



produced documents. . .”). However, Mr. Nickles never states under oath that he had no knowledge of the plaintiffs’ discovery concerns or filings on the subject. He does not explain why no investigation was initiated despite plaintiffs having raised these significant issues of document loss, destruction and withholding over and over again years ago, including to the attorney that he has now appointed to take charge of the case, Ellen Efos. As further discussed below, Ms. Efos has long been involved in this matter and directly apprised of the discovery abuses.

Mr. Nickles’ claim of surprise and/or lack of opportunity is neither credible nor viable at this late date. These have been prominent issues in a prominent case.

This Court observed at the July 29, 2009 sanctions hearing,

“All these discovery shortcomings have been appropriately documented in previously filed motions by Plaintiffs, so it comes as no surprise. None of this is any surprise to the City. . . . I want Mr. Nickles himself, under penalty of perjury, to address all of those shortcomings, the reasons for those shortcomings and his plan” for concluding discovery.

July 29, 2009 Transcript of Motion Hearing Before the Honorable Emmet G. Sullivan at 31.

Even counting from the filing of plaintiffs’ motion for sanctions, on January 16, 2009 (Doc. No. 439), Mr. Nickles has had over half a year in which to address the problems since that nearly encyclopedic compilation of evidence of discovery abuse, loss, and destruction was submitted.

Notwithstanding his claims of surprise and protestations of a lack of opportunity to educate himself and investigate the discovery violations, Peter J. Nickles has been personally involved in this litigation since his very first week in his official position as General Counsel to Mayor Fenty, way back in January, 2007.

On January 8, 2007, as one of his first acts as General Counsel in his first days in office, Mr. Nickles personally met with the first set of mediators in this case, George Cohen and

Richard Hotvedt under the auspices of the mediation office for the U.S. Court of Appeals for the District of Columbia. The mediation ended on January 9, 2007. The plaintiffs will not divulge any confidential mediation communications.

One would presume that in order to represent the District's (or the Mayor's) interest in settlement, Mr. Nickles became quite familiar with the case and the major issues that could impact its advance and defense and inform settlement posture.

Mr. Nickles also met with the appointed mediator in the second mediation process occurring in 2008, the Hon. Judge Richard Levie. It is a matter of record that at that time, discovery had closed, the destruction of the J.O.C.C. running resume had been established, missing periods of time of the recorded police channel communications had been established and acknowledged by the District in the deposition of Inspector James Crane, the materially inaccurate Declaration of Denise Alexander had been submitted to this Court, the former Director of the Office of Internal Affairs Stanley Wigenton had admitted in deposition that that Office has a practice and unwritten policy of not investigating allegations of police conduct if a victim filed a lawsuit (as conducting an Internal Affairs investigation "could jeopardize the course of the civil case"), the withholding by the OAG of the field arrest forms had been established, and the OAG certainly was aware of its belated production of nearly 3,000 documents on the last day of discovery and the next day after. The plaintiffs had advised the Court that a major motion for sanctions against the District was forthcoming, and a briefing schedule had been set and then suspended when the case was stayed for mediation. No doubt, Mr. Nickles informed himself of all relevant issues in order to properly represent the defendants' interests in settlement.

Even within Mr. Nickles' affidavit, it is clear that he has been personally involved in this litigation. He boasts that the January, 2008 admission by the District of liability for the common law false arrest claims was issued through his "personal authorization," Nickles Decl. at 14, ¶ 26 (Doc. No. 501-2), setting aside the fact that such belated concession was the consequence of years of intensive discovery and litigation by plaintiffs.

In his declaration, Mr. Nickles references his tenure as partner of the firm of Covington & Burling. He overlooks that he was the *pro bono* partner at Covington & Burling when that firm represented the five Abatte plaintiffs who unsuccessfully petitioned this Court to be class counsel in the Barham case. See Memorandum Opinion and Order, September 24, 2003 at 11 – 12 (Doc. No. 56) (observing that "the Abatte plaintiffs and their counsel remain unyielding in their approach," and that their "inflexibility" rendered impossible a consolidated action with both Abatte and Barham plaintiffs representing a class). It is fair to assume, from that high profile conflict between the competing plaintiff classes which was prominently reported in the media, as well as Mr. Nickles' role within Covington & Burling that he had at least some peripheral awareness of the litigation even before assuming official duties with the government. The Chang plaintiffs have sent correspondence to Mr. Nickles directly and specifically asking that he define the scope of his involvement, a reasonable request particularly given the exchange of confidential communications between the teams of plaintiffs' counsel, but Mr. Nickles has declined to respond to date. See Chang Plaintiffs' Response to Declarations Submitted by Attorney General Nickles and Others at 22, n.28 (Chang Doc. No. 495).<sup>1</sup>

---

<sup>1</sup> Barham plaintiffs' have sought not to burden this Court by reiterating the information presented to the Court by the Chang plaintiffs in response to the Nickles Declaration. Plaintiffs are aware that discovery is coordinated in these cases and the Court will be treating the Chang response along with the Barham response together. For purposes of the record, the Barham plaintiffs respectfully incorporate by reference the Chang plaintiffs' response to the Nickles Declaration.

Mr. Nickles tries to convey that the OAG's attorneys have not been able to dedicate ample resources to attend to this litigation and, consequently, the lack of high level attention and inability to focus resources on this class action has contributed to the inadvertent allowance of the discovery violations now before the Court.

That also is not true. The Office of the Attorney General (and its predecessor Office of the Corporation Counsel) has, in fact, dedicated substantial resources defending these cases and monitoring the conduct of these proceedings, just as one would expect for a constitutional rights class action of this size.

George Valentine, the OAG's Deputy of Civil Litigation, testified before the D.C. Council as to the substantial dedication of office resources, including much of his time personally, monitoring and defending in the Barham and related cases:

“[A]lthough I am head of the litigation division, I am not involved in detail in all of the [District's] litigation. This case, however, has taken up a lot of my time because obviously, with three class action lawsuits, it's something that we're focusing resources on.”

Ex. 1, Testimony of George Valentine at Committee Hearing on First Amendment Rights and police Standards Act of 2004 (October 7, 2004).

The discovery issues, as the Court observed, are not new.

They have been thoroughly addressed through the course of extended briefings, sufficiently so that the District – respectfully submitted over the names of Peter Nickles as Attorney General and George Valentine as Deputy Attorney General – has represented that “the District acknowledges its noncompliance with its discovery obligations and recognized the need for appropriate sanctions to be ordered for the protection of these plaintiffs and the integrity of the judicial process as well as to deter future repetitions. . .” Defendant District of Columbia's Amended Partial Opposition to Chang and Barham Plaintiffs' Motions for Sanctions at 42 (Doc. No. 452). With plaintiffs' consent, the District sought and received two enlargements of time to

“prepare a proper filing in response to the serious issues raised by plaintiffs’ filings.” (Doc. Nos. 451, 443). There has been ample review by the District’s OAG. Yet no action was taken, no investigation, no remediation.

At the July 29, 2009 sanctions hearing, the Court was unambiguous that the severity and prominence of these systematic violations and failures were of such moment that an agency of government outside of the OAG should have already intervened and investigated.

The other question I want to raise now is why there haven’t been any investigations by the city government into any of this. Why hasn’t the City council looked into any of these very serious problems that have been raised, appropriately so, time and time and time again by the Plaintiffs? There has been no oversight by anyone.

The Attorney General’s Office is in charge of this. No one has sought to intervene, to investigate, to ask questions why these discovery problems have existed for so long. I submit the city council has an obligation, the mayor’s office has an obligation to the citizens of the District of Columbia, if no one else, to ensure that its Office of Attorney General is functioning at the level of professionalism that the citizens of D.C. are entitled to.

And it’s shocking that no one has attempted exercise any oversight responsibility into the many serious shortcomings of the Office of the Attorney General of the District of Columbia. And quite frankly, I’m not going to tolerate it.

Now, if I have to get involved and appoint someone to start investigating, I’ll do it. I would prefer not to. I will leave it up to the City to exercise appropriate oversight responsibility, but this nonsense is going to stop and its going to stop soon.

July 29, 2009 Transcript at 32:12 – 33:10.

Given the prominence and persistence of these issues, the focus of resources and the personal involvement of the highest ranking attorneys directly serving the Attorney General, if that Attorney General did not know of the discovery issues in this case enough to have reviewed them, that would be a shocking case of official negligence.

As above, Attorney General Nickles did know or should have known about the discovery issues and violations in this case with sufficient notice and clarity to have caused him to satisfy himself that the conduct of the case was with his approval.

Mr. Nickles has been a controversial figure in his official duties. There has been great media focus on his work, both favorable from some and critical from others. No one, however, has ever suggested a lack of legal competence or qualifications. No one has ever suggested that the Office of the Attorney General, under his direction, has been an office out of control, an office lacking his supervision, or an office he has neglected.

Indeed, even when Mr. Nickles was not Attorney General but was General Counsel to Mayor Fenty, Mr. Nickles undertook the role of oversight over the OAG, took authority over certain matters that the AG would have handled, and even went so far as to argue cases before this Court on behalf of the District of Columbia OAG. See, Ex. 2, David Nakamura and Carol D. Leonnig, "Attorney General Quits; Clash With Fenty Aide Cited: Top Lawyer Felt Sidelined," *The Washington Post*, December 18, 2007, B01.

While some have taken issue with the manner of his control and conduct of that office, it is widely agreed and undisputed that the Office of the Attorney General under Peter Nickles is operated, supervised and directed by his firm hand and consistent with his intentions.

In response to plaintiffs' January, 2009 motion for sanctions, the District of Columbia took two enlargements of time in order to study and review the issues and determine a response, which the District did.

In response to the mountain of undisputable evidence thoroughly documented and presented by plaintiffs, the District of Columbia formally admitted that sanctions should issue against it for its own discovery violations (although that admission was accompanied by

argument that any sanction should be minimized). That admission could not occur without Mr. Nickles' knowledge or without notice to him of the substance of the allegations and the severity of the sanctions demanded. Mr. Nickles' name is on that brief. With that information, in his evaluation, implicitly or explicitly, he chose to not initiate a disciplinary investigation.

To imply that he has not had opportunity to investigate, because he has only been given two weeks to respond to the Court's order, is simply not true.

**Mr. Nickles' Response to the OAG Secretion of Evidence is Inadequate**

It is admitted by the District of Columbia that large numbers of discoverable materials were never produced to plaintiffs in discovery, even though those documents had been identified and collected from throughout the MPD, were in the possession of OAG counsel for the purpose of this and other litigation, had been in the possession of the OAG since "2003 or at the latest 2004," and had been maintained in the OAG's file rooms or "war rooms" and "within the premises of the Civil Litigation Division" and in particular on the 6th Floor of the Civil Litigation Division. July 29, 2009 Transcript at 5 – 6, 12; Koger Decl., 8/12/09 at 9 ¶ 19 (Doc. No. 501-3); Nickles Decl. at 5, ¶ 9 (Doc. No. 501-2).

Presented with just a few pages from the sets of late produced materials delivered on July 22, 2009 and July 28, 2009, the Court observed they reflected "startling revelations that go to the heart of some of Plaintiffs' theories." To this observation Mr. Koger simply responded, "Your Honor, I would not debate the pertinence or relevance of this." July 29, 2009 Transcript at 11:8 – 12.

The District represents that even more documents will be forthcoming, now almost seven years after the events and well after the close of litigation and completion of scores of depositions.

Mr. Nickles concedes as he must that it is “inexcusable” for government counsel to have collected such material as relevant to this litigation, have placed such materials within file rooms and areas for this case, have possessed such materials for a period of no less than five years in counsels’ file areas, and to never have acknowledged their existence or produced them until days before the sanctions hearing.<sup>2</sup>

Mr. Nickles nevertheless claims inadvertence. He characterizes these to be “errors,” the result of poor document management and a lack of organization as a consequence of which Mr. Koger and his supervisor Ellen Efros “lost track of” all that material that was within the file areas for this case.

The claim of inadvertence, and the claim that Ms. Efros and Mr. Koger were unaware or had no reason to believe that the District of Columbia’s attorneys (or they, themselves) were in possession of undisclosed discoverable material, is inconsistent with the fact that plaintiffs have brought this major issue to their attention time and again and, as discussed further below, is inconsistent with the sworn statements of OAG counsel.

Ms. Efros and Mr. Koger knew that D.C. attorneys were in possession of undisclosed materials. Plaintiffs placed them each on notice as to this.

By letter dated September 12, 2007, transmitted to both Ms. Efros and Mr. Koger, undersigned counsel wrote and advised:

---

<sup>2</sup> Counsel for Charles Ramsey in his individual capacity have argued to the Court that former Chief Ramsey should not be subject to additional depositions as a consequence of these discovery violations. It bears mention that Mr. Ramsey, as former Chief of Police, is equally culpable as an individual. As noted above, and in plaintiffs’ response to Kathy Patterson’s submission, former Chief Ramsey identified the vanished running resume in his sworn presentation to the D.C. Council, yet did not produce it to plaintiffs. Former Chief Ramsey did not produce or cause to be produced the video of his September 27, 2002 press conference about the arrests, which was recently disclosed after further persistent efforts by plaintiffs, years after it was requested and after the close of discovery. Former Chief Ramsey did not produce or cause to be disclosed any of his statements and admissions made on WTOP radio, which were also recently produced after persistent efforts by plaintiffs. The District and former Chief Ramsey had heretofore asserted such materials not to exist. Former Chief Ramsey did not produce his e-mails, some number of which were just disclosed in the days before the recent hearing on sanctions.

Former Chief Ramsey is properly subject to additional deposition, and it is his fault and failure that causes such need.

It also appears that the Office of the General Counsel may be in possession of undisclosed discoverable materials, including at least on CJIS list identified by you just before the adjournment of the deposition. **We are requesting that, without delay, the Office of the General Counsel review its records to ensure that all materials responsive to discovery requests have been produced** or identified on a privilege log. This includes, without limitation, CJIS data and Form 759s (field arrest forms) and any other arrest records for Pershing Park arrests.

See Ex. 3b, Letter dated September 12, 2007 from Carl Messineo to Leah Taylor (emphasis added); Ex. 3a, transmittal e-mail sending September 12, 2007 letter to Ms. Efros and Mr. Koger, among others.

The OAG, in response, expressed its outrage that plaintiffs' counsel make such inaccurate and "accusatory letters of non-compliance with discovery obligations." See Ex. 4b, Letter dated September 18, 2007 from Ms. Taylor to Mr. Messineo; Ex. 4a, transmittal e-mail sending September 18, 2007 letter to Ms. Efros and Mr. Koger, among others.

Mr. Messineo responded, again transmitting his response to both Mr. Koger and his then-supervising attorney Ellen Efros. Mr. Messineo, with boldface emphasis in the original, drew the OAG attorneys' attention to the following:

While you claim that the District has provided to us all of the field arrest forms for the Pershing Park mass arrest, your representation would be considerably more persuasive were you to identify the bates numbers that you claim to represent that production. **The District, while claiming to have produced all field arrest forms for the nearly 400 arrests at Pershing Park, refuses to identify by bates stamp number where those documents are. We can't find them and do not believe they were produced. Just tell us the numbers, please.**

...

Last week you delivered to us a new CJIS arrest printout that had been withheld by the MPD Office of General Counsel. Truly remarkable, if not sanctionable, for the District to have not previously produced a full listing of names and other identifying data for the arrestees.

The depositions of this past week establish that there has not only been the withholding of documents, but also the willful destruction of the running resumes. Unless, of course, you "discover" that the running resume was in the Office of the General Counsel also (which is exactly what happened in the case of Bolger v. District of Columbia, in which Ron Harris of the Office of General Counsel

possessed the running resume yet continued to endorse representations to the Court that it not only did not exist, but had never been created!). Ex. 5b, letter dated September 20, 2007 from Mr. Messineo (emphasis in original); Ex. 5a, transmittal e-mail sending September 20, 2007 letter to Ms. Efros and Mr. Koger, among others.

Ms. Efros and Mr. Koger continued to be non-responsive to these specific demands.

Then, on October 2, 2007, arresting Officer John Hansohn testified that he had personally seen the field arrest forms *in the possession of the OAG*, and that two OAG attorneys (matching the characteristics of attorneys Thomas Koger and Lori Paris) had shown the field arrest forms to him in preparation for an earlier anticipated deposition.

The next day, on October 3, 2007, Mr. Koger “found” thousands of pages of previously unproduced arrest records and delivered them unceremoniously to plaintiffs’ counsel, intentionally obfuscating the production by refusing requests to bates stamp those materials. (Mr. Koger swears in his declarations that his refusal to bates stamp the records was for the purported benefit of plaintiffs, to avoid further delay. That, however doubtful on its face, does not explain why he has never, to date, produced a bates stamped set of these materials.).

In response to these circumstances, undersigned counsel sent correspondence to Ms. Efros and Mr. Koger demanding they provide an accounting of physically where these documents had been maintained, and which attorneys knew of the existence of these documents or possessed the documents. As reflected in plaintiffs’ demands, it was clear that it was *counsel* for the District that had possessed, failed to produce and apparently secreted these discoverable materials.

I am writing to request and insist that the District of Columbia answer by Monday, October 8, 2007, the following inquiries:

1. Where physically have the Pershing Park field arrest forms delivered to us today been physically located since the date of our First Set of Requests for Production to the District of Columbia in February, 2004?

2. In whose possession, custody and control have these documents been during that period of time? **The request is intended to encompass counsel for the District**, or the MPD, or anyone acting under the authority or direction of any such counsel.

3. **Who within the District of Columbia government, including counsel, has known of the existence of these documents** and when did each such person come into such knowledge? To what extent did each such person know of the existence of plaintiffs' demand for such documents, or know that the documents were reasonably related to litigation against the District?

If we do not receive from the District full and complete responses to each and every one of these inquiries by 6 PM on Monday, October 8, 2007, we will conclude that the District does not intend to respond to these inquiries voluntarily and that the plaintiffs will be justified in seeking such relief as is required.

Ex. 6, e-mail dated October 3, 2007 from Mr. Messineo, including to Ms. Efros and Mr. Koger (emphasis added).

Plaintiffs persisted, repeatedly sending correspondence to Ms. Efros and Mr. Koger demanding that the attorneys for the District of Columbia disgorge themselves of the discoverable materials in their possession. See, e.g., Ex. 7, E-mail dated October 17, 2007 from Mr. Messineo to Ms. Efros and Mr. Koger ("You recently provided us with a box of documents consisting of Pershing Park field arrest forms which had not been produced previously. The District also refused to bates stamp those documents, even upon request, and so I am unable to refer to any individual pages with specificity. . . We are also requesting that all additional field arrest forms in the possession of the District of Columbia, **including the MPD Office of General Counsel**, be produced.) (emphasis added).

It cannot be denied that Mr. Koger and Ms. Efros have long known of plaintiffs' allegations of secretion.

Even the sworn affidavits submitted by Mr. Nickles are contradictory and unreliable.<sup>3</sup> Given counsel's prior sworn representations, submitted under penalty of perjury, to this Court in this case, Mr. Nickles' claim of inadvertence and lack of bad faith on the part of the OAG is a foreclosed possibility.

Mr. Nickles now submits his own statement, and sworn statements from counsel including Mr. Koger and Mr. Harris, in support of his claim that now, and in response to this Court's July 29, 2009 hearing, the OAG has conducted "a sweep of all locations on the 6th floor of the Civil Litigation Division where documents relevant to these cases could have been stored for the past several years. . ." Nickles Decl. at 5, ¶ 9 (Doc. No. 501-2). This unprecedented sweep, which Mr. Nickles suggests shows the due diligence of the OAG, has revealed the existence of even more unproduced documents in the OAG's possession. Id.

This current claim is completely inconsistent with the sworn attestations of Mr. Koger, submitted when the OAG was trying to persuade this Court just how exhaustive were search efforts throughout the premises of the 6th Floor of the Civil Litigation Division looking for the J.O.C.C. running resume.

Thomas Koger represented in his sworn statement dated November 16, 2007 that in efforts to locate a hard copy of the September, 2002 J.O.C.C. running resume "I have repeatedly searched the files relating to the several mass demonstration cases on which I am lead counsel for a JOCC Running Resume, without success. These materials are located in Room 6S114, my office (Room 6S011), and in a work area directly adjacent to my office, Room 6S011, on the

---

<sup>3</sup> Mr. Nickles submits the August 12, 2009 sworn declaration of attorney Thomas Koger, which incorporates by reference Mr. Koger's previously submitted declaration pertaining to discovery. Decl. of Koger, 8/12/2009 at 3, ¶ 5 (Doc. No. 501-3) (incorporating by reference Mr. Koger's November 16, 2007 declaration and exhibits, located at Doc. No. 373-2).

Mr. Nickles also submits the August 12, 2009 sworn declaration of attorney Ronald Harris, which incorporates by reference Mr. Harris' previously submitted declaration pertaining to discovery. Decl. of Harris, 8/12/2009 at 4, ¶ 7 (Doc. No. 501-4) (incorporating by reference Mr. Harris' November 16, 2007 declaration, located at Doc. No. 373-2).

Sixth Floor of 441 Fourth Street, NW, in OAG.” Declaration of Thomas L. Koger Pursuant to Order Dated October 30, 2007 at 26, ¶76 (Doc. No. 373-2).

Which of Thomas Koger’s declarations should the Court believe? Mr. Nickles has submitted both Mr. Koger’s August 12, 2009 declaration and Mr. Koger’s November 16, 2007 declaration, incorporated by reference, in an apparent approval of the substance of both.

If one accepts as accurate Mr. Koger’s sworn statement from 2007 that he “repeatedly” conducted physical searches of the premises of the 6th Floor of the Civil Litigation Division, then certainly he knew at that time there were other undisclosed documents that he and the OAG possessed. The failure to produce constitutes, therefore, secretion and not inadvertence.

Mr. Koger’s 2007 sworn statement regarding exhaustive physical search efforts did not stand alone.

Attorney Ronald Harris also swore under oath, separately and independently, that “On November 8 through November 14, 2007, I again searched the documents that were produced in response the Committee’s subpoenas, OGC’s file room, and the files of the other mass demonstration cases and did not locate the resume for September 2002.” Decl. of Ronald B. Harris, 11/16/2007, at 5 ¶ 12 (Doc. No. 373-2, p.33).

If the Court accepts as true the November 2007 sworn declarations of Messrs. Harris and Koger, that leaves little room for the possibility of the truthfulness of the current sworn declarations to the effect that they had inadvertently failed over the course of seven years of discovery-intensive litigation to take a thorough look at the documents that had been identified, returned to counsel as relevant and stored in the OAG file areas for this case.

If the Court accepts as true the current sworn declarations of Peter J. Nickles and Thomas Koger, then the earlier sworn statements from Mr. Koger and Mr. Harris are each false.

What is actually consistent across all of these sworn statements from counsel, as officers of this Court, and as witnesses subject to the penalties of perjury, is that they are unreliable at best and untruthful at worst.

However the Court deems to treat these incompatible sworn statements from top D.C. attorneys in the OAG, what remains clear is that the OAG is incapable of policing or investigating itself or properly serving the public interest on behalf of the residents and citizens of the District of Columbia in accordance with the rules of this Court and of the law.

It is also clear that, should the OAG submit additional affidavits in advance of the September 29, 2009 status hearing, or subsequent thereto, that those affidavits should not be accepted with the presumption of credibility that might ordinarily attach to submissions of government counsel.

To say that Mr. Nickles’ treatment of the issues of secretion is “inadequate” is an understatement. The submissions from Mr. Nickles actually evidence secretion, a fact which is not addressed at all by the Attorney General.

**Mr. Nickles’ Attempts to Shift Responsibility for OAG Discovery Abuse and Failure on the D.C. Council are Misplaced**

**(CB0)**

---

# Office of the Attorney General for the District of Columbia

**www.oag.dc.gov**  
**Telephone: 202-727-3400**

---

<b>Description</b>	<b>FY 2008 Actual</b>	<b>FY 2009 Approved</b>	<b>FY 2010 Proposed</b>	<b>% Change from FY 2009</b>
Operating Budget	\$94,270,460	\$99,492,843	\$102,828,506	3.4
FTEs	702.3	730.7	769.7	5.3

Mr. Nickles attests “that for Fiscal Year 2009 the Council reduced the OAG budget by over two million dollars, and for fiscal year 2010, the Council reduced the OAG budget further by almost three million dollars, which certainly will result in a reduction in force of present staff.” Nickles Decl. at 8-9, ¶ 17 (Doc. No. 501-2). Consequently, Mr. Nickles urges the Court to not anticipate improvements in resources to prevent recurrence of the discovery violations identified in this case. Id. The shocking discovery abuses in this case are not the result of resource problems, however Mr. Nickles’ inaccurate assertions regarding the OAG’s budget and available resources compel plaintiffs to respond. This is one more area in which the OAG seeks to obfuscate reality in order to deflect responsibility for its conduct in this litigation.

On July 17, 2009, Mayor Adrian Fenty transmitted to the Council his Fiscal Year 2010 Budget and Financial Plan, which is publicly available on the web site of the Office of the Chief Financial Officer for the District of Columbia. Plaintiffs excerpt above, the summary section pertaining to the OAG from the Mayor’s July, 2009 submission. Ex. 8, FY2010 Proposed Budget and Financial Plan at A-177 – A-195, Chapter on Office of the Attorney General for the District of Columbia. It reports an increase in funding from FY 2008 (actual) to FY 2009 (approved). It proposes an additional increase for FY 2010.

In response to the Attorney General’s sworn affidavit in this case, the Chair of the Council’s Committee on Public Safety and the Judiciary (formerly the Committee on the Judiciary), Phil Mendelson has written to Mr. Nickles and requested that he retract inaccurate statements made therein. See Ex. 9a, August 21, 2009 Letter from Phil Mendelson to Peter J. Nickles. Councilmember Mendelson, whose committee has oversight over the OAG and its budget, represents that the Mayor’s FY 2009 budget proposals to the Council for the OAG were each adopted “without reducing it one cent.” Mendelson confirms that regarding the FY 2010

budget, it will increase approximately 3.5% above the FY 2009 level and observes that the Council allotted an additional \$315,000 *above the Mayor's request* to fund litigation support. Id. at 2.

On April 4, 2008, Mr. Nickles personally testified at the Fiscal Year 2009 Proposed Budget Hearing before the Committee on the Public Safety and the Judiciary. Mr. Nickles did not plead with the Council for a new document management system. He did not assert that the OAG was failing to perform competently and had lost or was losing discoverable materials for want of a needed software system. On the contrary, he testified that “Now fully staffed, OAG will continue to provide timely, top-notch legal services and looks to extend this capacity into FY 2009.” Ex. 9b, Statement of Peter Nickles at Fiscal Year 2009 Proposed Budget Hearing at 3 (attached as exhibit to August 21, 2009 Letter from Phil Mendelson to Peter Nickles). In fact, his request for one-time funding of \$400,000 for an integrated electronic document system was approved. Id. at 5; Ex. 9a, August 21, 2009 Letter from Phil Mendelson to Peter J. Nickles.

On March 26, 2009, Mr. Nickles personally testified at the Fiscal Year 2010 Budget Oversight Hearing and, again, expressed that “[w]e are grateful that the Mayor, the Committee, and the Council support our important work and that this budget allows us to continue our operations.” Ex. 9c, Statement of Peter Nickles at Fiscal Year 2010 Budget Oversight Hearing at 7 (attached as exhibit to August 21, 2009 Letter from Phil Mendelson to Peter Nickles). For the above-referenced reasons, plaintiffs respectfully dispute the accuracy of the new claim by the Attorney General that the OAG budget was slashed by the Council of the District of Columbia and is the cause of the discovery violations in this case.

Mr. Nickles attests that the Council has rejected his Office's request for additional resources for document management technology. Nickles Decl. at 8, ¶ 16 (Doc. No. 501-2). Mr.

Nickles attributes the discovery violations in this case, in part, to critical resource limitations pertaining to document management technology. Id.

Specifically, Mr. Nickles identified the inability of the OAG to afford the document management software package called “Concordance.” Id. at 13, ¶ 25b.

Plaintiffs submit that, to the extent that Mr. Nickles is representing that the OAG lacks resources within the Office’s budget or even within the financial resources available for this case to purchase Concordance software for this case, such a representation is not accurate.

Plaintiffs contacted Lexis-Nexis, the publisher of the Concordance software system, and secured a pricing quote for the licensing of Concordance for five users. Plaintiffs did not seek any discounts in the quote, including government discount pricing.

A three year subscription to Concordance, with the optional and additional “Image Viewer” software package, for five users would cost a total of \$10,840, paid over the course of three years. The average monthly cost for this would, therefore, be \$301.11. Even multiplied for more users, the cost would be easily managed by the OAG.

To place this monthly cost in the perspective of overall OAG expenditures for this litigation alone, consider that to date the OAG has consented to payment of over \$1.2 million in tax-payer funds simply in litigation costs and fees to the attorneys representing former Chief Charles H. Ramsey and Assistant Chief Peter J. Newman for their personal defenses. See, e.g., Ex. 10, March 30, 2007 Invoice from Vinson and Elkins (also billing by the quarter of an hour rather than the tenth of an hour otherwise required by the District when plaintiffs’ counsel are awarded fees).

The relative monthly cost of Concordance, no more than \$301.11 for five users, has not been a bar to its purchase and use by the District for this and other class action litigation.

Mr. Nickles also attests in his affidavit that, in the course of his tenure as Attorney General, he has not even established “a uniform system for manually storing, tracking and copying documents.” Nickles Decl. at 13, ¶ 25c (Doc. No. 501-2). He blames this failure to do so, in part, for the discovery violations in this case. This is not oversight, if true, but an admission of complete negligence.

Even so, it is irrelevant. The discovery violations in this case did not come about because of poor document management.

No records tracking system would account for or have stopped the destruction of the J.O.C.C. running resume. That database *was* stored properly. It was in its standard locations. It was “easily” located by Sgt. Jones when called upon to do so. It was not lost.

No record tracking system would account for or have stopped the destruction of the master copies of the recorded radio channel communications. Those were stored and located in their standard location. The District did not issue a litigation hold for this case and allowed the master media to be destroyed in the ordinary course.

No record tracking system would account for missing or deleted data on the multiple different audio cassettes purporting to provide the unaltered radio communications, as claimed to have been copied from the system.

Even for those documents whose existence has now been acknowledged to have been in the OAG’s possession and file room all along, records tracking would not have aided there either. Those records were located. They were identified as relevant and discoverable. They were collected from their various locations throughout the MPD and centralized with counsel. They were just not produced in discovery.

**Mr. Nickles' Response Regarding the Destruction of the J.O.C.C. Running Resume is Inadequate**

Looking merely at circumstances pertaining solely to the J.O.C.C. running resume, there is evidence of obstruction of justice and the secretion and/or destruction of evidence that appears to involve the highest ranking attorneys now within the OAG and MPD, as well as a lack of candor.

The secretion and ultimate destruction of the running resume in this case deprives this Court, the jury, and the plaintiffs of the review of a most fundamental and comprehensive store of information. This massive destruction sweeps across the full scope of all issues and claims and permanently precludes the judicial function of the search for truth from being pursued with benefit of the material evidence.

This violation, the loss and/or destruction of the running resume, has been perpetrated not by one private litigant, but by the government itself.

If this can occur in this high-profile constitutional rights class action, where this Court is actively engaged in ensuring due process and fairness, where there is due diligence and persistence by plaintiffs over the course of many years, and where there has been the intensity of public focus that naturally arose in the course of the Council's oversight function and formal investigation of the MPD, one is forced to wonder: What is happening in the context of other litigation without these circumstances?

Mr. Nickles submits that the destruction of the S.O.C.C. / J.O.C.C. running resume was due, in part, to the failure of the OAG to properly issue a "litigation hold" letter directing its preservation and segregating key materials to avoid destruction in the ordinary course of operations. Nickles Decl. at 10, ¶ 19 (Doc. No. 501-2). It is true that the District plainly and blatantly allowed the destruction of documents and failed to issue a litigation hold letter. That,

however, cannot be attributed by Mr. Nickles to be a cause of the destruction of the running resume.

The running resume is required to be maintained, in the ordinary course of operations, for no less than three years. If one believes the current representations of OAG counsel, it was known in September, 2003 that the J.O.C.C. running resume had been destroyed and that no copies could be located, not on the multiple computer servers on which it was stored, not in the many offices to which it was distributed, and not in the Command Center itself where it was required to be maintained. The running resume was not destroyed in the ordinary course of document operations. Ordinary operations and policy required the preservation of the September, 2002 running resume until at least September, 2005.

Mr. Nickles, however, does not address the destruction of the S.O.C.C. / J.O.C.C. running resume which, in fact, occurred outside ordinary operations.

Mr. Nickles does not address the fact that OAG counsel now claim that they knew at the time of the July 2003 and/or September 2003 Council subpoenas that the running resume had gone missing (all copies), and yet did not advise the Council which would have triggered an independent search for and recovery of the running resume.

Mr. Nickles does not address the fact that General Counsel Terrence Ryan and Deputy General Counsel Ronald Harris and Chief of Police Charles Ramsey all misrepresented another document to be the S.O.C.C. / J.O.C.C. running resume to the Council, again having the effect of avoiding an independent search for and recovery of the running resume by the Council.<sup>4</sup>

---

<sup>4</sup> Plaintiffs respectfully direct the Court's attention to their submission of this same day, The Barham Class' Response to the Representations of Kathy Patterson as They Pertain to the Loss and Destruction of the J.O.C.C. Running Resume Database (Doc. No. 514), which is incorporated herein by reference. Plaintiffs have provided important detail therein in regard to the running resume and representations by the MPD and its attorneys to the Council, but are not reiterating that information here to avoid redundancy.

Mr. Nickles does, however, point to the D.C. Council as being responsible for denying the OAG access to the materials in its possession. Nickles Decl. at 10, ¶ 20 (Doc. No. 501-2) (“Unfortunately, OAG was denied access to these materials.”). This is false.

The law enforcement materials in the possession of the Council were from the MPD itself in the first place. How can the OGC/OAG, having first produced the materials to the Council then claim harm from being denied access (itself a false claim) to the materials which it had produced to the Council?

Mr. Nickles’ representation that the OAG counsel was denied access to the significant number of materials produced in response to the Council Judiciary Committee’s subpoenas is contradicted by the very declarations that are incorporated by reference in the materials that Mr. Nickles himself submits to the Court.

Attorney Ronald Harris attests as follows: “I gathered a significant number of documents in response to the Committee subpoenas and **made the documents available to OAG counsel for use during the discovery phase of this instant litigation.**” Harris Decl., 11/16/2007 at 2, ¶ 6 (Doc. No. 373-2, p.30) (emphasis added) (incorporated by reference in the materials submitted by Mr. Nickles).

As reflected in the correspondence from former Committee Chair Kathy Patterson and in the communication from current Committee Chair Phil Mendelson, the Council publicly released its underlying investigatory materials with the exception of a couple of items that MPD demanded be kept out of the public record. August 20, 2009 Letter from Kathy Patterson to Hon. Emmet G. Sullivan (Doc. No. 513); Ex. 9a, August 21, 2009 Letter from Phil Mendelson to Peter J. Nickles. According to Committee Chair Mendelson, Attorney Tom Koger requested and was

provided access to the Council materials. Koger sent staff over to review boxes of the materials. Ex. 9a, August 21, 2009 Letter from Phil Mendelson to Peter J. Nickles at 2.

While Mr. Koger now claims that he and the OAG were denied access to the materials transmitted to the Council by the MPD, he attested to something rather different back in 2007 when he was trying to demonstrate to the Court his diligence in reviewing those very same records. He then attested to this Court:

At that time, MPD was in process of providing thousands of pages of documents to the Council in response to subpoenas issued by then-Council member Kathy Patterson, Chair of the Council Committee on the Judiciary, which was conducting an investigation of MPD's policies and practices relating to handling mass demonstrations. In reviewing copies of those materials to respond to a request for the production of documents in *Abbatte v. Ramsey*, 03cv00767 (EGS), in or about February 2004, I was unable to locate a JOCC Running Resume. **I reviewed those materials in Room 6N81, on the Sixth Floor of 441 Fourth Street, N.W., in OCC.** [citation omitted].

Koger Decl., 11/16/2007 at 4, ¶ 10 (docket entry 373-2) (emphasis added) (incorporated by reference into the declarations submitted by Peter J. Nickles).

It is an exercise in smoke and mirrors, and in misdirection, for Attorney General Nickles at this advanced stage in the sanctions proceedings to come before this Court and attest that the OAG has been denied access to, and opportunity to review, the law enforcement materials that the MPD, though counsel, initially provided to the Council.

Another exercise in misleading direction is the reference in the declarations submitted by Mr. Nickles representing that no one other than Douglas Jones claims to have ever seen the running resume. See, e.g., Harris Decl., 8/12/09 at 4, ¶ 8 (Doc. No. 501-4). The running resume was displayed on every single workstation in the Command Center in September, 2002. It was displayed on one or two of the 50- inch screens at the front of the Command Center. If no one has ever seen the running resume, this would beg the question: What were the scores of officers and officials within the Command Center viewing, and entering data into? When they were all

looking at their computer screens, at what appeared to be the running resume, and keying information into what they believed to be the running resume, how could they all fail to observe that the running resume system was not there, literally at their fingertips?

The Office of Corporation Counsel, now the OAG, had attorneys who staffed the Command Center. If the running resume system was unexpectedly unavailable, there would have been a catastrophic breakdown in command and communication. There is no evidence of that. At best, when the OAG submits affidavits attesting that counsel knows of no person who has seen “a copy of the running resume” those claims need to be understood to be references to the dozen-plus hard copy print-outs of the running resume.

Yet, even here this sworn representation by Mr. Harris that he has never seen the running resume “[n]or do I know anyone who has claimed to see this document,” lacks any credibility Harris Decl, 8/12/2009 at 4, ¶ 8 (Doc. No. 501-4). He himself once claimed to have produced the September 2002 S.O.C.C. / J.O.C.C. running resume, in transmittal correspondence to Kathy Patterson signed by Mr. Harris. This representation was made also over the name of Terrence Ryan as General Counsel. Having once “claimed” to possess and be producing the S.O.C.C. / J.O.C.C. running resume for September 2002, he now represents that neither he nor anyone has ever “claimed” to have seen the running resume. The details of Mr. Harris’ misleading representations are set forth in greater detail in The Barham Class’ Response to the Representations of Kathy Patterson as They Pertain to the Loss and Destruction of the J.O.C.C. Running Resume Database (Doc. No. 514), filed today.

Mr. Nickles does not answer, as directed by the Court, whether there has been an investigation to date into the disappearance of the computer database and hard copies of the running resume and, if not, why not. There appears to not have been disciplinary investigation to

date by the OAG. This, standing alone, in the face of the record to date, is a demonstration of a substantial abrogation of responsibility by the Attorney General.

Again, plaintiffs' counsel repeatedly sent correspondence to the OAG, including to Ms. Efros in 2007, requesting the running resume, advising that it had not been produced, and further advising that the assertion that the running resume had never been created during the events of September 27, 2002 was not true.

The absence of a disciplinary investigation to date shows the absence of motivation on the part of the OAG to conduct a proper investigation. Claiming to start an investigation in response to the Court's July 29, 2009 sanctions hearing and order is insufficient. The OAG lacks the interest to prosecute these violations. The conflict of interest is apparent. The OAG is incapable of prosecuting or investigating itself and the General Counsel's Office of the MPD. Any purported investigation by the OAG of itself will be permanently tainted with this obvious conflict. This failure and inability of the OAG to investigate compels the appointment of a special investigator or prosecutor by this Court, the discovery required by plaintiffs necessary to determine the breadth of obstruction, and severe sanctions.

**Mr. Nickles' Response Regarding the Alteration of the Recorded Police Channel Communications and the Materially False Affidavit of Denise Alexander is Inadequate**

Mr. Nickles asserts "I take very seriously plaintiffs' assertions that this Office has attempted to persuade this Court with a perjured declaration from an MPD employee." Nickles Decl. at 11, ¶ 21 (Doc. No. 501-2). Mr. Nickles is referring to the Declaration of Denise Alexander, whose sworn statement was submitted by the OAG to this Court to support the OAG's false representation that there was nothing deficient with recordings that were admittedly missing long stretches of data at the time of the arrest and arrest decision.

This assertion fails to respond to the Court's directive for Mr. Nickles to disclose whether an investigation has been undertaken to date and, if not, why not. Plaintiffs have repeatedly put the OAG on notice as to the materially false nature of the submission of Ms. Alexander including in its submissions to the Court.

Mr. Nickles does not address even the obvious contradictions and failure of the Declaration of Ronald B. Harris on this same issue, which Mr. Nickles himself submits to the Court for its consideration and reliance.<sup>5</sup>

Mr. Nickles submits Mr. Harris' declaration in which Mr. Harris swears "**Following the deposition of now-Commander James Crane in December 2007**, OAG advised me that plaintiffs' counsel asserted that one or more of the communications tapes were defective in some respect. On or about January 10, 2008, I then provided OAG with another set of copies of the tapes." Harris Decl., 8/12/2009 at 4, ¶ 6 (Doc. No. 501-4) (emphasis added).

During his deposition, Commander Crane confirmed under questioning by plaintiffs that the tapes were indeed deficient notwithstanding the prior submission by the OAG of the *November 16, 2007 Declaration of Denise Alexander* submitted to the Court intended to end plaintiffs' inquiry into the altered tapes. Harris' affidavit suggests that this December deposition was the trigger for his knowledge of plaintiffs' assertions as to tape irregularities.

Yet, in the Declaration of Denise Alexander submitted by the OAG regarding her review of the deficient tapes, she attests that "[o]n November 15, 2007, **I was directed to review a number of audiotapes that were provided by Ronald Harris**, Deputy General Counsel of the MPD. . ." Ex. 11, Declaration of Denise Alexander at 1, ¶ 3 (emphasis added). She proceeds to

---

<sup>5</sup> Plaintiffs are aware that, while submitting the sworn statements of various attorneys (of disputed accuracy), the Attorney General also represents that he has not had the opportunity to review and corroborate the representations contained therein. This seems to be an attempt by the Attorney General to have it both ways, to have "benefit" of the sworn statements of disputed accuracy and to not accept responsibility for those statements which Mr. Nickles himself has submitted to the Court.

attest there to be “nothing unusual or deficient” about these tapes. *Id.* at 2, ¶ 5. Within the Declaration, *per se*, Ms. Alexander actually includes a copy of an e-mail correspondence between her and Mr. Harris dated November 16, 2007 regarding the tapes, which would suggest Mr. Harris was not only well aware of concerns about the missing minutes but involved in the formulation or at least the process of her false statement to the Court.

Mr. Nickles says he hasn’t had time to independently corroborate the attorneys’ sworn declarations that he submits. Yet, he tenders them to the Court and cites them in his declaration. This whole chain of circumstances reinforces the conclusion that plaintiffs have drawn throughout this filing: the sworn affidavits submitted by the OAG to this Court are not reliable.

Plaintiffs note, also, that Ms. Efos was sent pertinent e-communications about the defective and/or doctored tapes. Mr. Nickles fails to explain why Ms. Efos chose not to take any appropriate action in response to this issue, even though she was directly sent communications from plaintiffs detailing the tape deficiencies. Instead the OAG offered up the materially false affidavit of Denise Alexander.

**Mr. Nickles’ Unsolicited Representations Regarding Settlement Are Both Inappropriate and Inaccurate**

Mr. Nickles attests that “Offers have been made in these cases that equal and/or exceed . . . the Rule 68 offer accepted by the four non-class member *Barham* plaintiffs.” Nickles Decl. at 14, ¶ 27 (Doc. No. 501-2). This is not accurate.

Mr. Nickles thus represents that an offer to the arrestees in the class action at the same compensation level as accepted by the four non-class member Barham plaintiffs (who were not arrested in Pershing Park, but elsewhere on the same morning) would not only be reasonable, but has been made and rejected. Such has not occurred.

It is a matter of public record that undersigned counsel represented the four non-class member Barham plaintiffs and negotiated a settlement of those claims for equitable relief plus a monetary component of \$50,000 per arrestee plus reasonable attorneys fees and costs.

The total settlement value of such an offer, presented to approximately 400 arrestees, would be approximately \$20 million plus reasonable attorneys fees and costs. Contrary to Mr. Nickles' inference, no such offer, or anything approaching that offer, has been made to the class of arrestees. Plaintiffs have consistently been willing, and remain willing, to settle this case on terms that are fair and reasonable for the class as a whole and that will result in institutional changes ensuring that the misconduct evidenced in this case does not recur. The District is eager to make certain assertions to the Court and the media suggesting that the plaintiffs are a bar to reasonable settlement. This is not true. The Barham plaintiffs remain willing to waive confidentiality of the mediation sessions of 2006-7 and 2008 if the District will also agree to do so and allow positions taken to be made public, or allow the mediators, Messrs. Cohen and Hotvedt and Judge Levie, to provide summary or other information to the Court regarding those proceedings.

### **The Impact of Identifying Ellen Efros to be Lead Counsel**

Mr. Nickles represents that "As part of the effort to conclude discovery in these cases promptly and to assure the Court and the parties that all discoverable materials have or will be produced, I have asked one of the Assistant Deputies for the Civil Litigation Division, Ellen Efros, to assume the position of lead counsel in this matter." Nickles Decl. at 3, ¶ 6 (Doc. No. 501-2).

This announcement is troubling to plaintiffs as, far from representing a change in course, it evidences the recalcitrant nature of the District's response to this Court's Order.

Ms. Efros has been the direct supervisor above Mr. Koger since approximately December, 2006. She has also been personally involved in this case, including the mediations, and the discovery in this matter. As related herein, in the course of this matter she has been directly made aware by plaintiffs that discoverable materials remained in the possession of, and undisclosed by, the attorneys for the District of Columbia. She was repeatedly advised by plaintiffs that critical evidence was missing or altered including the running resume, the field arrest forms, and the police radio runs. With all that information she chose to take no action to remedy or investigate the matter. She appears as responsible as is Mr. Koger for the secretion, loss and destruction of evidence and the utter failure to bring the discovery abuses to a cessation even after plaintiffs specifically and repeatedly so demanded.

**Mr. Nickles' Response Lacks Seriousness of Purpose and Is Insufficient**

On one hand, Attorney General Nickles professes to not have had a chance to investigate the discovery violations. On the other hand, he has concluded that “the responsibility for the errors here falls on him [Thomas Koger].” Nickles Decl. at 7, ¶ 14 (Doc. No. 501-2). Mr. Nickles puts Mr. Koger forward, quite literally, as the fall guy.

Mr. Koger is responsible. However, responsibility is not limited to Mr. Koger.

This is a case where the evidence, even in the absence of an independent investigator or prosecutor, indicates that the District's top attorneys have engaged in and/or ratified the destruction and secretion of evidence and in apparent obstruction of justice.

Mr. Nickles starts out his declaration by saying that the discovery lapses are “inexcusable,” but then he proceeds to place his greatest emphasis and detail on presenting excuses for these violations. As above, his excuses are inaccurate and faulty.<sup>6</sup>

---

<sup>6</sup> It bears noting that Mr. Nickles attests that the violations are, in part, because “[i]n this case, and many of our other massive class action cases, OAG faces formidable adversaries with staffing and resources that far exceed

Mr. Nickles claims to want to start an undefined investigation now, but that is only because the Court has forced the issue and stated the intention to impose severe sanctions on the District. Mr. Nickles seeks to minimize the Court's intervention and sanctions. Despite the mountain of evidence at this stage, Mr. Nickles tries to minimize the violations with his selection of language, referring as he does generally to discovery "lapses," e.g., Nickles Decl. at 7, ¶ 14 (Doc. No. 501-2), and to "mistakes" having been made, id. at 14, ¶ 29. When referencing the destruction of the all-important S.O.C.C. / J.O.C.C. running resume, he reduces and minimizes its importance by referring to "whatever its probative value may be." Id. at 10, ¶ 19.

### **The Use of Former United States District Court Judge Stanley Sporkin as an Advisor to Mr. Nickles**

Plaintiffs take no exception to the qualifications of Judge Sporkin. However, Judge Sporkin is not being appointed as an independent investigator or prosecutor in this case. That is not his charge. He is to serve "as an advisor/counselor to [Mr. Nickles] to assist in improving the management of discovery in our massive class actions." Nickles Decl. at 4, ¶ 8 (Doc. No. 501-2).

On August 11, 2009, just one day before Mr. Nickles' declaration, the *Washington City Paper* contacted Judge Sporkin and asked what his responsibilities entailed in this position. He responded that "I don't know what I'll be doing. . . . I'll do whatever I have to do . . . I really don't at this stage have any idea of where this is all going and heading . . . It's very new to me."

---

those of this Office." Nickles Decl. at 8, ¶ 15 (Doc. No. 501-2). In all of the other constitutional cases cited by Mr. Koger (excepting the cases that are "related" to Barham, with different counsel) in his representations to the Court on July 29, 2009, plaintiffs' counsel is the same as Barham class counsel: The Partnership for Civil Justice Fund. The PCJF is a public interest organization with two senior attorneys and one junior attorney which takes on its litigation *pro bono*. The PCJF is also class counsel on behalf of the 700 persons arrested in connection with the April 2000 IMF/WB arrests, Becker v. D.C., CA. No. 01-811 (PLF)(JMF). Mr. Nickles claims in his sworn statement that the OAG has been out-staffed and out-resourced by the PCJF. Nevertheless, in every fee petition filed in these cases, the OAG time and again opens a second front of litigation to fight tooth-and-nail against reasonable compensation, claiming that the accomplishments of the PCJF in securing victories for its clients and the public interest are not even worth the going rate of law firms in the District. Yet, here, counsel is painted as a formidable adversary with greater litigation resources. The OAG will evidently say anything at any point to advance its immediate litigation position, regardless of accuracy or contradiction.

Ex. 12, “The Pershing Park Case: Judge Sporkin Starting to Get Involved, Praises AG Nickles,”  
*Washington City Paper City Desk Blog*, posted by Jason Cherkis August 11, 2009.

The *City Paper* reported:

Sporkin has nothing for praise for the city’s top lawyer. “I do know Peter,” he says, “I know him to be a person, a highly committed person . . . . He’s trying to give back . . . . You got a great talent in Peter Nickles.”

Id.

From plaintiffs’ perspective, Mr. Nickles is entitled to have anyone he pleases be his counselor or advisor. Judge Sporkin knows the Attorney General and approaches his responsibilities as a counselor to Mr. Nickles with friendship and having already determined that his function as Attorney General is beneficial.

For the purposes of this case, however, Judge Sporkin is not tasked to be an independent investigator with the authority to find fault and, indeed recommend sanction, wherever he may find it to be justified. He is not independent of the Attorney General at all, nor as the Attorney General’s trusted adviser should he be.

### **Conclusion**

The need for integrity of government and integrity of the judicial process weighs strongly in support of, and indeed compels, the appointment by this Court of an independent investigator or prosecutor and the issuance of sanctions severe enough to serve as a meaningful deterrent to the District’s ever engaging in this conduct again. While the plaintiffs have an immediate need for, and right to, significant sanctions that will work towards remedying the massive evidentiary failures and discovery abuses in this matter perpetrated by the District, the interests here extends to ensure the proper and just operation of this judicial system in which we are all vested.

The District of Columbia itself concedes it has engaged in sanctionable and inexcusable misconduct. It appears from the record to not be an isolated or aberrational occurrence but a

