts later discovery about the unlawful arrests. Among other things, it raises questions about the independence of witnesses' testimony regarding the events that were discussed with other witnesses.

In one email on October 2, 2002, Newsham sends "a document articulating the facts and circumstances surrounding the arrests" on September 27, 2002, to a list of witnesses in both these cases, including but not limited to Chief Ramsey, A/C Fitzgerald, A/C Jordan, Capt. Ralph McLean, and Capt. Andrew Solberg. *See* 7.2009 00039, attached as Exhibit 4. Other emails disclose communications with Michael Bromwich, the "Independent Monitor for Metropolitan District of Columbia Police Department Issues" communicating about the facts of the case. *See* Exhibit 5. This is the first time, Bromwich's involvement has been disclosed; he has not been deposed and his obviously relevant evidence was never made available during discovery.

In yet another set of emails, officials refer to directions by Defendant Ramsey and others for officers to "do whatever we can do [sic] emphasize the positive aspects of MPD operations." *See* Exhibit 5. Not only did the District's failure to disclose this material violate this Court's repeated orders but it denied to the Plaintiffs evidence that could have been addressed in depositions with relevant parties, including Ramsey and Newsham.

Documents included in this production reveal that Craig Broyles, an MPD intelligence division agent, was engaged in conducting intelligence gathering on those preparing for and engaging in political protests on September 27, 2002. Plaintiffs would have sought to depose him regarding his knowledge and recollection sooner in time than seven years after the events.

Multiple other officials and individuals are either identified themselves for the first time, or the significance of their involvement in the activities is now only being made known.

However, even this incredibly late production might not be the end of it. Some of the documents appear to be incomplete, containing only the first page of what appear to be multi-paged documents.

Many of the documents contain unexplained redactions. No privilege log was provided. Moreover, even this late production contains gaps in the Bates labeling, which might indicate that even more documents remain to be produced.⁷

The disclosure of this new evidence, virtually on the eve before the sanctions hearing, is both telling and troubling. Shortly before the Court is to consider the destruction of key evidence and the failure to produce other evidence before the end of discovery, the District reveals an entire cache of undisclosed material. It is further evidence of not just dilatory practice by the District but an open contempt for this Court, the parties in this case, and the Rules of Civil Procedure. Clearly, had these materials been produced on a timely basis, Plaintiffs' discovery efforts would have been substantially augmented and this material would have been the subject of focused depositional questioning of key parties.

It is unclear when the District became aware of this undisclosed material. However, the disclosure shortly before the sanctions hearing leaves the parties and the Court at an obvious

⁷ In fact, the *Chang* Plaintiffs are still attempting to resolve a number of issues regarding previous productions. Pursuant to the Court's order regarding the *Chang* Plaintiffs' Motion to Compel, the District produced documents to the *Chang* Plaintiffs on June 2, 2009. (See Dkt. Nos. 434 and 465.) On June 19, 2009, the *Chang* Plaintiffs sent a letter requesting clarification on a number of issues that were raised in the production. The District partially responded in a series of emails dated June 19, 2009, June 22, 2009, June 25, 2009, and July 6, 2009, and then in a letter dated July 22, 2009, but not delivered until July 27, 2009. Even in light of these responses from the District, a number of issues still remain outstanding in regards to this production, including the identification of handwriting, the identity of the author of certain documents, and the clarification of which video cameras were utilized by the District on September 27, 2009.

disadvantage. The Plaintiffs have repeatedly objected to endless appeals and motions to delay these proceedings.

The latest violations should warrant further sanctions, but they should not delay the resolution of the long-standing violations alleged in the pending papers. The Court has before it extensively briefed Motions for Sanctions resulting from the District's numerous, repeated, and blatant discovery failures including massive document and evidence destruction. This most recent production underlines the fact that the sanctions previously sought by the Plaintiffs are, if anything, understated. While additional actions may be warranted to address the continued and outrageous violations by the District, and possibly other parties in this case, Plaintiffs respectfully urge the Court proceed to resolve the issues previously scheduled for this week without any further delay caused by the District's conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2009, I caused copies of the foregoing NOTICE BY PLAINTIFFS PERTAINING TO LATE DISCLOSED DOCUMENTS FROM DEFENDANT DISTRICT OF COLUMBIA to be served electronically upon the following:

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