

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

UNITED STATES OF AMERICA :
 :
 v. : **CASE NO. 21-cr-268 (CJN)**
 :
 JEFFREY MCKELLOP, :
 :
 Defendant. :

**GOVERNMENT’S OPPOSITION TO
DEFENDANT’S MOTION TO COMPEL DISCOVERY RELATED TO
THE PRESENCE OF FBI AGENTS**

The United States respectfully submits this Opposition to defendant McKellop’s motion to compel discovery of all documentation reflecting the presence of undercover Federal Bureau of Investigation agents or assets in the vicinity of the Capitol on January 6, 2021. For the reasons cited below, the defendant’s motion should be denied.

ARGUMENT

The Government began producing discovery in this case in March 2021, which has been supplemented by case specific, as well as global discovery, throughout 2021 and 2022. ECF Nos. 32, 38, 41, 42, 48. Discovery produced has included, but is not limited to, body-worn camera footage, Capitol CCTV footage, open-source videos, photographs, reports, and witness statements.

The defendant makes a generic request for “all documentation in its possession reflecting the presence on January 6, 2021, at, in or near the Capitol, of undercover Federal Bureau of Investigation agents or assets (e.g., Confidential Informants), their purpose and any consequence of their presence.” ECF No. 123.

The government has produced significant discovery regarding the specific charged offenses and the events of January 6, 2021 generally.¹ Regarding law-enforcement information, the government has already produced:

Over 30,000 files consisting of body-worn and hand-held camera footage from five law enforcement agencies and surveillance-camera footage from three law enforcement agencies and the Hilton Garden Inn; and

Reports from investigations of alleged wrongdoing by USCP and MPD officers on January 6, 2021.² Those reports detail allegations of USCP officers “pos[ing] for several pictures with Pro-Trump supporters” (see CAPD 000000001); “wai[ving] unauthorized persons into a restricted area secured by bike racks” (see CAPD_000000021); posting on social media about “how to steal an election” (see CAPD_000000510); “initiat[ing] fist bump” with individuals near the Rotunda Lobby East stairs (see CAPD_000000560); “pos[ing] for a photograph” with rioters (see CAPD 000000729; CAPD 000000812); “bump[ing] elbows” with a rioter (see CAPD 000000736; CAPD 000000744), among other allegations.

We are not aware of any person who was acting on behalf of any government agency as an “agent provocateur” – that is, as a person who committed or acted to entice another person to commit an illegal or rash act – with respect to January 6, 2021. We decline to identify all government “assets” around or inside the Capitol on January 6, 2021. “The so-called ‘informant’s privilege’ is well established.” *United States v. Glover*, 583 F. Supp. 2d 5, 11 (D.D.C. 2008). It recognizes the Government’s right “to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” *Roviaro v. United States*, 353 U.S. 53, at 59 (1957). The idea is that there is an “obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials,” and

¹ As of mid-November 2022, the government has produced over 3.86 million files to the defense-based discovery workspace including, but not limited to, the results of searches of digital devices, FBI memoranda, subject interviews, tips, and camera footage.

² Discovery memorialized in emails to defense counsel on September 14, 2021, and September 28, 2021.

“preserving anonymity[] encourages [citizens] to perform that obligation.” *Id.*

Of course, there are limits on the applicability of the privilege. *See Roviato*, 353 U.S. at 60. When “the disclosure of an informer’s identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” *Id.* at 60–61 (footnote omitted). But the “defendant bears the ‘heavy burden to establish that the identity of an informant is necessary to his defense [,]’ and mere speculation about an informant’s role or that an informant might prove helpful is insufficient to meet this burden.” *Glover*, 583 F. Supp. 2d at 11 (cleaned up) (quoting *United States v. Skeens*, 449 F.2d 1066, 1070 (D.C. Cir. 1971)). Here, where the defendant is plainly speculating that there might have been an informant somewhere near him in a crowd of thousands, he fails to carry his burden.

CONCLUSION

For these reasons, the defendant’s motion to compel discovery should be denied.

Respectfully submitted,

MATTHEW M. GRAVES
UNITED STATES ATTORNEY
D.C. Bar No. 481052

/s/ Shalin Nohria
Shalin Nohria
Assistant United States Attorney
D.C. Bar No. 1644392
United States Attorney’s Office
601 D St. NW, 6.713
Washington, D.C.,
202-344-5763
shalin.nohria@usdoj.gov