No. 23-CV-488

In the District of Columbia Court of Appeals

WP Company LLC,

Appellant,

v.

District of Columbia,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division, No. 2021 CA 002114 B (Hon. Ebony M. Scott)

Appellant's Opening Brief

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RULE 28(a)(2) DISCLOSURE

The parties here and in the proceedings below, and their counsel, are:

1. Plaintiff-Appellant WP Company LLC d/b/a *The Washington Post*, represented by Chad R. Bowman, Charles D. Tobin, Maxwell S. Mishkin, and Margaret N. Strouse of Ballard Spahr LLP.

2. Defendant-Appellee the District of Columbia, represented below by Assistant Attorney General Matthew R. Blecher and Assistant Attorney General Brendan Heath, and represented here by Solicitor General Caroline S. Van Zile and Principal Deputy Solicitor General Ashwin P. Phatak.

RULE 26.1 DISCLOSURE

WP Company LLC d/b/a *The Washington Post* is a wholly owned subsidiary of Nash Holdings LLC, which is privately held and does not have any outstanding securities in the hands of the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This appeal arises from a May 9, 2023 Omnibus Order granting summary judgment for Defendant-Appellee the District of Columbia (the "District") on all counts of the Complaint filed in this Freedom of Information Act ("FOIA") matter by Plaintiff-Appellant WP Company LLC d/b/a *The Washington Post* (the "Post"). The Post timely filed a notice of appeal on June 8, 2023. This Court has jurisdiction over this appeal pursuant to D.C. Code § 11-721(a)(1).

ISSUES PRESENTED FOR REVIEW

1. The Post requested copies of certain 911 call recordings from January 6, 2021, and the District refused to produce any of those recordings on the grounds that their release may interfere with ongoing law enforcement proceedings. Did the Superior Court err in ruling that the District could withhold all responsive 911 recordings, including calls related solely to closed Capitol riot investigations, because other Capitol riot investigations remain ongoing?

2. The Post requested a copy of the autopsy report of Capitol Police Officer Brian Sicknick, who died the day after the Capitol riot, and the District withheld the report in full under FOIA's personal privacy exemption. Did the Superior Court err in permitting the District to withhold that entire autopsy report, rather than directing the District to produce a properly redacted copy of the report?

3. When the Post requested copies of all messages that District Mayor Muriel Bowser sent via WhatsApp between January 5 and January 8, 2021, Mayor Bowser conducted the search herself and, according to the District, found no responsive records. The Superior Court authorized the Post to take discovery into the scope and efficacy of that search, but the District obtained a protective order to prevent the Post from taking Mayor Bowser's deposition. Did the Superior Court err in subsequently granting summary judgment for the District and concluding that the District had carried its burden to show that it made a good faith effort to conduct a search for the requested records, using methods which could have been reasonably expected to produce the requested messages, even though, as a result of the protective order, the record contains no testimony whatsoever from Mayor Bowser – or anyone else – about how she in fact conducted that search?

STATEMENT OF THE CASE

The Post submitted the FOIA requests at issue in this appeal to further the public's understanding of the riot at the U.S. Capitol on January 6, 2021, "the most significant assault on the Capitol since the War of 1812." *Trump v. Thompson*, 20 F.4th 10, 18-19 (D.C. Cir. 2021). One of those requests sought messages sent by District Mayor Muriel Bowser via WhatsApp between January 5 and January 8, 2021, another sought recordings of certain 911 calls related to the Capitol riot, and

a third sought the autopsy report of Capitol Police Officer Brian Sicknick, who was attacked with a chemical spray while defending the Capitol and died the next day.

The Mayor's messages and the 911 recordings would help the public evaluate whether the District's chief executive and law enforcement adequately prepared for this historic attack and how they responded to it in real-time, and the autopsy report would help resolve the public's lingering confusion over the official ruling that Officer Sicknick died of natural causes. But the District claimed that it could not locate any WhatsApp messages that Mayor Bowser sent during that period, it withheld all of the 911 call recordings under the FOIA exemption for law enforcement records whose release would interfere with active investigations, and it withheld the autopsy report in full under FOIA's personal privacy exemption.

The Superior Court (Scott, J.) erred in granting summary judgment for the District on each of those responses. As to the 911 recordings, the Superior Court ruled that the District could withhold all such recordings, even though the District did not, and could not, show that those recordings all relate to open investigations. As to the autopsy report, the Superior Court erred in permitting the District to withhold the entire record rather than ordering it to produce the report with any photographs redacted. And, as to Mayor Bowser's messages, the Superior Court ruled that the District's search was adequate even though Mayor Bowser conducted

the search herself and the court barred the Post from taking the Mayor's deposition.

Because the Superior Court erred on each of these issues, the Court should reverse the Omnibus Order as to Counts I, II, and VI of the Post's Complaint.

FACTUAL BACKGROUND

I. Mayor Bowser's Use Of WhatsApp Messages

It is public knowledge that, in Mayor Bowser's office, "it is 'commonplace' for communication between managers and employees, both individually and in groups" to take place over the ephemeral text messaging application WhatsApp, and that "[m]uch of that communication happens during the day and touches on official government business and functions." *See* Martin Austermuhle, *Staff For Mayor Muriel Bowser Use WhatsApp, Raising Concerns About Open Records*, WAMU (Oct. 9, 2019).[1] This use of WhatsApp was confirmed in this litigation by Christina Sacco from the Executive Office of the Mayor's Office of General Counsel, who testified that she used WhatsApp for District business when employed by the Executive Office of the Mayor. JA-122 (Sacco Tr. at 24:17-19).

The advent of ephemeral messaging applications such as WhatsApp, which can be set by senders or recipients to automatically delete messages, poses a threat

[1] *Available at* https://dcist.com/story/19/10/09/staff-for-mayor-muriel-bowser-use-whatsapp-raising-concerns-about-open-records/.

to FOIA as more government business is conducted outside the scope of public view. *See generally* Comment, Kurt J. Starman, *Now You See It, Now You Don't: The Emerging Use of Ephemeral Messaging Apps by State and Local Government Officials*, 4 Concordia L. Rev. 213 (Apr. 2019); Jason R. Baron, *Correcting the Public Record: Reforming Federal and Presidential Records Management* (Mar. 15, 2022).[2] Ephemeral messaging apps exist to prevent the creation of records, a purpose in opposition to the District's obligations under FOIA. "Modernization and innovation in technology should be used to create and retain *more* not less transparency in the spaces where public official and employees exercise the public trust." FOIA Advisory Opinion, OOG-#2022-00, at 15 (Mar. 16, 2022).[3]

Thus, after public outcry regarding Mayor Bowser's use of WhatsApp for official business, the District Office of Open Government issued an Advisory Opinion recommending that the Mayor "prohibit the use of ephemeral text messaging applications[]" because it "indirectly circumvents D.C. FOIA by effectively treating a written conversation as a phone call." *Id.* The Office of Open Government observed that the use of ephemeral messaging applications undermines FOIA because "[d]isclosure later depends on retention now." *Id*.

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[2] *Available at* https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Testimony-Baron-2022-03-15.pdf.

[3] *Available at* https://www.open-dc.gov/sites/default/files/FOIA%20Advisory%20Opinion_Text%20Messages_OOG%202022-001_03162022.pdf/.

II. The Capitol Riot

"On November 3, 2020, Americans elected Joseph Biden as President, giving him 306 electoral college votes. Then-President Trump, though, refused to concede, claiming that the election was 'rigged' and characterized by 'tremendous voter fraud and irregularities[.]'" *Trump*, 20 F.4th at 17. "[A] Joint Session of Congress convened on January 6, 2021 to certify the results of the election," and "[i]n anticipation of that event, President Trump had sent out a Tweet encouraging his followers to gather for a '[b]ig protest in D.C. on January 6th' and to '[b]e there, will be wild!'" *Id.* (citations omitted).

"[O]n January 6th, President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House." *Id.* at 17-18. "Urging the crowd to 'demand that Congress do the right thing and only count the electors who have been lawfully slated,' [Trump] warned that 'you'll never take back our country with weakness' and declared 'we fight like hell and if you don't fight like hell, you're not going to have a country anymore.'" *Id.* at 18 (cleaned up).

"[A]fter the speech, a large crowd of President Trump's supporters – including some armed with weapons and wearing full tactical gear – marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results." *Id.* They "overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to

the interior of the Capitol. Police officers were attacked with chemical agents, beaten with flag poles and frozen water bottles, and crushed between doors and throngs of rioters." *Id.* "Even with reinforcements from the D.C. National Guard, the D.C. Metropolitan Police Department, Virginia State Troopers, the Department of Homeland Security, and the FBI, Capitol Police were not able to regain control of the building and establish a security perimeter for hours." *Id.*

Federal law enforcement agencies subsequently "deployed [their] full investigative resources . . . to aggressively pursue those involved in criminal activity" on January 6. *See Director Wray's Statement on Violent Activity at the U.S. Capitol Building*, FBI (Jan. 7, 2021).[4] To date, more than 1,100 people have been charged with crimes relating to the Capitol riot and more than 700 people have pleaded guilty to one or more charges stemming from the riot. *See The Capitol siege: The cases behind the biggest criminal investigation in U.S. history*, NPR (published Feb. 9, 2021, last updated Nov. 10, 2023).[5]

III. Officer Brian Sicknick

Brian D. Sicknick "was the youngest of three brothers who grew up in a borough along the I-95 corridor south of New Brunswick, and earned a bachelor's

[4] *Available at* https://www.fbi.gov/news/press-releases/director-wrays-statement-on-violent-activity-at-the-us-capitol-building-010721.

[5] *Available at* https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories.

degree in criminal justice from the University of Phoenix." *See* Peter Hermann et al., *U.S. Capitol Police officer Brian D. Sicknick, who died after assault on Capitol, protected with a kind touch*, The Washington Post (Jan. 8, 2021).[6] Officer Sicknick "wanted to be a police officer his entire life" and "joined the New Jersey Air National Guard as a means to that end following the 9/11 terrorist attacks." *Id.* (internal marks omitted). Officer Sicknick joined the Capitol Police in 2008. *Id.*

On the afternoon of January 6, 2021, Officer Sicknick was one of several law enforcement personnel protecting the Capitol's Lower West Terrace when he was confronted by Julian Khater and George Tanios. *See* Statement of Facts at 2-3, *United States v. Khater* ("*U.S. v. Khater*"), No. 21-cr-222-TFH (D.D.C. Mar. 6, 2021), ECF No. 1-1. At approximately 2:23 P.M., Khater sprayed a chemical irritant into Officer Sicknick's face and the faces of several other officers. *Id.* at 5-6. Officer Sicknick was "temporary blinded by the substance" and a fellow officer "reported lasting injuries underneath her eyes, including scabbing that remained on her face for weeks." *Id.* at 6. Khater subsequently pleaded guilty to having "assaulted, resisted, opposed, impeded, intimidated, or interfered with" Officer Sicknick using "a deadly or dangerous weapon." *See* Gov't's Submission of

[6] *Available at* https://www.washingtonpost.com/local/public-safety/brian-sicknick-capitol-police-officer-dies/2021/01/08/5552e036-51bc-11eb-83e3-322644d82356_story.html.

Elements of Offense & Proffer of Evid. in Supp. of Def.'s Plea of Guilty at 5-6, *U.S. v. Khater*, ECF No. 80.

According to the Capitol Police, following the riot Officer Sicknick "returned to his division office and collapsed. He was taken to a local hospital where he succumbed to his injuries." *See Loss of USCP Officer Brian D. Sicknick*, U.S. Capitol Police (Jan. 7, 2021).[7] The Acting Attorney General of the United States issued a statement the following day, noting that Officer Sicknick "succumbed . . . to the injuries he suffered defending the U.S. Capitol, against the violent mob who stormed it on January 6th," and reassuring the public that "[t]he FBI and Metropolitan Police Department will jointly investigate the case and the Department of Justice will spare no resources in investigating and holding accountable those responsible." *See Statement of Acting Att'y Gen. Jeffrey A. Rosen on the Death of U.S. Capitol Police Officer Brian D. Sicknick*, Dep't of Justice Off. of Pub. Affairs (Jan. 8, 2021).[8]

On February 1, 2021, Congress passed a Concurrent Resolution providing "[t]hat the remains of the late United States Capitol Police Officer Brian D. Sicknick shall be permitted to lie in honor in the rotunda of the Capitol." *See*

[7] *Available at* https://www.uscp.gov/media-center/press-releases/loss-uscp-colleague-brian-d-sicknick.

[8] *Available at* https://www.justice.gov/opa/pr/statement-acting-attorney-general-jeffrey-rosen-death-us-capitol-police-officer-brian-d.

H. Con. Res. 10 (117th Cong.). Officer Sicknick became only "the fifth deceased person who was not a public official or military leader to lie in the Rotunda." *See* Meagan Flynn et al., *Officer Brian Sicknick remembered as hero who died defending the U.S. Capitol*, The Washington Post (Feb. 3, 2021).[9]

On April 19, 2021, the District's Chief Medical Examiner, Dr. Francisco J. Diaz, gave an interview to the Post, during which Dr. Diaz stated that Officer Sicknick died of strokes at the base of his brainstem, but also that "all that transpired played a role in [Officer Sicknick's] condition." *See* Hermann et al., *supra* note 6.

Even after the Office of the Chief Medical Examiner ("OCME") ruled that Officer Sicknick died of natural causes, officials have continued to attribute Officer Sicknick's death to the events of January 6. Capitol Police General Counsel Thomas A. DiBiase, for example, has insisted that OCME's "conclusion does not mean that Officer Sicknick was not assaulted nor that the events at the Capitol did not contribute to his death." *See* Ltr. from T. DiBiase to Sen. R. Johnson (May 6, 2021).[10] Similarly, in June 2021 President Biden described the events of January 6 as "criminals . . . break[ing] through cordon, go[ing] into the

[9] *Available at* https://www.washingtonpost.com/local/public-safety/sicknick-honor-capitol/2021/02/02/3878d5ae-6578-11eb-8c64-9595888caa15_story.html.

[10] *Available at* https://www.ronjohnson.senate.gov/services/files/DAA99532-CA05-4653-8F97-F2E263030B38.

Capitol, kill[ing] a police officer, and be[ing] held unaccountable." *See Remarks by President Biden in Press Conference*, The White House (June 16, 2021).[11] And in August 2021, Congress passed and the President signed a bill awarding the Congressional Gold Medal "to the United States Capitol Police and those who protected the U.S. Capitol on January 6, 2021," which referred to "[t]he sacrifice of heroes" including Officer Sicknick. *See* Pub. L. 117-32 (2021).

IV. The Post's FOIA Requests

On January 7, 2021, the day after the Capitol riot, Post FOIA Director Nate Jones submitted a FOIA request seeking "[a]ll messages sent by Mayor Muriel Bowser on her WhatsApp account and email account between January 5 and January 8, 2021." JA-032 (Compl. Ex. A). At the time the Post filed this lawsuit, the District had not responded to this request. JA-023 (Compl. ¶ 39).

On February 19, 2021 Post journalist Shawn Boburg submitted a FOIA request seeking "[a]ll 911 recordings, dispatch communications and CAD entries related to the Jan. 6, 2021 protest and subsequent riot at the U.S. Capitol," and expressly "limit[ing] the responsive records to events located in or calls originating from the First and Second police districts from 10 a.m. to 10 p.m. on Jan. 6, 2021." *See* JA-035 (Compl. Ex. B). On March 30, 2021, the District denied that request,

[11] *Available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/16/remarks-by-president-biden-in-press-conference-4/.

citing FOIA's law enforcement exemption. *See* JA-041 (Compl. Ex. D) (citing D.C. Code §§ 2-534 (a)(3)(A)(i) and (a)(3)(B)).

On April 20, 2021, Post reporter Peter Hermann submitted a FOIA request seeking a copy of the autopsy report for Officer Sicknick. JA-060 (Compl. Ex. K); JA-026 (Compl. ¶ 53). On April 27, 2021, the District denied that request, citing FOIA's personal privacy exemption. JA-061 (Compl. Ex. K at 1) (citing D.C. Code § 2-534(a)(2)).

V. This FOIA Lawsuit

The Post filed this action against the District on June 23, 2021, challenging the District's responses to multiple FOIA requests related to the Capitol riot, including the three requests discussed above. The District initially moved to dismiss the Post's Complaint in part, and the Court (Williams, J.) denied dismissal as to the request for Mayor Bowser's WhatsApp messages, explaining that it "is not convinced that the Mayor's search for messages sent from her WhatsApp account between January 5 and January 8 was sufficient," including because the declaration of Associate General Counsel Sacco that the District submitted with its first partial motion to dismiss "d[id] not provide information about how the search was conducted." JA-073 (Jan 24, 2022 Order at 3).

The Court accordingly permitted the Post to take discovery as to search adequacy, specifically the "efficacy and scope" of the search and "the process used

to search these messages." *Id.* Mayor Bowser purportedly conducted the search for records responsive to that request herself and, according to the District, found no such WhatsApp messages. *See, e.g.*, JA-084 (Def.'s Resp. to Pl.'s Interrogs. at 4) ("Mayor Bowser searched her WhatsApp account for messages sent during the specified period and determined that there were none"). The Post subsequently took Ms. Sacco's deposition, but her testimony revealed that she lacked any knowledge whatsoever of how Mayor Bowser conducted the search in question. *See e.g.*, JA-160 (Sacco Tr. at 62:12-14) ("I wasn't involved in conducting a search of [WhatsApp] messages in any way").

Because Ms. Sacco lacked knowledge regarding the Mayor's search for WhatsApp messages – the subject into which the Court authorized the Post to take discovery – the Post then noticed the deposition of Mayor Bowser. The District moved for a protective order to preclude the deposition, which the Post opposed. Following a hearing, the Court granted the District's motion and prevented the Post from taking Mayor Bowser's deposition. JA-075.

On December 5, 2022, the District moved for summary judgment on Counts II-VI of the Post's Complaint. The Post responded in opposition as to Counts II and VI, which pertain to the 911 recordings and the autopsy report, respectively, on the grounds that the District's withholdings are improper and that at least some

of the 911 recordings and certain portions of Officer Sicknick's autopsy report must be released pursuant to FOIA.

Several months later, on March 17, 2023, the District moved for partial summary judgment on Count I of the Post's Complaint, which pertains to the Mayor's WhatsApp messages. The Post responded in opposition to that motion for partial summary judgment on the grounds that the District's search was inadequate.

VI. The Omnibus Order And The Post's Appeal

On May 9, 2023, the Superior Court issued an Omnibus Order granting summary judgment for the District on all counts of the Post's Complaint. JA-210-221. As to the 911 call recordings, the Superior Court wrote that it "disagrees that many of the investigations or prosecutions have ceased and therefore there is no longer a legitimate danger of interference in these criminal investigations," and that "[s]ince January 6, 2021, the Department of Justice has had ongoing criminal proceedings that continue to this day." JA-217. The Superior Court therefore ruled that all of the 911 calls "are undisputedly law enforcement records that should remain exempt from disclosure." *Id.* As to the autopsy report, the Superior Court ruled that it "disagrees with [the Post] that the balance here favors disclosure" even if the District were to redact photographs of Officer Sicknick. JA-217-218. And as to the Mayor's WhatsApp messages, the Superior Court ruled that even though the record contained no testimony from Mayor Bowser about how

she conducted the search for her own messages, whether via affidavit or deposition, "'the search is quite frankly adequate when reviewing the entire record.'" JA-220 (quoting JA-204).

On June 8, 2023, the Post timely filed a notice of appeal of the Superior Court's Omnibus Order granting summary judgment for the District.

SUMMARY OF ARGUMENT

The Superior Court erred in ruling that the District could categorically withhold all 911 call records responsive to the Post's request, rather than permitting the District to withhold only those records that relate to pending or prospective investigations. The Superior Court also erred in ruling that the District could withhold the autopsy report of Officer Sicknick in full, rather than directing the District to produce a copy of the report with photographs of Officer Sicknick redacted. The Superior Court further erred in ruling that the District carried its burden to show that it conducted an adequate search for Mayor Bowser's WhatsApp messages after having prevented the Post from obtaining any firsthand testimony from the Mayor herself, or indeed relevant testimony from anyone else, about how she conducted that search. The Superior Court therefore erred in granting summary judgment for the District on Counts I, II, and VI of the Post's Complaint.

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of summary judgment in [a] FOIA case." *FOP v. District of Columbia*, 124 A.3d 69, 75 (D.C. 2015). When the Court is reviewing an agency's withholding of records, "[s]ummary judgment is appropriate where the agency describes the documents and the justifications for nondisclosure with reasonably specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Tax Analysts v. District of Columbia*, 298 A.3d 334, 338 (D.C. 2023) (internal marks omitted). When the Court is reviewing an agency's search for records, the agency bears the burden to "'show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220 (D.C. 2008) (quoting *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *see also FOP v. District of Columbia*, 139 A.3d 853, 865 (D.C. 2016) ("The District must establish 'beyond material doubt' that it expended reasonable efforts 'to uncover all relevant documents.'") (quoting *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)).

ARGUMENT

I. THE DISTRICT CANNOT CATEGORICALLY WITHHOLD ALL OF THE REQUESTED 911 CALL RECORDINGS

In the proceedings below, the District withheld recordings of the 911 calls it received on January 6, 2021, pursuant to D.C. Code § 2-534(a)(3), on the grounds that those recordings are law enforcement records whose release would interfere with enforcement proceedings. The District failed to demonstrate that it could not release any of these recordings without interfering with such ongoing proceedings, however, and the Superior Court erred in permitting such a blanket withholding.

As a threshold matter, the Post does not dispute that these recordings qualify as "law enforcement records" or that release of certain 911 recordings from January 6 could theoretically interfere with ongoing Capitol riot investigations. But even with those caveats, the District's blanket withholding remains improper because so many riot investigations and prosecutions are no longer ongoing. As the D.C. Circuit has explained, the law enforcement exemption that the District relies on here "is temporal in nature" because disclosure "'cannot interfere with parts of [an] enforcement proceeding [that have] already concluded.'" *CREW v. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (quoting *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989)). To assert this law enforcement exemption, therefore, the District must "show that the material withheld 'relates to a concrete prospective law enforcement proceeding,'" that "must remain pending at the time

of [the court's] decision, not only at the time of the initial FOIA request." *Id.* In other words, once "cases are closed – not pending or contemplated" they are no longer "proceedings with which disclosure may interfere." *Id.*

The District did not make such a specific showing with respect to any of the 911 calls it withheld. Nor can it possibly do so for all of them, because it is beyond dispute that hundreds of Capitol riot investigations and prosecutions are now closed. *See, e.g.*, NPR, *supra* note 5 (noting that at least 700 people have already been sentenced in Capitol riot cases). Any 911 calls that relate solely to those closed investigations and prosecutions thus cannot qualify for protection under D.C. Code § 2-534(a)(3).

FOIA "does not contemplate an 'all or nothing' approach where this situation arises." *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 522 (D.C. 1989). Instead, it is well settled that the District "must produce any reasonably segregable non-exempt parts" of the requested records. *Id.* But the District did not do so here. Rather, it insisted that it could withhold all of the 911 call recordings on a categorical basis, and the Superior Court agreed, concluding that all of the 911 records "are undisputedly law enforcement records that should remain exempt from disclosure." JA-217.

Precedent shows that the Superior Court erred in permitting this categorical withholding. In *American Immigration Lawyers Association v. Executive Office*

for Immigration Review, for example, plaintiff requested records related to complaints about the conduct of immigration judges, and the government withheld the names of all of those judges on a categorical basis. 830 F.3d 667, 669 (D.C. Cir. 2016). The district court approved this blanket withholding and granted summary judgment for the government, but the D.C. Circuit reversed, explaining that while "in certain situations we have allowed an agency to justify withholding or redacting records category-of-document by category-of-document rather than document-by-document," it has "permitted such an approach only if the documents within each category are sufficiently similar – and the categories are sufficiently well-defined and distinct – to allow a court to determine whether the specific claimed exemptions are properly applied." *Id.* at 675 (emphasis added and internal marks omitted).

In deciding whether to approve a categorical withholding, the court must therefore ask "whether there has been a sufficient showing" that the applicability of the cited exemption "would yield a uniform answer across the entire proffered category, regardless of any variation among the individual records." *Id.* The D.C. Circuit thus concluded that the government could not justify its withholding there "in purely categorical, across-the-board terms," because "variations" among the records left the court "unable to find, at least as a blanket matter, that the [government's cited exemption] tips in favor of withholding immigration judges'

names in all circumstances." *Id.* at 676; *see also, e.g.*, *WP Co. LLC v. Dep't of Def.*, 626 F. Supp. 3d 69, 79 (D.D.C. 2022) (rejecting categorical withholding of the names of servicemembers who applied to work for foreign governments and ordering agencies to conduct "individualized assessment" of each withholding).

Here, the District cannot dispute that, while some of the 911 calls may relate to Capitol riot investigations that remain active, other 911 calls may relate solely to Capitol riot investigations that have closed. This variation among the 911 calls is therefore too substantial to conclude, as a categorical matter, that the District's cited law enforcement exemption weighs in favor of withholding all of the 911 call recordings. This Court should accordingly reverse the ruling below and direct the District to conduct an individualized assessment of the 911 calls, withholding only those recordings that relate to pending or prospective investigations, and releasing those recordings that relate solely to closed investigations.

II. THE DISTRICT CANNOT WITHHOLD OFFICER SICKNICK'S ENTIRE AUTOPSY REPORT

The District also failed to justify withholding the entirety of Officer Sicknick's autopsy report, and the Superior Court erred in permitting that withholding as well. The District withheld the complete record under FOIA's personal privacy exemption, which applies to "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(2). The Post has agreed

throughout this litigation that the privacy interests of Officer Sicknick's family may justify withholding portions of the report. But FOIA's privacy exemption, which balances the privacy interest in the information against the public interest in its disclosure, does not permit the District to withhold the report as a whole.

Specifically, case law would permit the District to redact photographs of Officer Sicknick from the autopsy report. *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) ("FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."). But the same is not true for other portions of the report. Indeed, addressing this exact issue, the D.C. federal district court has concluded that the government must disclose portions of autopsy records that do not contain death-scene images. In *Charles v. Office of the Armed Forces Medical Examiner*, plaintiff was investigating the effectiveness of body armor issued to American troops, and as part of his investigation he sought records, including autopsy reports, that would show "whether any service member's deaths may have resulted from bullet wounds in torso areas that are usually covered by body armor." 935 F. Supp. 2d 86, 89-90 (D.D.C. 2013). Citing *Favish*, just as the District did here, the government withheld the autopsy reports in their entirety on the grounds that disclosure would invade surviving family members' privacy. *Id.* at 97-98.

The district court rejected that argument. First, the court explained that *Favish*'s holding is "limited to surviving family members' right to personal privacy with respect to their close relative's death-scene images." *Id.* at 98 (quoting *Mobley v. CIA*, 924 F. Supp. 2d 24, 70 (D.D.C. 2013)). Second, the court explained that after redacting such sensitive material, releasing the reports would no longer "'shock the sensibilities of surviving kin.'" *Id.* at 99 (quoting *Badhwar v. Dep't of Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987)). The court also noted the "significant public interest in disclosure" of these redacted reports because "the information will advance the public's right to be informed about what their government is doing with respect to body armor issued to service members." *Id.* at 100 n.11. The court therefore ordered the government to release redacted copies of the servicemembers' autopsy reports. *Id.* at 100; *see also Charles v. Off. of the Armed Forces Med. Exam'r*, 979 F. Supp. 2d 35, 41-42 (D.D.C. 2013) (Brown Jackson, J.) ("adopt[ing] as law of the case the previous rulings that . . . Defendants failed to invoke FOIA Exemption 6 properly in regard to the final autopsy reports and therefore such reports must be produced").

This Court should reach the same conclusion with respect to Officer Sicknick's autopsy report. After photographs in the report are redacted, the remaining information would not be of the type that would shock the sensibilities of Officer Sicknick's family members – particularly family members who have

placed the cause of Officer Sicknick's death directly at issue in a federal lawsuit against former President Trump and the rioters who confronted Officer Sicknick on January 6. *See* First Am. Compl. ¶¶ 118-37, *Garza v. Trump*, No. 23-cv-38-APM (D.D.C. May 31, 2023), ECF 35-3 (asserting wrongful death claim and alleging that defendants committed "acts which caused Officer Sicknick's death").

On the other side of the balancing test, the public interest in that remaining information is powerful. In the context of FOIA's privacy exemption, the relevant public interest is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *District of Columbia v. FOP*, 75 A.3d 259, 266 (D.C. 2013) (citation omitted). Here, releasing the redacted autopsy report would help the public understand and reconcile the Chief Medical Examiner's finding that Officer Sicknick died of natural causes with the Chief Medical Examiner's statement that "all that transpired played a role in his condition," *see* Hermann et al., *supra* note 6, and with the Capitol Police's claim that the Chief Medical Examiner's finding "does not mean that Officer Sicknick was not assaulted nor that the events at the Capitol did not contribute to his death," *see* Ltr. from T. DiBiase, *supra* note 10.

Given this powerful public interest in disclosure and the District's ability to mitigate the privacy interest under *Favish* through targeted redactions, the Superior

Court should have ordered the District to produce Officer Sicknick's autopsy report without photographs. Instead, the Superior Court erred in analyzing both sides of the FOIA exemption's balancing test. On the privacy side, the Superior Court observed that even with a redacted report "the identity of Officer Sicknick would be easily determined," JA-218, but it did not address whether that unredacted material would shock the sensibilities of Officer Sicknick's family members. On the public interest side, the Superior Court appeared to acknowledge that "releasing the report would help the public understand and reconcile the cause of death of Officer Sicknick," JA-216, but it stated without elaboration that it "disagrees with [the Post] that the balance here" between the public interest in disclosure and the privacy interest in withholding "favors disclosure," JA-217.

Reviewing the record *de novo*, this Court should reverse the ruling below. The District has not articulated a substantial privacy interest in any portion of the autopsy report other than photographs, which the Post agrees should be redacted. And even if it had articulated such an interest, it would be outweighed by the public interest in understanding and reconciling the various statements that public officials have made about why a Capitol Police officer died the day after January 6, 2021. This Court should therefore reverse the ruling below and direct the District to produce a properly redacted copy of Officer Sicknick's autopsy report.

III. THE DISTRICT HAS NOT CARRIED ITS BURDEN TO SHOW THAT MAYOR BOWSER CONDUCTED AN ADEQUATE SEARCH FOR HER OWN WHATSAPP MESSAGES

The District Court failed to show that it conducted an adequate search for any WhatsApp messages that Mayor Bowser sent from January 5-8, 2021, and the Superior Court erred in concluding that the District's efforts were sufficient. The District cannot dispute that it bears the burden to "'show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *See Doe*, 948 A.2d at 1220 (quoting *Oglesby*, 920 F.2d at 68). To carry this burden, the District must submit "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.* at 1221; *see also FOP v. District of Columbia*, 139 A.3d 853, 865 (D.C. 2016) ("The District must establish 'beyond material doubt' that it expended reasonable efforts 'to uncover all relevant documents.'") (quoting *Nation Magazine*, 71 F.3d at 890).

The District failed to carry this burden. The District chose to task Mayor Bowser with searching for her own WhatsApp messages, rather than relying on other District employees to do so, which is what the District did in conducting a search for records responsive to the Post's related request for copies of Mayor Bowser's emails. *See* JA-078 ¶ 10 (Sacco Decl.). The District then blocked the

Post from taking the Mayor's deposition, and its written discovery responses failed to provide any details about the search, including even when it was conducted. For example, the Post asked the District to "[d]escribe each and every step that Mayor Bowser took to conduct a search for messages she sent on her WhatsApp account between January 5 and January 8, 2021," and the District responded in conclusory fashion that "[t]here were no messages in her WhatsApp message history for the time period specified." JA-083-84 (Post's Interrog. No. 2 and District's Resp.).

The District does not and cannot dispute that Mayor Bowser alone has personal knowledge about the methods she used to search for her WhatsApp messages, or that this knowledge is directly relevant to determining whether those methods "can be reasonably expected to produce the information requested," *see Doe*, 948 A.2d at 1220. Nor can the District dispute that the one witness it made available for a deposition, Ms. Sacco, lacked any knowledge of how Mayor Bowser conducted the search. *See e.g.*, JA-160 (Sacco Tr. at 62:13-14). Without that information, it is not possible to determine whether the search was adequate.

Only the Mayor knows whether she searched for messages only on her mobile phone or also on other devices that could have been "linked" to her WhatsApp account.[12] The Mayor alone likewise knows whether she searched her

[12] *See About linked devices*, WhatsApp, https://faq.whatsapp.com/general/download-and-installation/about-linked-devices/.

computer files or cloud storage for responsive records contained within backed up copies of her "chat history."[13] The Mayor further knows when the search occurred, a fact that Superior Court Judge Yvonne M. Williams recognized as salient when she presided over the matter below. JA-188 (MSJ Ex. E at 24:9-11) ("I'd like a response to the date [of the search], whether or not the District has the dates of the search."). In addition, the Mayor knows whether, during the relevant time period, she was part of any WhatsApp groups where other members could have turned on the "self-deleting" messages option such that messages the Mayor sent that would have been responsive to the Post's request were deleted, even if the Mayor herself never activated that option. *See generally* JA-180-81 (MSJ Ex. E at 16:8-17:9). The answers to those types of questions are necessary to determine what steps the Mayor took in searching for her WhatsApp messages and whether those steps could reasonably be expected to produce those messages, and thus whether the District conducted an adequate search for the Mayor's WhatsApp messages during the Capitol riot. Without providing any of that information, the District failed to carry its burden to establish the adequacy of its search.

The Superior Court erred in reaching the opposite conclusion. For one, the Superior Court wrote that the Post "argues that [the District] failed to carry [its]

[13] *See How to save your chat history*, WhatsApp, https://faq.whatsapp.com/android/chats/how-to-save-your-chat-history/.

burden by relying on the Mayor to search for her own messages rather than relying on the Office of the Chief Technology Officer," and that the Post did not submit "any authority exhibiting how or why this search must have been conducted by the Office of the Chief Technology Officer." JA-220. But that is not and has never been the Post's argument. Rather, the Post's position is that when the District chose to allow the Mayor to conduct the search for her own messages, it placed her personal knowledge directly at issue in the litigation, which it could easily have avoided by tasking other District employees with the same search. For another, the Superior Court wrote that it found "unavailing" the proposition "that the Mayor herself should have provided an affidavit to prove the validity of the search," *id.*, even though, at the hearing on its motion for a protective order, the District's own counsel offered to "go back to our client and provide . . . a declaration [or] affidavit" regarding certain details about the search, JA-189 (MSJ Ex. E 25:1-3).

Because the District failed to carry its burden of demonstrating that it conducted an adequate search for the Mayor's messages, this Court should reverse the ruling below and direct the Superior Court to permit additional discovery.

CONCLUSION

For the foregoing reasons, the Omnibus Order of the Superior Court granting summary judgment for the District should be reversed as to Counts I, II, and VI of the Post's Complaint.

Dated: November 20, 2023

Respectfully submitted,

/s/ Chad R. Bowman

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ADDENDUM

D.C. Code § 2-532. Right of access to public records; allowable costs; time limits.

(a) Any person has a right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534, in accordance with reasonable rules that shall be issued by a public body after notice and comment, concerning the time and place of access.

(a-1) In making any record available to a person pursuant to this section, a public body shall provide the record in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format.

(a-2) In responding to a request for records pursuant to this section, a public body shall make reasonable efforts to search for the records in electronic form or format, except when the efforts would significantly interfere with the operation of the public body's automated information system.

(a-3) A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and the public body with programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by the public body.

(b) A public body may establish and collect fees not to exceed the actual cost of searching for, reviewing, redacting, and making copies of records. Documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(b-1) Any fee schedules adopted by the Mayor, an agency or a public body shall provide that:

(1) Fees shall be limited to reasonable standard charges for document search, duplication, and review when records are requested for commercial use;

(2) Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is

made by an educational or non-commercial scientific institution for scholarly or scientific research, or a representative of the news media;

(3) For any request for records not described in paragraphs (1) or (2) of this subsection, fees shall be limited to reasonable standard charges for document search and duplication; and

(4) Only the direct costs of search, duplication, or review may be recovered.

(b-2) Review costs shall include only the direct costs incurred during the initial examination of a document to determine whether the documents must be disclosed or withheld in part as exempt under this section. Review costs may not include costs incurred to determine issues of law or policy related to the request.

(b-3) No agency or public body may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency or public body has determined that the fee will exceed $250.

(c)(1) Except as provided in paragraph (2) of this subsection, a public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.

(2)(A) If the public record requested is a body-worn camera recording recorded by the Metropolitan Police Department, the Metropolitan Police Department, upon request reasonably describing the recording, shall within 25 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested recording accessible or notify the person making such request of its determination not to make the requested recording or any part thereof accessible and the reasons therefor.

(B) A request for a body-worn camera recording may only be submitted to the Metropolitan Police Department.

(d)(1) In unusual circumstances, the time limits prescribed in subsection (c)(1) and (c)(2) of this section may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination. Such extension shall not exceed 10 days (except Saturdays, Sundays, and legal public holidays) for records requested under subsection (c)(1)

of this section and 15 days (except Saturdays, Sundays, and legal public holidays) for records requested under subsection (c)(2) of this section.

(2) For the purposes of this subsection, and only to the extent necessary for processing of the particular request, "unusual circumstances" are limited to:

(A) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;

(B) The need for consultation, which shall be conducted with all practicable speed, with another public body having a substantial interest in the determination of the request or among 2 or more components of a public body having substantial subject-matter interest therein; or

(C) For body-worn camera recordings covered by subsection (c)(2) of this section, the inability to procure a vendor that is able to perform the redactions within the 25-day time period provided under subsection (c)(2) of this section.

(e) Any failure on the part of a public body to comply with a request under subsection (a) of this section 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, unless such person chooses to petition the Mayor pursuant to § 2-537 to review the deemed denial of the request.

(f) For purposes of this section, the term:

(1) "Reasonable efforts" means that a public body shall not be required to expend more than 8 hours of personnel time to reprogram or reformat records.

(1A) "Request" means a single demand for any number of documents made at one time to an individual public body.

(2) "Search" means to review manually or by automated means, public records for the purpose of locating those records which are responsive to a request.

* * *

D.C. Code § 2-534. Exemptions from disclosure.

(a) The following matters may be exempt from disclosure under the provisions of this subchapter:

(1) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;

(2) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(2A) Any body-worn camera recordings recorded by the Metropolitan Police Department:

(A) Inside a personal residence; or

(B) Related to an incident involving domestic violence as defined in § 4-551(1), stalking as defined in § 22-3133, or sexual assault as defined in § 23-1907(a)(7).

(3) Investigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

(ii) Council investigations; or

(iii) Office of Police Complaints ongoing investigations;

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government; or

(F) Endanger the life or physical safety of law-enforcement personnel;

(4) Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.

(5) Test questions and answers to be used in future license, employment, or academic examinations, but not previously administered examinations or answers to questions thereon;

(6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(7) Information specifically authorized by federal law under criteria established by a presidential executive order to be kept secret in the interest of national defense or foreign policy which is in fact properly classified pursuant to such executive order;

(8) Information exempted from disclosure by § 28-4505;

(9) Information disclosed pursuant to § 5-417;

(10) Any specific response plan, including any District of Columbia response plan, as that term is defined in § 7-2301(1), and any specific vulnerability assessment, either of which is intended to prevent or to mitigate an act of terrorism, as that term is defined in § 22-3152(1);

(11) Information exempt from disclosure by § 47-2851.06;

(12) Information, the disclosure of which would reveal the name of an employee providing information under subchapter XV-A of Chapter 6 of Title 1 and subchapter XII of Chapter 2 of this title, unless the name of the employee is already known to the public;

(13) Information exempt from disclosure by § 7-2271.04;

(14) Information that is ordered sealed and restricted from public access pursuant to Chapter 8 of Title 16;

(15) Any critical infrastructure information or plans that contain critical infrastructure information for the critical infrastructures of companies that are regulated by the Public Service Commission of the District of Columbia;

(16) Information exempt from disclosure pursuant to § 38-2615;

(17) Information exempt from disclosure pursuant to § 50-301.29a(13)(C)(i);

(18) Information exempt from disclosure pursuant to § 24-481.07(a);

(19) Information exempt from disclosure under subchapter XIV of Chapter 1A of Title 41; and

(20) Information withheld from disclosure under § 10-551.07e(e)(2).

(a-1)(1) The Council may assert, on behalf of any public body from which it obtains records or information, any exemption listed in subsection (a) of this section that could be asserted by the public body pertaining to the records or information.

(2) Disclosure of any public record, document, or information from a District of Columbia government agency, official, or employee to the following persons or entities shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the District of Columbia to prevent disclosure to the general public or in a judicial or administrative proceeding:

(A) The Council;

(B) A Council committee;

(C) A member of the Council acting in an official capacity;

(D) The District of Columbia Auditor;

(E) An employee of the Office of the District of Columbia Auditor; or

(F) The Ombudsperson for Children or an employee of the Office of the Ombudsperson for Children.

(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent

of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from the Council of the District of Columbia. This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.

(c-1) Notwithstanding any other provision of law, no document or information described in § 2-536(a)(6A) that was created on or after December 7, 2004, shall be exempt from disclosure pursuant to subsections (a)(4) and (e) of this section.

(d)[(1)] The provisions of this subchapter shall not apply to vital records covered by Chapter 2 of Title 7 or Chapter 2A of Title 7.

[(2)] The provisions of this subchapter shall not apply to:

(A) The Violence Fatality Review Committee, established by § 5-1403.01;

(B) The Child Fatality Review Committee, established by § 4-1371.03;

(C) The Maternal Mortality Review Committee, established by § 7-761.02; and

(D) The Domestic Violence Fatality Review Board, established by § 16-1052.

<Text of subsec. (d-1) applicable upon the date of inclusion of the fiscal effect of D.C. Law 24-345 in an approved budget and financial plan>

(d-1)(1) Notwithstanding any provision of this subchapter, a request under this subchapter for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy for officers within the Metropolitan Police Department (“MPD”), the District of Columbia Housing Authority Police Department (“HAPD”), or the

Office of the Inspector General ("OIG"), except as described in paragraph (3) of this subsection.

(2) For the purposes of this subsection, the term "disciplinary records" means any record created in furtherance of a disciplinary proceeding for, or an Office of Police Complaints ("OPC") investigation of, an MPD, HAPD, or OIG officer, regardless of whether the matter was fully adjudicated or resulted in policy training, including:

(A) The name of the officer complained of, investigated, or charged;

(B) The complaints, allegations, and charges against the officer;

(C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at the trial or hearing;

(D) The disposition of any disciplinary proceeding;

(E) The final written opinion or memorandum supporting the disposition and any discipline imposed, including the MPD's, HAPD's, or OIG's complete factual findings and its analysis of the conduct and appropriate discipline of the officer; and

(F) Any other record or document created by OPC, MPD, HAPD, or OIG in anticipation of, or in preparation for, any disciplinary proceeding.

(3) When providing records or information related to disciplinary records, the responding public body may redact:

(A) With respect to the officer or the complainant, records or information related to:

(i) Technical infractions solely pertaining to the enforcement of administrative departmental rules that do not involve interactions with members of the public and are not otherwise connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities;

(ii) Their medical history, except in cases where the medical history is a material issue in the basis of the complaint; and

(iii) Their use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy, unless such

use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection; and

(B) With respect to any person:

(i) Personal contact information, including home addresses, telephone numbers, and email addresses;

(ii) Any social security numbers;

(iii) Any records or information that preserves the anonymity of whistleblowers, complainants, victims, and witnesses; and

(iv) Any other records or information otherwise exempt from disclosure under this section other than subsection (a)(2) of this section.

<Text of subsec. (d-2) applicable upon the date of inclusion of the fiscal effect of D.C. Law 24-345 in an approved budget and financial plan>

(d-2) Notwithstanding any other provision of law, agencies shall not categorically treat law enforcement disciplinary records as falling within any exemption listed in this section.

(e) All exemptions available under this section shall apply to the Council as well as agencies of the District government. The deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege are incorporated under the inter-agency memoranda exemption listed in subsection (a)(4) of this section, and these privileges, among other privileges that may be found by the court, shall extend to any public body that is subject to this subchapter.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Opening Brief was sent via this Court's e-filing system, on November 20, 2023, to all counsel of record.

/s/ Chad R. Bowman
Chad R. Bowman (#484150)

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Chad R. Bowman
Signature

23-CV-488
Case Number(s)

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