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 Reply Brief

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PRELIMINARY STATEMENT

In this Freedom of Information Act ("FOIA") case, Plaintiff-Appellant WP Company LLC d/b/a The Washington Post challenged Defendant-Appellee the District of Columbia over its inadequate responses to a series of FOIA requests aimed at furthering the public's understanding of the January 6, 2021 Capitol riot, "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). As the Post explained in its opening brief ("Post Br."), the District violated FOIA in three ways. **First**, it improperly withheld 911 call recordings related to the riot under FOIA's law enforcement exemption. Post Br. at 17-20. **Second**, it erroneously withheld the entirety of an autopsy report of Capitol Police Officer Brian Sicknick, who died the day after the riot, under FOIA's personal privacy exemption. *Id.* at 20-24. **Third**, it insufficiently justified its efforts to search for any WhatsApp messages that District Mayor Muriel Bowser had sent shortly before, during, and after the riot. *Id.* at 25-28. The Post further showed that the Superior Court erred in granting summary judgment for the District as to these responses. *See generally id.*

The District's brief ("D.C. Br.") fails to answer the Post's arguments. As to the 911 calls, the District principally claims that it can withhold *all* of those recordings under the law enforcement exemption because, according to the District, the hundreds of criminal proceedings that have arisen from the riot – even

prosecutions that have concluded by way of plea or conviction – are part of one "*single* investigation" that remains in progress, potentially forever. *See* D.C. Br. at 24-25. That novel interpretation defies precedent, which states that the government cannot withhold records under the law enforcement exemption unless those records relate to a "*concrete* prospective law enforcement proceeding," *Juarez v. DOJ*, 518 F.3d 54, 59 (D.C. Cir. 2008) (emphasis added). Consistent with FOIA, this Court should hold that the District's categorical withholding of all 911 calls is improper and that the District must release all recordings that relate solely to *closed* Capitol riot investigations or prosecutions.

As to the autopsy report, the District principally argues that a 2023 amendment to the statute governing the Office of the Chief Medical Examiner ("OCME") – *i.e.*, an amendment enacted years after the Post submitted its FOIA request – strips the public of any right to obtain a copy of this important document, even a copy with all photographs redacted. The District has not justified the retroactive application of this statute in these circumstances. Indeed, its application here would be perverse given that the Council expressly cited the autopsy report of Officer Sicknick as an example of how "public access to external examination or autopsy reports" may be "needed to provide the public with the necessary context and information." *See* D.C. Council, Committee Report on Bill 24-0203 ("Comm. Report"), at 5 (Nov. 3, 2022), https://lims.dccouncil.gov/

downloads/LIMS/46929/Committee_Report/B24-0203-Committee_Report1.pdf. The District also errs in inflating the privacy interest in the report, which is modest once photographs are redacted, and in minimizing the public interest in the report, which is massive given the contradictory statements that OCME and the Capitol Police made regarding the effect of the riot, if any, on Officer Sicknick's death.

As to Mayor Bowser's WhatsApp messages, the District still has not shown that it conducted an adequate search for responsive records – nor could it possibly do so after having prevented the Post from obtaining firsthand testimony from the only person who conducted that search: the Mayor herself. Though the District claims that all of the "question[s] posed by the Post" regarding the search have "been answered," *see* D.C. Br. at 46, those "answers" are facially deficient. The District has simply failed to carry its burden as to demonstrating search adequacy, and the Superior Court erred in concluding otherwise.

For each of these reasons and those set forth in the Post's initial brief, the Court should reverse the Superior Court's Omnibus Order as to Counts I, II, and VI of the Post's Complaint.

ARGUMENT

I. THE DISTRICT STILL HAS NOT JUSTIFIED CATEGORICALLY WITHHOLDING ALL OF THE 911 CALL RECORDINGS

In its opening brief, the Post did not dispute the obvious: 911 calls that the District received on January 6, 2021 are law enforcement records for purposes of

FOIA, and it is conceivable that releasing a particular 911 recording from that day could interfere with a particular ongoing or prospective Capitol riot investigation or prosecution. Post Br. at 17. The Post's position is thus rather modest: while the District may be able to justify withholding *some* of the 911 calls under FOIA's law enforcement exemption, so long as those calls relate to specific, pending proceedings or "concrete" ones, the District cannot withhold *all* such 911 calls on a categorical basis because hundreds of those investigations and prosecutions have already closed, whether through guilty pleas or convictions. *Id.* at 17-18. The Post merely asks, therefore, that this Court direct the District to release all those call recordings that relate solely to *closed* Capitol riot investigations or those with no concrete, non-speculative prospect of leading to a prosecution. *Id.* at 19-20.

The District responds to this common sense argument with a novel and sweeping interpretation of the law enforcement exemption that would, if accepted, swallow the rule that "FOIA favors disclosure, not concealment." *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 586 (D.C. Cir. 2020). According to the District, even if a 911 call "explicitly identif[ied] one suspect and report[ed] only the criminal acts of that person," and even if that person had already pleaded guilty or been tried and convicted and exhausted all appeals, the District *still* could withhold that record because it *might* someday "be relevant to charges against others." *See* D.C. Br. at 26. In other words, the District posits that there is but "a *single*

investigation" into the Capitol riot, *id.* at 24, and *any* record that relates to *any* piece of that investigation can be withheld from the public until the *entire* "single investigation" is completed. When that will be is impossible to say, of course, including because several riot defendants are fugitives (one was granted asylum in Belarus, which has no extradition treaty with the United States),[1] and "[n]o statute of limitations shall extend to any person fleeing from justice." 18 U.S.C. § 3290.

The District's position, if adopted, would thus amount to an unprecedented expansion of the law enforcement exemption's scope, because the District could make the same argument to withhold other records theoretically related to other sprawling but ostensibly "single" investigations – say, into government corruption, or organized crime, or gun violence, or the opioid crisis. Public access to these records would dry up and transparency and public oversight would suffer.

Fortunately for the public, however, precedent squarely rejects the District's position. The law enforcement exemption "cannot justify withholding material unless it relates to a '*concrete* prospective law enforcement proceeding.'" *Juarez*, 518 F.3d at 59 (emphasis added) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978)). The D.C. Circuit's decision in *CREW v. DOJ*, 746 F.3d 1082 (D.C. Cir. 2014) (cited at D.C. Br. 21-23, 27), illustrates why the

[1] *See, e.g.*, *Evan Neumann*, FBI, https://www.fbi.gov/wanted/additional/evan-neumann; *Evan Neumann: US Capitol riot suspect gets asylum in Belarus*, BBC (Mar. 23, 2022), https://www.bbc.com/news/world-us-canada-60843262.

supposed "single investigation" into the Capitol riot fails this concreteness requirement. There, the FBI "opened a wide-ranging public corruption investigation into the activities of former lobbyist Jack Abramoff," which "yielded 21 guilty pleas or convictions by jury," including two convictions of former senior aides to Rep. Tom DeLay. *Id.* at 1087. After DeLay announced that he had learned the FBI was not going to charge him personally, CREW sought records of the FBI's investigation into DeLay, and the FBI categorically withheld the records under FOIA's law enforcement exemption. *Id.* The district court granted summary judgment for the government and permitted the categorical withholding based in part on the government's claim that the DeLay investigation was only one part of a "continuing large public corruption investigation." *Id.* at 1097-98. The D.C. Circuit reversed, however, explaining that it was *not* enough for the government to assert that "there was a wide-ranging . . . investigation pending and that the release of the requested records could disclose to individuals under investigation the identities of potential witnesses, the content of the government's evidence and trial strategy and the focus of the investigation," because the government needed to demonstrate how records "primarily about" an individual no longer under investigation "would disclose anything relevant to the investigation of [other] individuals." *Id.* at 1099. That is, the government "must clarify" with specificity "*how* disclosure of documents relating to [one defendant] would

interfere with" the supposedly ongoing investigation into others. *Id.* (emphasis added).

As the D.C. Circuit recognized, rejecting the government's categorical withholding does not necessarily mean "hold[ing] that the requested information is not exempt." *Id.* Rather, if the government can show with "specific information" *how* release of a *particular* document would interfere with a *concrete* prospective or continuing investigation, then the government can withhold that record under the law enforcement exemption. *Id.* So too here: if the District can show with specific information that a particular 911 recording would interfere with a concrete prospective or ongoing riot investigation, then the District can properly withhold *that particular* recording. But the District cannot properly withhold *all* 911 call recordings, and the Superior Court erred in concluding otherwise.

CREW also forecloses the District's argument that an investigation or prosecution that was prospective or ongoing at the time of summary judgment must be treated the same on appeal for the purposes of the law enforcement exemption – even if that investigation or prosecution has actually concluded by the time this Court renders its ruling. Specifically, in *CREW* the government argued that it could continue to withhold records related to three particular sentencing hearings that had not yet been held at the time of summary judgment, and the D.C. Circuit squarely rejected that argument, because the law enforcement exemption

"is temporal in nature" and thus "[t]he proceeding must remain pending at the time of [the appellate court's] decision, not only at the time of the initial FOIA request." *Id.* at 1097. The District attempts to brush off that settled FOIA principle as mere "dictum," *see* D.C. Br. at 27, but DOJ has correctly characterized that rule as what the Court "held" in *CREW*. *See DOJ Guide to FOIA: Exemption 7(A)* at 25-26, https://www.justice.gov/oip/page/file/1485791/dl. The District also claims that the rule unwisely requires an appeals court "to accept new evidence and make factual findings on appeal." D.C. Br. at 27. But this Court need not review any evidence or make factual findings to assess whether a prosecution has concluded – it can just take judicial notice of the records of that proceeding, which this Court is willing and able to do. *See, e.g.*, *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) ("[W]e may take judicial notice of [court] proceedings and orders.").

In seeking to withhold all 911 call recordings categorically, the District asks this Court not only to accept a novel and maximalist interpretation of the law enforcement exemption – one that flips the normal presumption in favor of disclosure on its head – but also to ignore multiple published rulings of the D.C. Circuit speaking directly to the issues on appeal. The Court should reject the District's arguments, hold that the Superior Court erred in permitting the District to categorically and perpetually withhold the requested 911 calls, and direct the District to conduct an individualized assessment of those calls, releasing those

recordings that relate solely to investigations that are closed at the time this Court will have issued its ruling.

II. THE DISTRICT STILL HAS NOT JUSTIFIED WITHHOLDING OFFICER SICKNICK'S ENTIRE AUTOPSY REPORT

The Superior Court further erred in permitting the District to withhold Officer Sicknick's autopsy report in full under FOIA's privacy exemption, because once photographs are redacted, the powerful public interest in the rest of the report clearly outweighs the privacy interest in the remaining information. *See* Post Br. at 20-24. The District's main response, *see* D.C. Br. at 28-30, is that this Court does not even need to evaluate the reasoning below because an amendment to the OCME statute, which became effective in 2023, ostensibly overrides the balancing test altogether and permits the District to withhold the autopsy report, which the Post requested two years earlier, *see* JA 26. In making this argument, however, the District misreads precedent and ignores the legislative history of the OCME amendment, which *supports* disclosure of this particular autopsy report. The District also maintains that the withholding is proper under the current privacy exemption, but in making that argument the District misreads precedent yet again.

A. The OCME Amendment Should Not Apply Retroactively.

As the District notes, courts generally agree that when the legislature adds or amends a FOIA exemption, that exemption applies not only to future FOIA requests, but also to FOIA requests that are still in administrative processing or

litigation at the time of the legislative enactment. D.C. Br. at 29-30. These courts have reasoned that applying a new or revised *exemption* to a pending request has "no impermissible retroactive effect" because "the relevant event for assessing retroactivity" is "the disclosure of the withheld data, which is a potential future event, not a past, completed event." *City of Chicago v. Dep't of Treasury*, 423 F.3d 777, 783 (7th Cir. 2005) (cited at D.C. Br. at 29-30). Following this line of argument, courts have applied new statutes authorizing expanded withholdings under Exemption 3 to pending requests, *see id.*; *Ctr. for Biological Diversity v. USDA*, 626 F.3d 1113, 1117 (9th Cir. 2010), and this Court has accordingly recognized the general rule that "[n]ew FOIA exemptions have been held applicable to pending cases," *Kane v. D.C.*, 180 A.3d 1073, 1083 n.43 (D.C. 2018).

The problem with the District's argument is that the OCME amendment neither creates a new FOIA exemption nor expands the scope of an existing FOIA exemption. That is to say, the amendment does not *exempt* autopsy reports from FOIA. Instead, the amendment provides that the lion's share of an autopsy report is no longer a "public record" even subject to FOIA in the first place. *Compare* D.C. Code § 2-532(a) (FOIA generally provides "a right to inspect, and . . . to copy any public record of a public body"), *with* D.C. Code § 5-1412(c-1)(1) (an "autopsy report of a decedent in the CME's records and files . . . [s]hall be a public record under [FOIA] only as to [10 enumerated categories of] information").

That distinction makes a difference. The logic behind applying new or amended exemptions to FOIA requests in progress is that doing so does not "impair rights" that the requestor "possessed when he acted" in making the requests, as a requestor ostensibly has no right to the scope of a FOIA exemption remaining static. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *Kane*, 180 A.3d at 1083. But under District law, the Post without doubt *did* have "a right . . . to copy any public record" at the time it made the request for Officer Sicknick's autopsy report, D.C. Code § 2-532(a), and that report was without doubt a public record subject to FOIA at the time of the request. By removing autopsy reports from the universe of "public records," therefore, the OCME amendment impairs a right of access that the Post possessed when it requested the autopsy report in the first place. That would make its application here retroactive, and this Court "recognize[s] a presumption against retroactivity." *MPD v. Pub. Emp. Rels. Bd.*, 301 A.3d 714, 721 (D.C. 2023) (citing *Landgraf*, 511 U.S. at 270).

That leads to the next problem with the District's argument: under the presumption against retroactivity, a retroactive law "does not govern absent clear [legislative] intent favoring such a result." *Landgraf*, 511 U.S. at 280. Here, the legislative history shows that the Council never intended to limit public access to Officer Sicknick's autopsy report. To the contrary:

> As the events of January 6, 2021 at the U.S. Capitol demonstrated, *public access to external examination or*

> *autopsy reports are needed to provide the public with the necessary context and information*. For example, initial reporting into the death of U.S. Capitol Police Officer Brian Sicknick stated that Mr. Sicknick died a day after sustaining injuries during the riot. The autopsy performed on Mr. Sicknick by OCME later revealed that he died of natural causes the day after engaging with rioters.

Comm. Report at 5-6 (emphasis added and footnotes omitted). The legislative history thus refutes the notion that the Council *intended* for the OCME amendment to apply retroactively, and absent "clear" evidence to the contrary, the presumption against retroactivity applies and the OCME amendment should not be given retroactive effect here.[2]

B. The Public Interest in Officer Sicknick's Autopsy Report Outweighs Any Privacy Interest Once Photographs Are Redacted.

Absent the OCME amendment, the District's sole argument for withholding the autopsy report is that the privacy interest in the report outweighs the public interest. D.C. Br. at 31-42. That argument is wrong on the facts and the law, and the Superior Court erred in accepting it below. *See* JA 217-18.

1. The District has not identified a cognizable privacy interest in portions of the autopsy report other than photographs.

On the privacy interest side of the balancing test, the District continues to misinterpret the Supreme Court's ruling in *Favish*, citing it for the proposition that

[2] The District cites this Report a half-dozen times in its brief, but never mentions that it *specifically* identifies Officer Sicknick's autopsy report as an example of such a report whose release would benefit the public.

surviving family members have "a well-settled privacy interest" in the "autopsy report" of their deceased relatives. D.C. Br. at 32. In truth, *Favish* held only that "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's *death-scene images*," not to autopsy reports more generally. *NARA v. Favish*, 541 U.S. 157, 170 (2004) (emphasis added); *see also, e.g.*, *Mobley v. CIA*, 924 F. Supp. 2d 24, 70 (D.D.C. 2013) ("[T]he Supreme Court's holding in that case was limited to surviving family members' right to personal privacy with respect to their close relative's death-scene images.") (cleaned up). The District similarly errs in claiming that "*Favish* quoted caselaw finding 'a protectable privacy interest in the *autopsy records* of the deceased,'" D.C. Br. at 33 (District's emphasis), selectively quoting from the Supreme Court of Washington's ruling in *Reid v. Pierce County*, 136 Wash. 2d 195, 209 (1998). There, too, the Washington court addressed the familial privacy interest solely in "photographs" of the deceased. *Id.* at 197; *see also id.* at 207 (noting that "the actions here involved photographs only"). *Favish* thus does not even imply that the familial privacy interest in autopsy reports extends beyond photographs of the deceased, and the Post *expressly asks* that such photographs be redacted here.

Perhaps recognizing that *Favish* does not bear the weight that it wishes to place on it, the District offers a different, novel argument as well: that "Officer Sicknick *himself* also maintains a continued privacy interest in the contents of his

autopsy report." D.C. Br. at 37 (emphasis added). But the District never made such an argument in Superior Court, and "[i]t is fundamental that arguments not raised in the trial court are not usually considered on appeal." *Thornton v. Norwest Bank of Minnesota*, 860 A.2d 838, 842 (D.C. 2004). The District offers no basis to depart from that general rule against considering newly raised issues here, and thus the District identifies no cognizable privacy interest in the portions of the autopsy report other than photographs, which the Post concedes are properly redacted.

2. With photographs redacted, the public interest in Officer Sicknick's autopsy report outweighs any privacy interest.

The District does not dispute that 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." *D.C. v. FOP*, 75 A.3d 259, 266 (D.C. 2013) (citation omitted). The District claims that releasing the autopsy report would not advance that interest, *see* D.C. Br. at 38-42, but in doing so the District offers a series of arguments bordering on the absurd.

First, the District argues that "Officer Sicknick was assaulted by private citizens, not government actors," which somehow means that "the public does not have a FOIA-protected interest in learning whether his assailants caused his death." *Id.* at 39. Quite the contrary: the District's Chief Medical Examiner declared that Officer Sicknick died of natural causes, so if the autopsy report were

to demonstrate that "his assailants caused his death," that would without question shed light on how well the OCME performed its statutory duties in this instance.

Second, the District claims that "the Post does not seek to expose any governmental act or omission that made Officer Sicknick particularly vulnerable to assault that day," drawing a comparison to the FOIA request in *Charles* that sought to "'investigat[e] the effectiveness of the body armor that the United States military issues to its troops.'" *Id.* (quoting *Charles v. Off. of the Armed Forces Med. Exam'r*, 935 F. Supp. 2d 86 (D.D.C. 2013)). But if the autopsy report were to show that the chemical spray with which rioters attacked Officer Sicknick had any connection to his subsequent collapse and death, then that would indeed shed light on whether the riot gear issued to Capitol Police is sufficiently protective.

Third, the District disputes that the report will help 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," by asserting that "[t]here is no meaningful conflict between these statements." *Id.* at 40. The District cites no authority for that argument, nor could it, because the OCME itself explains that a finding of death by natural causes means that "disease alone cause[d] death," which is to say that "[i]f death is hastened by an injury, the manner of death is *not* considered natural." *See 2020 Annual Report*, OCME, at 68, *available at* https://ocme.dc.gov/page/ocme-annual-

reports-00 (emphasis added).[3] The public thus has a *powerful* interest in understanding how OCME could have concluded that Officer Sicknick's death was not hastened by injury (which it *must* have concluded to find a natural cause of death) at the same time that the Chief Medical Examiner was telling the press that the events of January 6 "played a role" in his death.

The Post recognizes and respects the privacy interests of Officer Sicknick and his survivors, and it has repeatedly made clear that it is not seeking the potentially upsetting, graphic photos that were at issue in past cases like *Favish*. But the remainder of the report is of undeniable public interest, because without it, the public is being asked to accept the OCME's findings without having any meaningful way of evaluating them. That public interest in the report's release clearly outweighs the privacy interest, if any, in a properly redacted version. This Court should therefore reverse the ruling below and direct the District to promptly produce a redacted copy of Officer Sicknick's autopsy report.

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

The District concedes that it bears the burden of demonstrating that its search for Mayor Bowser's WhatsApp messages was adequate, and that carrying

[3] The 2020 Annual Report is the most recent such OCME report published on the District's website.

this burden requires the District 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* Post Br. at 25 (quoting *Doe v. MPD*, 948 A.2d 1210, 1220 (D.C. 2008)); D.C. Br. at 42-43 (same). The Post has shown that the District failed to carry that burden by refusing to provide any details about the search – whether by affidavit or deposition testimony. The District responds that all of the "question[s] posed by the Post" regarding the search have "been answered," *see* D.C. Br. at 46, but those "answers" serve only to demonstrate that the District acted improperly in blocking a deposition of the person who actually conducted the search: Mayor Bowser.

First, the District claims that "it has provided sworn evidence proving that it conducted an adequate search," *id.* at 43, but that "sworn evidence" comes from individuals who cannot, and did not, speak to how the search was conducted. Specifically, the District cites the testimony of Associate General Counsel Christina Sacco, who was asked at her deposition, "[C]an you tell me how Mayor Bowser searched for WhatsApp messages responsive to The Post request?" and who answered, "No, I -- I lack that knowledge for this particular request." JA 140-41. The District also cites the interrogatory responses verified by General Counsel Betsy Cavendish, which stated that "The Mayor conducted the search of her phone for WhatsApp messages sent during the time period specified, and no other

individuals assisted her," and that Mayor Bowser "informed General Counsel Cavendish that her search of her WhatsApp account yielded no responsive records." JA 84. This "sworn evidence" conspicuously lacks *any* details about the "methods" by which the Mayor actually conducted that search – information that the Mayor herself could and should have provided.

Second, the District's "answers" only raise more questions. The Post has asked whether Mayor Bowser "searched for messages only on her mobile phone or also on other devices that could have been 'linked' to her WhatsApp account," Post Br. at 26 & n.12, and the District responded that "Mayor Bowser's WhatsApp messages are stored on her WhatsApp account on her phone," D.C. Br. at 46 (quoting JA 86). That response does not answer the question posed: the District did not state that the Mayor's messages are stored *only* on her phone, or that the Mayor *does not have* multiple devices linked to her account.[4] Yet an answer to the question, which explores if responsive records could have been found on more than one device, is necessary to assess the search's adequacy because the District must show that "all files likely to contain responsive materials (if such records exist) were searched." *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

[4] The District now asserts in briefing that the Mayor's "WhatsApp account was never linked to her computer or any other device, so there was no need to search additional devices for responsive records." D.C. Br. at 47. In doing so, the District cites only JA 84, which contains no information about whether the Mayor's WhatsApp account was linked to more than one electronic device.

Similarly, the Post asked "where and how data on Mayor Bowser's mobile phone(s), including WhatsApp messaging data, has been archived, backed up, or otherwise stored," and the District answered only that "*the District* does not maintain a back-up system for archiving such messages." JA 86 (emphasis added). A responsive answer, which the Mayor could have provided, would have stated whether the Mayor maintains any backups of her phone data. The Post thus could have elicited more information about where responsive records might have been located through questioning at a deposition, but it was precluded from doing so. And as a result, the District failed to show that its search for the Mayor's messages "was reasonably calculated to uncover all relevant documents" because the District has not averred (nor could it without more information from the Mayor) "that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68.

Third, the District's "answers" create and attack straw-men arguments that the Post never made. For one, according to the District "the Post suggests that the District's search was unreasonable because it was conducted by Mayor Bowser herself" and the District thus chides the Post for "offer[ing] no authority, or even reasoned argument, suggesting that an official cannot reasonably search her *own* device." D.C. Br. at 48. But that is not the Post's argument. Instead, the Post maintains that when the District chose to task the Mayor with searching her own

device, that choice had consequences, including that it made the Mayor the most (if not the only) knowledgeable witness to how that search was conducted. The Post's actual argument, therefore, is merely that the District cannot fairly have the Mayor search for her own messages but then both fail to provide details and block *any* questioning of the Mayor as to how she conducted that search.

Likewise, the District suggests that the Post "forfeited" this argument by not appealing the order below precluding the Mayor's deposition. D.C. Br. at 48. But that misapprehends which party bears the burden of persuasion. The District's failure to make the Mayor available for a deposition or to produce an affidavit from the Mayor means that the District failed to carry *its* 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*, 948 A.2d at 1220 (quoting *Oglesby*, 920 F.2d at 68).

Because the District has not shown 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 into this search process.

CONCLUSION

For the foregoing reasons and those set out in the Post's opening brief, 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: June 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was sent via this Court's e-filing system, on June 10, 2024, 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 (amended April 17, 2024), this certificate must be filed in all cases with all briefs and motions 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. This form only needs to be filed once and should be filed under "Redaction Certification Form" on Ctrack.

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I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended April 17, 2024, and Super. Ct. Civ. R. 5.2, and I will remove the following information from any subsequent briefs and motions filed in this case:

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.

Initial here

7. **I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact any filings. This form will be independently filed as record of this notice and the filing will be unavailable for viewing through online public access**

/s/ Chad R. Bowman
Signature

23-CV-488
Case Number(s)

Chad R. Bowman
Name

June 10, 2024
Date

bowmanchad@ballardspahr.com
Email Address