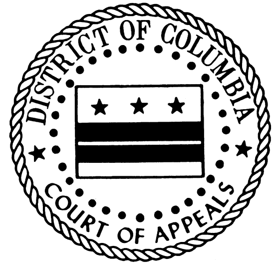

Clerk of the Court
Received 04/29/2024 03:49 PM
Filed 05/01/2024 02:06 PM

No. 23-CV-488

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

THE POST COMPANY LLC,
APPELLANT,

v.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

CARL S. SCHIFFERLE
Deputy Solicitor General

*HOLLY M. JOHNSON
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
holly.johnson@dc.gov

*Counsel expected to argue

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

1. Statutory Overview 3

2. On January 6, 2021, Rioters Violently Breach The U.S. Capitol, Spawning A Criminal Investigation That Continues To This Day 5

   A. As police discover illegal firearms and incendiary devices nearby, a militarized group of extremists joins with rioters to besiege and breach the U.S. Capitol 5

   B. Federal law-enforcement agencies begin a sweeping investigation that has led to hundreds of prosecutions and continues to this day 8

3. The Post Submits Several FOIA Requests To The District 9

   A. The District withholds protest- and riot-related 911 call recordings under the investigatory-records exemption 9

   B. The District withholds Officer Sicknick's autopsy report under FOIA's personal-privacy exemption 11

   C. The District advises the Post that it has no records responsive to the Post's request for WhatsApp messages sent by Mayor Bowser 12

4. After The Post Brings Suit, The Superior Court Grants Limited Discovery Regarding The Adequacy Of The District's Search For The Requested WhatsApp Messages 12

5. The Superior Court Bars The Post From Taking Mayor Bowser's Deposition 15

6. The Superior Court Enters Summary Judgment In Favor Of The District 16

STANDARD OF REVIEW 18

SUMMARY OF ARGUMENT 18

ARGUMENT 21

I. The 911 Call Records Are Investigatory Records That Remain Exempt From Disclosure Because Their Release Would Interfere With An Ongoing Criminal Investigation And Prosecutions 21

II. Officer Sicknick's Autopsy Report Is Not A "Public Record" Subject To Disclosure Under FOIA And, In Any Event, Was Properly Withheld Under The Personal-Privacy Exemption 28

A. The Council has removed autopsy reports from the scope of documents subject to FOIA disclosure 28

B. Alternatively, the release of the autopsy report would be a clearly unwarranted invasion of the privacy interests of Officer Sicknick and his family 31

1. Officer Sicknick's family has a strong personal privacy interest in his autopsy report 31

2. Officer Sicknick also has a posthumous interest in maintaining the confidentiality of his autopsy report 37

3. The Post has not proffered any public interest in Officer Sicknick's autopsy report, much less one that outweighs these strong privacy interests 38

III. The District Conducted An Adequate Search For WhatsApp Messages Sent By Mayor Bowser 42

CONCLUSION 50

TABLE OF AUTHORITIES*

Cases

**Accuracy in Media v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999) 37, 41

Arieff v. U.S. Dep't of Navy, 712 F.2d 1462 (D.C. Cir. 1983) 34

August v. FBI, 328 F.3d 697 (D.C. Cir. 2003)...27, 42

Bevis v. U.S. Dep't of State, 801 F.2d 1386 (D.C. Cir. 1986) 23

Campbell v. U.S. Dep't of Just., 164 F.3d 20 (D.C. Cir. 1998)..............................37

Charles v. Off. of the Armed Forces Med. Exam'r,
935 F. Supp. 2d 86 (D.D.C. 2013)..34, 39

Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.,
746 F.3d 1082 (D.C. Cir. 2014)..22, 23, 27

City of Chicago v. U.S. Dep't of the Treasury,
423 F.3d 777 (7th Cir. 2005) 29, 30

Ctr. for Biological Diversity v. U.S. Dep't of Agric.,
626 F.3d 1113 (9th Cir. 2010) 30

District of Columbia v. Fraternal Ord. of Police, 33 A.3d 332 (D.C. 2011)..........42

**District of Columbia v. Fraternal Ord. of Police*,
75 A.3d 259 (D.C. 2013) 5, 18, 31, 38, 39, 40

Doe v. D.C. Metro. Police Dep't, 948 A.2d 1210 (D.C. 2008)........................22, 43

Dunn v. Evening Star Newspaper Co., 232 A.2d 293 (D.C. 1967)........................49

Durrani v. U.S. Dep't of Just., 607 F. Supp. 2d 770 (D.D.C. 2009) 22

Eil v. DEA, 878 F.3d 392 (1st Cir. 2017)..34

---

* Authorities upon which we chiefly rely are marked with asterisks.

FLRA v. U.S. Dep't of Veterans Affs., 958 F.2d 503 (2d Cir. 1992) 31

**Fraternal Ord. of Police v. District of Columbia*,
79 A.3d 347 (D.C. 2013) 4, 22, 43, 45, 48, 49

**Fraternal Ord. of Police v. District of Columbia*,
82 A.3d 803 (D.C. 2014) 3, 4, 21, 22, 23, 25, 26

**Fraternal Ord. of Police v. District of Columbia*,
124 A.3d 69 (D.C. 2015) 17, 38

In re Cheney, 544 F.3d 311 (D.C. Cir. 2008) 49

Juarez v. U.S. Dep't of Just., 518 F.3d 54 (D.C. Cir. 2008).........................4, 21, 26

Kane v. District of Columbia, 180 A.3d 1073 (D.C. 2018)....................................29

King v. U.S. Dep't of Just., 830 F.2d 210 (D.C. Cir. 1987)......................................4

Landgraf v. USI Film Prods., 511 U.S. 244 (1994)..29

Lykins v. U.S. Dep't of Just., 725 F.2d 1455 (D.C. Cir. 1984).................................4

Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993)...43

McFarland v. George Wash. Univ., 935 A.2d 337 (D.C. 2007) 24, 48

McKinley v. Fed. Deposit Ins. Corp., 756 F. Supp. 2d 105 (D.D.C. 2010) 3, 4

Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986) 43

Multi Ag Media LLC v. Dep't of Agric., 515 F.3d 1224 (D.C. Cir. 2008) 18

**Nat'l Archives & Records Admin. v. Favish*,
541 U.S. 157 (2004)..32, 33, 36, 37

Nat'l Ass'n of Retired Fed. Emps. v. Horner,
879 F.2d 873 (D.C. Cir. 1989)...32, 41

News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173 (11th Cir. 2007).......31

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).......................22, 23, 25

Padou v. District of Columbia, 29 A.3d 973 (D.C. 2011)....................5, 18, 31, 38

Plough Inc. v. Nat'l Acad. of Scis., 530 A.2d 1152 (D.C. 1987)............................49

Reibenstein v. Barax, 286 A.3d 222 (Pa. 2022)..40

Reid v. Pierce Cnty., 961 P.2d 333 (1998) 33

Riley v. Fenty, 7 A.3d 1014 (D.C. 2010) 4, 22, 38

Safecard Servs., Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991)...............................43

Simplex Time Recorder Co. v. Sec'y of Lab.,
766 F.2d 575 (D.C. Cir. 1985)..48, 49

Sussman v. U.S. Marshals Serv., 494 F.3d 1106 (D.C. Cir. 2007).........................27

Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric.,
314 F.3d 1060 (9th Cir. 2002) 29

United States v. Morgan, 313 U.S. 409 (1941) 49

United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024)..5

U.S. Dep't of Def. v. FLRA, 510 U.S. 487 (1994) 31, 38

U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press,
489 U.S. 749 (1989)..31

U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982)..................................32

Wash. Post Co. v. Minority Bus. Opportunity Comm'n,
560 A.2d 517 (D.C. 1989) 38

Statutes and Regulations

D.C. Code § 1-327.52 9

D.C. Code § 2-532 ....3, 28

D.C. Code § 2-534 .... 4, 10, 11, 21, 22, 31, 37, 38, 41, 42

D.C. Code § 2-537 22

D.C. Code § 3-1210.11 38

D.C. Code § 5-1405 ....28, 42

D.C. Code § 5-1412 ....5, 28, 34

D.C. Code § 7-231.24 37

Legislative History

D.C. Council, Report on Bill 24-0203 (Nov. 3, 2022) 28, 29, 32, 34, 37

Other

39 Months Since the Jan. 6 Attack on the Capitol, U.S. Att'y Off. for D.C., District of Columbia, https://tinyurl.com/44w3t24n 8, 9

Am. Med. Ass'n, Code of Medical Ethics, ch. 3, Opinion 3.2.2 (Confidentiality Postmortem), https://tinyurl.com/3hrty65w 38

Clay Calvert, *A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 Hastings Const. L.Q. 475 (2013) 36

Tom Jackman, *et al.*, *A Quarter of Americans Believe FBI Instigated January 6, a Post-UMD Poll Finds*, Wash. Post (Jan. 4, 2024), https://tinyurl.com/2skrnj7n 35, 36

Most Wanted: U.S. Capitol Violence, FBI, https://tinyurl.com/ycxf4xmt; *see $500,000 Reward Remains in Effect for Information About Capitol Hill Pipe Bomber*, FBI Wash. Field Off. (Jan. 4, 2024), https://tinyurl.com/u3p34u95 ....9, 25

OCME-FAQs, Off. of the Chief Med. Exam'r, https://ocme.dc.gov/page/ocme-faqs.meaning 40

Press Release, Off. of Pub. Affs., Dep't of Just., *Jury Convicts Four Leaders of the Proud Boys of Seditious Conspiracy Related to U.S. Capitol Breach* (May 4, 2023), https://tinyurl.com/mr49ubyz.......................................26

Melissa Quinn, *Family of Capitol Police Brian Sicknick, Top Democrats Lambaste Fox News & Tucker Carlson Over Jan. 6 Portrayal*, CBS News (Mar. 7, 2023), https://tinyurl.com/35vww42y 35, 36

Ryan J. Reilly, *2023 Was a Massive Year in the Jan. 6 Probe. 2024 Will Be Even Bigger*, NBC News (Jan. 6, 2024), https://tinyurl.com/43pxzuy3 24

Alanna Durkin Richer and Michael Kunzelman, *Hundreds of Convictions, But a Major Mystery Is Still Unsolved 3 Years After the Jan. 6 Capitol Riot* (Jan. 5, 2024), https://tinyurl.com/3da8hmc2 ....24, 25, 27

Phillip Rucker et al., *After: Contagion*, Wash. Post, (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm...8

Philip Rucker et al., *Before: Red Flags*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm...35

Philip Rucker et al., *During: Bloodshed*, Wash. Post, (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm...6, 7, 26

Joseph Uscinski, *Five Things To Know About "False Flag" Conspiracy Theories*, Wash. Post (Oct. 27, 2018), https://tinyurl.com/4tmcw9w7 ....

Cat Zakrzewski, *Election Workers Brace For a Torrent of Threats: 'I KNOW WHERE YOU SLEEP'*, Wash. Post (Nov. 8, 2022), https://tinyurl.com/mwtzbsu9 35

GLOSSARY OF ACRONYMS

DOJ	U.S. Department of Justice
EOM	Executive Office of the Mayor
FOIA	D.C. Freedom of Information Act
JA	Joint Appendix
MPD	D.C. Metropolitan Police Department
OCME	D.C. Office of the Chief Medical Examiner
OCTO	D.C. Office of the Chief Technology Officer
OUC	D.C. Office of Unified Communications
SA	Supplemental Appendix

STATEMENT OF THE ISSUES

On January 6, 2021, thousands of rioters seeking to disrupt Congress's certification of the 2020 presidential election besieged and breached the United States Capitol. The rioters assaulted U.S. Capitol Police Officer Brian Sicknick during the melee, and he died the next day. The events of January 6 spawned a nationwide criminal investigation that has led to the U.S. Attorney's Office filing criminal charges against over a thousand individuals. The investigation and prosecutions continue to this day.

The Washington Post ("the Post") requested records related to the Capitol breach from various District of Columbia agencies and Mayor Muriel Bowser under the D.C. Freedom of Information Act ("FOIA"). The District produced most of the documents but withheld recordings of 911 calls and Officer Sicknick's autopsy report. It also informed the Post that it had no records in response to the Post's request for messages sent by Mayor Bowser via WhatsApp Messenger.

The Post sued the District to compel release of these records. Following discovery, the Superior Court entered summary judgment in favor of the District. The Post's appeal raises three issues:

1. Whether the District properly withheld the 911 recordings under FOIA's investigatory-records exemption, where public release of those recordings would

interfere with the ongoing criminal investigation and pending and future prosecutions.

2. Whether the Post's request for Officer Sicknick's autopsy report has been mooted by a statutory amendment that removes autopsy records from the scope of FOIA, or, alternatively, whether the report was properly withheld under FOIA's personal-privacy exemption, where the Post has not articulated any public interest that could outweigh the strong privacy interests of Officer Sicknick and his family.

3. Whether the District adequately searched for WhatsApp messages sent by Mayor Bowser, where it provided undisputed evidence that Mayor Bowser used WhatsApp only on her cell phone and did not use WhatsApp's "disappearing messages" feature, and that her search of the WhatsApp message history on her phone revealed no messages responsive to the Post's request.

STATEMENT OF THE CASE

The Post brought this action in the Superior Court in June 2021, seeking release of the 911 recordings, Officer Sicknick's autopsy report, and emails and text messages sent by Mayor Bowser between January 5 and January 8, 2021. Joint Appendix ("JA") 14-64. In January 2022, the court dismissed the claim for Mayor Bowser's emails, holding that the District had produced all responsive documents. JA 73. The court was not convinced, however, that the District had adequately searched for Mayor Bowser's WhatsApp messages, so it authorized the Post to

conduct limited discovery regarding the scope and efficacy of that search. JA 73. The Post then deposed the attorney who handled the FOIA response, and it obtained sworn answers to interrogatories from Mayor Bowser's General Counsel. JA 81-89, 99-161.

The Post was not satisfied with this information and served the District with a notice of Mayor Bowser's deposition. *See* JA 204. In February 2023, the court entered a protective order precluding the deposition. JA 204.

On May 9, 2023, the court granted the District's motion for summary judgment on the Post's remaining claims, holding that the 911 recordings and Officer Sicknick's autopsy report are exempt from FOIA production and that an adequate search had revealed no WhatsApp messages responsive to the Post's request. JA 210-21. On June 8, 2023, the Post filed this timely appeal. JA 12.

STATEMENT OF FACTS

1. Statutory Overview.

FOIA grants "[a]ny person" "a right to inspect . . . [and] copy any public record of a public body, except as otherwise expressly prohibited" by enumerated exemptions. D.C. Code § 2-532(a). "[T]he burden of proof is always on the agency to demonstrate that it has fully discharged its obligations under the FOIA." *Fraternal Ord. of Police v. District of Columbia* ("*FOP 2014*"), 82 A.3d 803, 815 (D.C. 2014) (quoting *McKinley v. Federal Deposit Ins. Corp.*, 756 F. Supp. 2d 105,

111 (D.D.C. 2010)). The agency must therefore provide the trial court with enough information to permit "adequate adversary testing of the . . . claimed right to an exemption" without requiring the court to "actually view[] the documents" or "thwarting the [claimed] exemption's purpose." *Fraternal Ord. of Police v. District of Columbia* ("*FOP 2013*"), 79 A.3d 347, 355 (D.C. 2013) (quoting *King v. U.S. Dep't of Just.*, 830 F.2d 210, 218 (D.C. Cir. 1987)). This is often accomplished through production of a so-called *Vaughn* index, which "itemize[es] each item withheld, the exemptions claimed for that item, and the reasons why the exemption applies to that item." *Riley v. Fenty*, 7 A.3d 1014, 1018 n.2 (D.C. 2010) (quoting *Lykins v. U.S. Dep't of Just.*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)).

Two of FOIA's exemptions are at issue here. *First*, an agency may withhold any "[i]nvestigatory records compiled for law enforcement purposes" if release of the records "would . . . [i]nterfere with . . . [e]nforcement proceedings." D.C. Code § 2-534(a)(3). This exemption applies "[s]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence." *FOP 2014*, 82 A.3d at 815 (quoting *Juarez v. U.S. Dep't of Just.*, 518 F.3d 54, 59 (D.C. Cir. 2008)).

Second, an agency may withhold "[i]nformation 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 term 'unwarranted' requires

[courts] to 'balance the public interest in disclosure against the privacy interest [that lawmakers] intended the exemption to protect." *District of Columbia v. Fraternal Ord. of Police* ("*D.C. 2013*"), 75 A.3d 259, 265 (D.C. 2013) (quoting *Padou v. District of Columbia*, 29 A.3d 973, 982 (D.C. 2011)).

In February 2023, the Council of the District of Columbia enacted the Medical Examiner Records Privacy Amendment Act of 2022, which amended the statute governing the Office of the Chief Medical Examiner ("OCME") to state that an "autopsy report . . . [s]hall be a public record under [FOIA] *only* as to" the decedent's "[n]ame," "[r]ace," "[s]ex," and "[a]ge"; the "[c]ause," "[m]anner," and "[p]lace" of death; and the "[c]ase identification number," "[d]ate of examination," and "[n]ame of the examiner." D.C. Code § 5-1412(c-1) (emphasis added).

2. On January 6, 2021, Rioters Violently Breach The U.S. Capitol, Spawning A Criminal Investigation That Continues To This Day.

A. As police discover illegal firearms and incendiary devices nearby, a militarized group of extremists joins with rioters to besiege and breach the U.S. Capitol.

Donald Trump was elected the 45th president of the United States in 2016. He lost his bid for reelection in 2020, but the transfer of power to Joe Biden "did not proceed peacefully." *United States v. Trump*, 91 F.4th 1173, 1180 (D.C. Cir. 2024). Trump "did not concede the 2020 election and, in the ensuing months, he and his supporters made numerous attempts to challenge the results." *Id.* "His alleged interference in the constitutionally prescribed sequence culminated with a

Washington, D.C., rally held on January 6, 2021," the day Congress was required to meet in a joint session to certify the election results. *Id.*

That morning, thousands of Trump supporters gathered in the District to protest the certification. *See* Philip Rucker et al., *During: Bloodshed*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm (providing narrative timeline of events). Around 8:00 a.m., "an internal Secret Service alert said that roughly 10,000 people were waiting to go through magnetometers" at the rally site on the Ellipse, some "wearing ballistic helmets, body armor and carrying radio equipment and military-grade backpacks." Phillip Rucker et al., *Seven Hours To Go*, in *During: Bloodshed*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. An hour later, a mob of Trump supporters overran police at the Washington Monument. *Id.* An hour after that, U.S. Park Police encountered hundreds of protesters at the Lincoln Memorial, many of whom were wearing body armor and equipped with shields and gas masks. *Id.* Then, "[o]utside the Capitol around 11:30 a.m., a conspicuously large contingent of Trump supporters arrived with a rowdy swagger: the Proud Boys, a far-right group that engages in political violence." Phillip Rucker et al., *Five Hours To Go*, in *During: Bloodshed*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. They moved "in semi-organized formation," wearing body armor and extremist symbols. *Id.* During these morning hours, police also

responded to reports of a man with a rifle near the Ellipse and recovered firearms from an unattended vehicle near L'Enfant Plaza. *Id.*

Trump began speaking around noon. *Id.* While he was speaking, Capitol Police reported hearing a Taser weapon fired near the Senate, and Park Police reported that they had detained a person with a rifle near the World War II Memorial. Phillip Rucker et al., *Two Hours To Go*, in *During: Bloodshed*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. Soon after that, Capitol Police officers, along with the FBI and other federal agents, responded to reports of a pipe bomb with a timer found outside the Republican National Committee headquarters and a suspicious package near the Democratic National Committee headquarters. *Id.* Around that same time, Capitol Police also found an unoccupied vehicle "containing a trove of weapons, including an M4 carbine assault rifle, loaded magazines of ammunition, and components to make 11 molotov cocktails." *Id.*

Just after 1:00 p.m., Trump called on his followers to march on the Capitol. *Id.* They did so, toppling security barricades, bludgeoning police, and smashing windows and doors to breach the Capitol. Phillip Rucker et al., *60 Minutes To Go*, in *During: Bloodshed*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. Federal and local law enforcement—including hundreds of members of the Metropolitan Police Department ("MPD")—responded to the scene and successfully expelled the rioters. Supplemental Appendix ("SA") 1. At least 140 Capitol and

D.C. police officers were assaulted in the siege, emerging from the fight with broken limbs, concussions, cuts, and chest pain. Phillip Rucker et al., *48 Days After*, in *After: Contagion*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm.

During the attack, Capitol Police Officer Brian Sicknick was doused with chemical spray and collapsed on the scene. *Id.* He suffered two strokes and died the next day. *Id.*; SA 2.

B. Federal law-enforcement agencies begin a sweeping investigation that has led to hundreds of prosecutions and continues to this day.

During the siege and in its aftermath, hundreds of rioters were arrested on various charges related to the violence and attack on the Capitol. SA 1-2. According to the Department of Justice ("DOJ"), more than 2,000 people breached the Capitol on January 6. Rucker, et al., *229 Days After*, in *After: Contagion*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. So far, nearly 1,400 people have been charged with crimes. *39 Months Since the Jan. 6 Attack on the Capitol*, U.S. Att'y Off., District of Columbia, https://tinyurl.com/44w3t24n.

The federal "investigation and prosecution of those responsible for the attack continues to move forward," and the U.S. Attorney's Office remains "resolve[d] to hold accountable those who committed crimes on January 6, 2021." *Id.* The FBI "continues to seek the public's help in identifying individuals believed to have committed violent acts on Capitol grounds" and, to that end, has published "videos of suspects wanted for violent assaults on federal officers . . . [and] members of the

media on January 6th." *Id.* This request for public assistance remains published on the FBI's "Most Wanted" website, which also offers substantial monetary rewards for "information leading to the location, arrest, and conviction of the person(s) responsible for the placement of pipe bombs in Washington, D.C., on January 5, 2021." *Most Wanted: U.S. Capitol Violence*, FBI, https://tinyurl.com/ycxf4xmt; *see $500,000 Reward Remains in Effect for Information About Capitol Hill Pipe Bomber*, FBI Wash. Field Off. (Jan. 4, 2024), https://tinyurl.com/u3p34u95.

3. The Post Submits Several FOIA Requests To The District.

In the months following the January 6 riot, the Post submitted FOIA requests to various District agencies. Most of the requested documents were produced. *See* JA 46, 49, 52; SA 7-8. This appeal involves three of the remaining requests.

A. The District withholds protest- and riot-related 911 call recordings under the investigatory-records exemption.

In February 2021, the Post submitted a FOIA request for "[a]ll 911 recordings, dispatch communications and CAD [computer aided dispatch] entries related to the Jan. 6, 2021 protest and subsequent riot at the U.S. Capitol." JA 36. It limited the request 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." JA 36.

The D.C. Office of Unified Communications ("OUC") manages the District's 911 system, dispatch communications, and CAD entries. D.C. Code § 1-327.52(a) *et seq*. On March 30, 2021, OUC withheld the requested records as exempt from

disclosure under the investigatory-records exemption, D.C. Code § 2-534(a)(3)(A)(i) and (a)(3)(B). JA 43. OUC explained that the requested information "is part of an ongoing open criminal investigation and enforcement proceedings," and that premature release of these records would "interfere with the enforcement proceedings by revealing the direction and pace of the investigation." JA 43. "It could also lead to attempts to destroy or alter evidence, reveal information about potential witnesses who could then be subjected to intimidation as part of an effort to frustrate future investigative activities, or . . . place witnesses in danger." JA 43. MPD later provided the Post with dispatch communications and CAD records, with redactions not challenged in this litigation. SA 7.

MPD continued, however, to withhold the 911 calls. Its Office of the General Counsel later explained that it had compiled recordings of these "calls for service to MPD in response to suspicious or criminal acts related to the attack on the United States Capitol on January 6, 2021." SA 8. It transmitted these records to the U.S. Attorney's Office "for use in the criminal prosecutions of the individuals involved in and responsible for the Capitol riots." SA 8. MPD's Office of the General Counsel understands that these records "have been deemed sensitive and are under protective orders in the various criminal cases." SA 8.

B. The District withholds Officer Sicknick's autopsy report under FOIA's personal-privacy exemption.

On April 20, 2021, the Post submitted a FOIA request seeking Officer Sicknick's "final and complete autopsy report." JA 62. The day before, OCME had finalized the autopsy report and publicly announced that Officer Sicknick died "a natural death," caused by "acute brain-stem and cerebellar infarcts due to acute basilar artery thrombosis." SA 3; *see* JA 62. In an interview with the Washington Post, Chief Medical Examiner Francisco J. Diaz explained this in simpler terms—Officer Sicknick had suffered two strokes at the base of the brain stem caused by a clot in an artery that supplies blood to that area of the body. 12/23/22 Opp'n to Mot. for Summary Judgment, Ex. 1. The autopsy had revealed no evidence that Officer Sicknick had suffered an allergic reaction to chemical irritants, nor was there evidence of internal or external injuries. *Id.* Diaz declined to comment on whether Officer Sicknick had a pre-existing medical condition, citing privacy laws. *Id.* Diaz also noted that Officer Sicknick was among the officers who had engaged with the mob, and that "all that transpired played a role in his condition." *Id.*

OCME denied the Post's request a week later under FOIA's personal-privacy exemption, D.C. Code § 2-534(a)(2). It explained that it "does not release its case files in response to FOIA requests" because "[d]isclosure of personal information, especially medical records, is not permitted." JA 61.

C. The District advises the Post that it has no records responsive to the Post's request for WhatsApp messages sent by Mayor Bowser.

Meanwhile, on January 7, 2021, the Post submitted a FOIA request for "[a]ll messages sent by Mayor Muriel Bowser on her WhatsApp account and email account between January 5 and January 8, 2021." JA 33. Cristina Sacco, Associate General Counsel for the Executive Office of the Mayor ("EOM"), submitted a search request to the Office of the Chief Technology Officer ("OCTO") for all responsive emails. JA 78. The District produced those documents to the Post in August 2021. JA 78.

At the same time, Sacco informed the Post that "there are no messages sent by the Mayor on her WhatsApp account between January 5 and January 8, 2021." JA 80.

4. After The Post Brings Suit, The Superior Court Grants Limited Discovery Regarding The Adequacy Of The District's Search For The Requested WhatsApp Messages.

The Post sued the District to compel production of the requested documents. JA 14-69. In November 2021, the District moved for partial dismissal, arguing that it had produced all of Mayor Bowser's emails responsive to the Post's request, and that it had no record of WhatsApp messages sent by her between January 5 and January 8, 2021. *See* JA 6, 71. The Superior Court granted the motion to dismiss as to Mayor Bowser's emails but denied the motion as to her WhatsApp messages, explaining that it was "not convinced" that the District's search was sufficient.

JA 72-73. It authorized limited discovery as to "the efficacy and scope" of the search. JA 73.

In March 2022, the District responded to the Post's discovery requests with answers to interrogatories, sworn to by EOM General Counsel Betsy Cavendish, describing the Mayor's search for responsive WhatsApp messages. JA 81-90. Two months later, the District produced Sacco to testify at deposition on behalf of the District under Superior Court Civil Rule 30(b)(6). JA 99-162.

This discovery revealed the following facts regarding the search, which are not genuinely disputed. Sacco testified that, "maybe a month before" she responded to the FOIA request, she had emailed Cavendish to request that a search be conducted for any WhatsApp messages sent by the Mayor between January 5 and 8, 2021. JA 117, 143-44. Cavendish attested that she then asked the Mayor to search for all such messages. JA 78. The Mayor "search[ed] . . . her phone for WhatsApp messages sent during the time period specified," but found "no messages in her WhatsApp history" for those dates. JA 84; *see* JA 78. She told Cavendish "that her search of her WhatsApp account yielded no responsive records." JA 84. She also told Cavendish that she did not recall deleting any WhatsApp messages she had sent between January 5 and January 8, 2021, and that she had "never enabled the 'disappearing messages' setting on her WhatsApp account." JA 85-86. After that,

Cavendish reported back to Sacco that Mayor Bowser had found no WhatsApp messages responsive to the Post's FOIA request. JA 134.

In the responses to interrogatories, Cavendish also attested as to why expanding the search would not lead to the discovery of responsive documents. "Mayor Bowser's WhatsApp messages are stored on her WhatsApp account on her phone," and "the District does not maintain a back-up system for archiving such messages." JA 86. "[N]o individuals other than Mayor Bowser have permission or authorization to use [her] mobile phone," and "no individuals other than Mayor Bowser have sent or received messages via WhatsApp on her behalf." JA 88.

Those interrogatory responses also explained that no such messages had turned up in earlier searches either. Cavendish attested that, to help Mayor Bowser and other District officials prepare for interviews with the Department of Defense Inspector General and Congress's Select Committee to Investigate the January 6 Attack, "the District put together a timeline relating to the events of January 6." JA 85. "In the course of this process, no WhatsApp messages were found relating to the events." JA 85. And, in response to a separate request from Congress for records, the Mayor's then-Deputy General Counsel had searched for riot-related text messages sent by the Mayor and had found none. JA 85.

5. The Superior Court Bars The Post From Taking Mayor Bowser's Deposition.

Unsatisfied with this evidence, the Post served the District with a notice of video deposition of Mayor Bowser. 6/2/22 Mot. for Prot. Order, Ex. B. The District moved for a protective order, noting that "discovery has already revealed that there are no responsive records," *id.* at 1, and arguing that the Post had not established the type of extraordinary circumstances that could justify subjecting high-ranking government officials to oral depositions, *id.* at 4. In the alternative, the District argued that the court "should instead allow the District provide a supplemental affidavit, or supplemental interrogatory responses." *Id.* at 2.

Ruling from the bench, the court granted the District's motion to protect the Mayor from deposition. It explained that "discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the [c]ourt is satisfied that no factual dispute remains." JA 198; *see* JA 75-76 (protective order). The court found that Sacco had provided detailed testimony regarding her request for a search by Cavendish. JA 200-01. And Cavendish had attested that "no individual other than the Mayor has access to her phone with her WhatsApp account," that "[t]he Mayor conducted the search of her phone during the time period specified and . . . no other individuals assisted her," and that "Mayor Bowser searched her WhatsApp account . . . for messages sent during a specified time period . . . and determined there were none." JA 202. Moreover, Cavendish

also attested that “Mayor Bowser never enabled the disappearing messages setting on her WhatsApp account,” and that all her WhatsApp messages “are stored on her WhatsApp account on her phone and that the District does not maintain a backup system for . . . such messages.” JA 203. On top of that, “others conducted a search of text messages from the Mayor and from others in her cabinet regarding the riot . . . and no messages were found.” JA 202-03.

The court concluded that Mayor Bowser was the person “best suited to perform the search,” and that “[s]he did, in fact, perform the search.” JA 203.

6. The Superior Court Enters Summary Judgment In Favor Of The District.

After additional briefing, the Superior Court granted the District’s motion for summary judgment on the Post’s three remaining claims.

First, the court found the 911 recordings exempt under the investigatory-records exemption. The Post had conceded “that the 911 records . . . qualify as law enforcement records,” JA 216, arguing only that the completion of many prosecutions required the District to release some of the responsive records, *see* JA 216-17. The court, however, rejected the Post’s claim that “there is no longer a legitimate danger of interference in these criminal investigations.” JA 216-17. “In fact, this [c]ourt finds quite the opposite. Since January 6, 2021, the Department of Justice has had ongoing criminal proceedings that continue to this day.” JA 217 & n.2 (citing Associated Press article from May 6, 2023).

Second, the court found Officer Sicknick's autopsy report exempt under the personal privacy exemption. JA 217-18. It found no way to protect Officer Sicknick's privacy by redacting identifying information because "there is only one autopsy report at issue here." JA 218. And, the court noted, "[t]he only relevant public interest in disclosure . . . is the extent to which disclosure would . . . [contribute] significantly to public understanding *of the operations or activities of the government*." JA 217 (quoting *Fraternal Ord. of Police v. District of Columbia* ("*FOP 2015*"), 124 A.3d 69, 77 (D.C. 2015) (emphasis in original)). The court concluded that the balance of these interests does not permit disclosure. JA 217.

Third, the court reiterated its finding that the District had conducted an adequate search for any responsive WhatsApp messages sent by Mayor Bowser. JA 218-19. It noted that the District had produced sworn evidence showing that:

> (1) the Mayor's phone is the device she uses to communicate via WhatsApp; (2) no other individual sends or receives messages on her behalf on that phone; (3) she has never enabled 'disappearing messages[]'; (4) she does not recall deleting any messages from the specified time period . . . ; (5) there are no back-ups; (6) . . . the Mayor herself conducted the search; and ([7]) this search revealed nothing.

JA 218-19. As the court found, the Post failed to produce "specific facts to rebut how this search is not a sufficiently good-faith search, nor any authority exhibiting how or why this search [needed to be] conducted by" someone other than Mayor Bowser. JA 220. "Indeed, [the District] asserts that a similar search involving other personnel at the Mayor's office, including the Chief of Staff, failed to provide any

messages that would comport to [the Post's] requests and [the Post] failed to rebut the sufficiency of those searches as well." JA 220.

STANDARD OF REVIEW

This Court "review[s] *de novo* the trial court's grant of summary judgment in a FOIA case." *D.C. 2013*, 75 A.3d at 264. "Summary judgment is appropriate only when the record, including pleadings together with affidavits, indicates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Padou*, 29 A.3d at 980). This requires the Court, in FOIA cases, to "ascertain whether the agency has sustained its burden of demonstrating the documents requested are exempt from disclosure." *Id.* (quoting *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008)).

SUMMARY OF ARGUMENT

This Court should affirm the entry of summary judgment for the District regarding the three categories of records the Post requested under FOIA.

1. The District properly withheld the requested 911 recordings under the investigatory-records exemption. The Post does not challenge the District's initial decision to withhold these recordings, conceding that they are investigatory records, the release of which would interfere with pending enforcement actions. Instead, the Post claims that it is now entitled to some recordings because hundreds of January 6 prosecutions are complete. But these prosecutions do not involve discrete crimes

for which the evidence is segregable. Each prosecution involves the same overarching incident: the attack on the U.S. Capitol and related crimes aimed at preventing Congress from certifying the results of the election. And, for some of the perpetrators, this was a coordinated assault, leading to charges of criminal conspiracy that necessarily encompass crimes committed by others. On top of that, federal investigators are *still* conducting this massive investigation—the largest criminal probe in DOJ history—in which many suspects have yet to be identified. Because the investigation continues unabated, *all* of the requested 911 calls from that day remain important to the investigation, pending prosecutions, and enforcement actions yet to begin.

2. The Post is not entitled to the release of information contained in Officer Sicknick's autopsy report. *First*, an amendment to OCME's enabling act has removed autopsy reports from the scope of documents subject to FOIA disclosure—which dispositively negates any entitlement to the report. *Second*, even setting that amendment aside, release of the autopsy report would be a clearly unwarranted invasion of the privacy interests of Officer Sicknick and his family. Every autopsy report contains detailed medical and health information about the decedent that can reveal, for example, prior substance abuse, previous injuries, and gruesome details regarding his death. The Supreme Court has declared that a decedent's family has a vital privacy interest in this information, and the Council has confirmed that interest

by explicitly removing autopsy reports from the scope of FOIA. And apart from his family's interest, Officer Sicknick himself has a posthumous privacy interest in this intimate information about his medical history.

On its side of the balancing test, the Post offers no FOIA-recognized public interest in the autopsy report. The only interest it proffers is a need to "reconcil[e]" the medical examiner's conclusion that Officer Sicknick died of natural causes with the Chief Medical Examiner's statement that the events of January 6 "played a role in his condition." Br. 23. These statements, however, are not facially inconsistent. And even if they were, the public's interest in reconciling them does not outweigh Officer Sicknick's interest in the confidentiality of his medical history and his family's interest in avoiding the emotional anguish and harassment that would inevitably follow the report's public release.

3. As requested by the Post, the District properly searched for WhatsApp messages sent by Mayor Bowser between January 6 and 8, 2021. It provided sworn answers to interrogatories by the Mayor's General Counsel as well as a Rule 30(b)(6) deposition of the attorney who responded to the Post's FOIA request. This undisputed evidence established that Mayor Bowser used WhatsApp only on her phone, that she did not delete any responsive records or use WhatsApp's "disappearing message" feature, and that she searched her WhatsApp message history and found no responsive messages. Moreover, earlier searches—in response

to requests from Congress and the Department of Defense Inspector General—had not revealed any responsive messages either. The Post has offered nothing but speculation that expanding that search to other devices would lead to the discovery of any responsive records. Nor would requiring Mayor Bowser—the District's highest-ranking official—to testify make any difference because she would simply repeat what the undisputed evidence already says: that she searched her phone and found no responsive records.

ARGUMENT

I. The 911 Call Records Are Investigatory Records That Remain Exempt From Disclosure Because Their Release Would Interfere With An Ongoing Criminal Investigation And Prosecutions.

The trial court properly found that the requested 911 recordings are exempt from disclosure. FOIA's investigatory-records exemption allows agencies to withhold "[i]nvestigatory records compiled for law enforcement purposes" if their production "would . . . [i]nterfere with . . . [e]nforcement proceedings." D.C. Code § 2-534(a)(3). The exemption applies "[s]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence." *FOP 2014*, 82 A.3d at 815 (quoting *Juarez*, 518 F.3d at 59).[1] Courts "give deference to an agency's predictive

[1] "Because many provisions of the D.C. FOIA mirror provisions in the federal Freedom of Information Act," this Court has "found case law interpreting the federal

judgment of the harm that will result from disclosure of information." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.* ("*CREW*"), 746 F.3d 1082, 1098 (D.C. Cir. 2014). The agency need only "identif[y] a pending or potential law-enforcement proceeding or provid[e] sufficient facts from which the likelihood of such a proceeding may reasonably be inferred." *FOP 2014*, 82 A.3d at 815 (quoting *Durrani v. U.S. Dep't of Just.*, 607 F. Supp. 2d 77, 90 (D.D.C. 2009)).

Before an agency can apply any of FOIA's enumerated exemptions, it must "determine whether any portions of the documents are 'reasonably segregable' from the protected portions and, if so, . . . provide those portions to the requestor." *Riley*, 7 A.3d at 1018 (citing D.C. Code § 2-534(b)). The agency then bears the burden of defending the decision to withhold the remaining documents. *Id.* (citing D.C. Code § 2-537(b)). This burden is usually satisfied with a *Vaughn* index, which is an itemized list of documents with the reasons why each has been withheld. But sometimes the *Vaughn* index itself will reveal an investigation's scope, direction, or progress, or "allow[] litigants 'earlier or greater access' to agency investigatory files than they otherwise would have." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 225 (1978). In that situation, the agency can withhold the requested records on a "categorical" or "generic" basis rather than producing a *Vaughn* index. *CREW*,

FOIA to be 'instructive authority with respect to our own Act.'" *FOP 2013*, 79 A.3d at 354 (quoting *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220 (D.C. 2008)).

746 F.3d at 1098; *see Robbins Tire*, 437 U.S. at 236. To justify this approach, the agency must "define its categories functionally," "conduct a document-by-document review in order to assign documents to the proper category," and "explain to the court how the release of each category would interfere with enforcement proceedings." *FOP 2014*, 82 A.3d at 815 (quoting *Bevis v. U.S. Dep't of State*, 801 F.2d 1386, 1388-90 (D.C. Cir. 1986)).

The District's decision to withhold the requested 911 recordings adheres to these standards. MPD and OUC defined the category functionally, providing the Post with other responsive documents but withholding the 911 recordings regarding "suspicious or criminal acts related to the attack on the United States Capitol on January 6, 2021." SA 8. An MPD attorney reviewed all relevant documents to ensure that they were assigned to the proper category. SA 7-8. She attested that the withheld recordings "were transmitted to USAO for use in the criminal prosecutions of the individuals involved in and responsible for the Capitol riots" and affirmed her understanding that these records "have been deemed sensitive and are under protective orders in the various criminal cases." SA 8.

The Post does not argue that this information was insufficient or untrue at the time the records were withheld. *See* Br. 17-20. It concedes that the 911 recordings are "law-enforcement records," the release of which "could theoretically interfere with ongoing Capitol riot investigations." Br. 17. And while it obliquely suggests

that the District's "blanket withholding" of these records has always been improper, *see* Br. 17, it has forfeited any such claim by offering no argument or authority supporting it, *see McFarland v. George Wash. Univ.*, 935 A.2d 337, 351 (D.C. 2007) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

The Post's sole developed argument on appeal is that this categorical withholding is no longer appropriate because hundreds of prosecutions are now complete. According to the Post, the District must now "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." Br. 20.

This, however, misunderstands the nature of the ongoing investigation, pending prosecutions, and prosecutions that have not yet begun. The breach of the Capitol on January 6 was not a series of random and unconnected incidents, lacking in any degree of organization or coordination. *See supra* pp. 5-7. The DOJ thus did not conduct thousands of discrete, severable investigations—it opened a *single* investigation, "the largest criminal probe in Justice Department history." Ryan J. Reilly, *2023 Was a Massive Year in the Jan. 6 Probe. 2024 Will Be Even Bigger*, NBC News (Jan. 6, 2024), https://tinyurl.com/43pxzuy3. And this sprawling investigation "is far from over." Alanna Durkin Richer and Michael Kunzelman,

Hundreds of Convictions, But a Major Mystery Is Still Unsolved 3 Years After the Jan. 6 Capitol Riot (Jan. 5, 2024), https://tinyurl.com/3da8hmc2. As the USAO reported in January 2024, its "investigation and prosecution of those responsible for the attack continues to move forward." *39 Months Since the Jan. 6 Attack on the Capitol*, U.S. Att'y Off., District of Columbia, https://tinyurl.com/44w3t24n. Indeed, the FBI "continues to seek the public's help in identifying individuals believed to have committed violent acts on Capitol grounds" and, to that end, has published "videos of suspects wanted for violent assaults on federal officers . . . [and] members of the media on January 6th." *Id.*; *see* Richer & Kunzelman, *supra* ("Authorities are still working to identify more than 80 people wanted for acts of violence at the Capitol."). The FBI and MPD also continue to offer substantial monetary rewards for "information leading to the location, arrest, and conviction of the person(s) responsible for the placement of pipe bombs in Washington, D.C., on January 5, 2021." *Most Wanted: U.S. Capitol Violence*, FBI, https://tinyurl.com/ycxf4xmt.

"[I]nterference with enforcement proceedings" is presumed whenever a law enforcement agency is required to release "information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding." *FOP 2014*, 82 A.3d at 815 (quoting *Robbins Tire*, 437 U.S. at 232). "[S]o long as the investigation continues to gather evidence for a possible future criminal case, and

that case would be jeopardized by the premature release of the evidence," the investigatory records exemption applies. *Id.* (quoting *Juarez*, 518 F.3d at 59). The District has more than satisfied this standard. Because the investigation is far from complete, the 911 calls requested by the Post are still needed for the investigation and important to future prosecutions. As the Washington Post reported, citizens began reporting alarming activity—some blatantly criminal—in areas all around the National Mall, Ellipse, and Capitol starting in the early morning hours of January 6 and continuing throughout that day. *See generally* Rucker, *During: Bloodshed*, *supra*. Even in the unlikely event that some calls explicitly identify one suspect and report only the criminal acts of that person, those records would still be relevant to charges against others, including ongoing (or new) conspiracy charges. *See, e.g.*, Press Release, Off. of Pub. Affs., Dep't of Just., *Jury Convicts Four Leaders of the Proud Boys of Seditious Conspiracy Related to U.S. Capitol Breach* (May 4, 2023), https://tinyurl.com/mr49ubyz (reporting "seditious conspiracy" verdict against leaders of Proud Boys).[2] As such, there simply are no "911 calls that relate solely to th[e] closed investigations and prosecutions." Br. 18. The Superior Court thus properly found that the District was not required to produce any 911 call records responsive to the Post's FOIA request.

---

[2] These judgments are now on appeal in the D.C. Circuit at Nos. 23-3192 through 23-3196.

This Court should also reject the Post's suggestion that the District's duty to produce documents withheld under the investigatory-records exemption continues even after summary judgment in the Superior Court. *See* Br. 17-18. The Post cites dictum in *CREW* suggesting that, to justify continued withholding, the enforcement proceeding "must remain pending at the time of our decision, not only at the time of the initial FOIA request." 746 F.3d at 1097. However, in *CREW*, the D.C. Circuit was remanding the case anyway, *id.* at 1099, so it had no reason to consider whether adopting such a rule would require it to accept new evidence and make factual findings on appeal. The same is true for the cases on which *CREW* relied, *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1115 (D.C. Cir. 2007), and *August v. FBI*, 328 F.3d 697, 698 (D.C. Cir. 2003). Given that the requester can always submit a new FOIA request once enforcement actions are complete or the circumstances have otherwise changed, this Court should not adopt a rule requiring it to consider new evidence on the status of pending prosecutions during appellate briefing, argument, or while its decision is pending. Adopting such a rule would be unwieldy, requiring this Court to make factual findings about records and their connection to pending investigations and prosecutions in the first instance, sometimes years after the trial court's decision. In any event, here, it is clear that the January 6 investigation and prosecutions will continue well into the future. *See* Richer & Kunzelman, *supra*.

II. Officer Sicknick's Autopsy Report Is Not A "Public Record" Subject To Disclosure Under FOIA And, In Any Event, Was Properly Withheld Under The Personal-Privacy Exemption.

A. The Council has removed autopsy reports from the scope of documents subject to FOIA disclosure.

FOIA requires the release only of "public record[s]." D.C. Code § 2-532(a). In February 2023, the Council amended OCME's enabling statute to clarify that the only information in an autopsy report that is a "public record" under FOIA is the decedent's "[n]ame," "[r]ace," "[s]ex," and "[a]ge"; the "[c]ause," "[m]anner," and "[p]lace" of death; and the "[c]ase identification number," "[d]ate of examination," and "[n]ame of the examiner." D.C. Code § 5-1412(c-1).

The Council enacted this amendment to protect the privacy of decedents and their families, who often have no say in whether an autopsy is performed. *See* D.C. Code § 5-1405(b) (requiring OCME to investigate certain deaths). "[A]n . . . autopsy report contains highly sensitive and inflammatory information" that, for example, "can shed light on prior substance use by a decedent, provide gruesome details regarding his [death], and include prior medical history or information." D.C. Council, Report on Bill 24-0203, at 3 (Nov. 3, 2022) ("Comm. Report"). Its public release can "prove prejudicial to the decedent's family, who in seeking to move on and heal from the decedent's death, may confront harassment and malicious behavior if such information is disclosed to the public." *Id.* At the same time, the Council recognized that "exempting all OCME records and files from disclosure . . .

unfairly tilts the balance toward individual privacy interests." *Id.* at 5. The Council thus "str[uck] a careful balance by making . . . autopsy reports public records" only "with respect to certain information." *Id.* at 6.

This amendment clearly defeats the Post's request for Officer Sicknick's autopsy report. The Post seeks the report with only the photographs redacted. Br. 22-23. And OCME has already released the limited information from the autopsy report that remains subject to FOIA following the Council's amendment: Officer Sicknick's name, race, sex, and age, as well as the cause, manner, and place of his death. *See* 12/23/22 Opp'n to Mot. for Summary Judgment, Ex. 1.

It does not matter that this amendment was enacted after the Post submitted the FOIA request, or even after it sued to compel release. As this Court acknowledged in *Kane v. District of Columbia*, 180 A.3d 1073 (D.C. 2018), intervening FOIA amendments may be "applicable to pending cases." *Id.* at 1083 n.43 (citing *City of Chicago v. U.S. Dep't of the Treasury*, 423 F.3d 777, 783 (7th Cir. 2005); *Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric.*, 314 F.3d 1060, 1062 (9th Cir. 2002)). This is because, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive"—the court is simply applying the law in effect at the relevant time. *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994)).

Although *Kane* recognized this principle in dictum, it is well settled among federal courts. As the Ninth Circuit explained in *Center for Biological Diversity v. U.S. Department of Agriculture*, 626 F.3d 1113 (9th Cir. 2010), "there is no impermissible retroactive effect in applying [a new statute] to [a] pending FOIA action" because "the [appellant] seeks the prospective relief of an injunction directing the [agency] to provide it with certain information," and the new law "merely affects the propriety of this prospective relief." *Id.* at 1117-18. And in *City of Chicago*, the Seventh Circuit found this to be so even for legislation enacted to moot a pre-existing FOIA dispute. 423 F.3d at 783. There, Congress enacted a law precluding FOIA disclosure of gun-sale data after the Seventh Circuit held that it must be released and the agency appealed to the Supreme Court. *Id.* at 778-79. Although the new law said nothing about pending cases, the Seventh Circuit found it "unquestionably" applicable because "the relevant event for assessing retroactivity here is the disclosure of the withheld data, which is a potential future event, not a past, completed event." *Id.* at 783. This Court should likewise hold the amendment to Section 5-1412 applicable to the Post's request and deny it for that reason.[3]

---

[3] The District did not make this argument in the Superior Court because the amendment was enacted after the District had completed summary judgment briefing on the claim. *See* JA 11.

B. Alternatively, the release of the autopsy report would be a clearly unwarranted invasion of the privacy interests of Officer Sicknick and his family.

The trial court also correctly found the report exempt for personal privacy reasons. FOIA exempts disclosure of "[i]nformation 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). "Once a more than *de minimis* privacy interest is implicated, the requestor must indicate how disclosing the withheld information would serve the public interest." *D.C. 2013*, 75 A.3d at 265 (citing *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1191 (11th Cir. 2007)). The relevant public interest is limited to "shed[ding] light on an agency's performance of its statutory duties or otherwise let[ting] citizens know what their government is up to." *D.C. 2013*, 75 A.3d at 266 (quoting *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994)). The Court must then balance the personal privacy interest against that public interest. *Padou*, 29 A.3d at 982.

1. Officer Sicknick's family has a strong personal privacy interest in his autopsy report.

"[R]egardless of the nature of the information contained in them, 'disclosure of records containing personal details about private citizens can infringe significant privacy interests.'" *FLRA v. U.S. Dep't of Veterans Affs.*, 958 F.2d 503, 510 (2d Cir. 1992) (quoting *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 766 (1989)). The privacy exemption thus "protect[s] personal

information . . . even if it is not embarrassing or of an intimate nature." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). "Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal," but still is "exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982).

Autopsy reports—which "contain[] highly sensitive and inflammatory information regarding the circumstances of one's death"—involve much stronger privacy interests. Comm. Report 3. During an autopsy, medical examiners take "copious notes on their observations of the body, noting any identifying marks or injuries on the body and detailing precise measurements of specific organs as well as providing a full toxicological summary." *Id.* These observations, along with photographs, videos, or images of the body, "are then compiled into a report, which includes [the medical examiner's] contemporaneous narrative findings of the decedent's intimate medical and health information as well as conclusions on the decedent's cause and manner of death." *Id.* The report can thus reveal a decedent's "prior substance abuse," "provide gruesome details" about his death, and "include prior medical history or information." *Id.* "[N]othing is left untold." SA 15.

Given this, Officer Sicknick's family has a well-settled privacy interest in his autopsy report. In *National Archives & Records Administration v. Favish*, 541 U.S.

157 (2004), a FOIA requester sued for the release of death-scene images after a White House official committed suicide in federal parkland. *Id.* at 161. The Supreme Court found the records exempt from disclosure, holding that "family members [can] assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *Id.* at 167. The Court noted that "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial." *Id.* Consistent with these traditions, a decedent's family has "a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Id.* at 168.

The Post argues that the Supreme Court recognized a privacy interest only in the death-scene images of a loved one. Br. 21. But *Favish* quoted caselaw finding "'a protectable privacy interest in the *autopsy records* of the deceased,'" explaining that FOIA's personal privacy exemption was enacted "against this background of law, scholarship, and history." 541 U.S. at 169 (quoting *Reid v. Pierce Cnty.*, 961 P.2d 333, 342 (1998)) (emphasis added). The First Circuit has thus concluded that "the [Supreme] Court also implicitly recognized that family members have privacy interest in their deceased relatives' autopsy records." *Eil v. DEA*, 878 F.3d 392, 400 (1st Cir. 2017) (citing *Favish*, 541 U.S. at 168-70). And the Council explicitly

recognized the surviving family's "privacy interests" when it removed autopsy reports from the scope of FOIA. Comm. Report at 2. Even if that amendment did not control here (and it does), it at minimum confirms the protected privacy interest in the information under District law. D.C. Code § 5-1412(c-1).

The Post is also mistaken in its reliance on the district court's decision in *Charles v. Office of the Armed Forces Medical Examiner*, 935 F. Supp. 2d 86 (D.D.C. 2013), which ordered the release of information in 82 *redacted* autopsy reports of soldiers killed in Iraq and Afghanistan. The court held that the personal-privacy exemption applied only to documents that "disclose information attributable to an individual," *id.* at 96 (quoting *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983)), and the agency "ha[d] not shown that family members would be able to discern which redacted records relate[d] to their deceased family member," *id.* at 99. Here, as the Superior Court noted, "there is only one autopsy report at issue," so redaction of identifying information "would be futile." JA 218.

And the Post simply misses the point when it suggests that the family's privacy interest is limited to images that would "shock [their] sensibilities." Br. 22. As the Council explained, family members *also* have a protected interest in avoiding "harassment and malicious behavior if [autopsy] information is disclosed to the public." Comm. Report at 3. There is good reason for such concern here. The January 6 riot was fueled by Internet-spread conspiracy theories challenging the

legitimacy of the 2020 election. *See generally* Philip Rucker et al., *Before: Red Flags*, Wash. Post (Oct. 31, 2021), https://tinyurl.com/4pcjhhnm. Even before the election, "false-flag" conspiracy theories—claims that terrorist attacks and mass shootings were actually orchestrated by governments or sinister forces in furtherance of a political or social goal—were on the rise, often leading to cyberbullying, death threats, and physical harassment of crime victims and their families. *See* Joseph Uscinski, *Five Things To Know About "False Flag" Conspiracy Theories*, Wash. Post (Oct. 27, 2018), https://tinyurl.com/4tmcw9w7. After the 2020 election, "a tide of threats . . . targeted election workers at all levels"—"a direct result of the false narratives . . . that were spread in part on social media." Cat Zakrzewski, *Election Workers Brace For a Torrent of Threats: 'I KNOW WHERE YOU SLEEP'*, Wash. Post (Nov. 8, 2022), https://tinyurl.com/mwtzbsu9.

The January 6 riots have now been folded into this narrative. "Twenty-five percent of Americans say it is 'probably' or 'definitely' true that the FBI instigated the Jan. 6, 2021, attack on the U.S. Capitol, a false concept promoted by right-wing media." Tom Jackman, *et al.*, *A Quarter of Americans Believe FBI Instigated January 6, a Post-UMD Poll Finds*, Wash. Post (Jan. 4, 2024), https://tinyurl.com/2skrnj7n. And Officer Sicknick's death has been explicitly used in this false narrative. *See* Melissa Quinn, *Family of Capitol Police Brian Sicknick,*

Top Democrats Lambaste Fox News & Tucker Carlson Over Jan. 6 Portrayal, CBS News (Mar. 7, 2023), https://tinyurl.com/35vww42y.

In *Favish*, the Supreme Court noted that, because FOIA requires release of records regardless of who makes the request, "child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims." 541 U.S. at 170. The Court found it "inconceivable that Congress could have intended a definition of 'personal privacy' so narrow that it would allow convicted felons to obtain these materials . . . at the expense of surviving family members' personal privacy." *Id.* Advances in technology have only compounded these concerns—there is now an "Internet-based interest in autopsy reports," particularly those of "'famous celebrities and other infamous persons.'" Clay Calvert, *A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 Hastings Const. L.Q. 475, 502 (2013) (quoting introductory paragraph of http://www.autopsyfiles.org (last visited Apr. 25, 2024)). It is thus reasonable to conclude that, if Officer Sicknick's autopsy report is publicly released, his family will face harassment and other malicious conduct.[4]

[4] The Post suggests that Officer Sicknick's family has invited this intrusion by bringing suit against his assailants. Br. 22-23. But it cites no authority suggesting that plaintiffs waive privacy rights under FOIA by bringing personal injury suits. On the contrary, litigation often requires parties to produce private information, such

2. Officer Sicknick also has a posthumous interest in maintaining the confidentiality of his autopsy report.

Officer Sicknick himself also maintains a continued privacy interest in the contents of his autopsy report. The D.C. Circuit has "squarely rejected the proposition that FOIA's protection of personal privacy ends upon the death of the individual depicted." *Accuracy in Media v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (citing *Campbell v. U.S. Dep't of Just.*, 164 F.3d 20, 33 (D.C. Cir. 1998)). This is corroborated by dictum in *Favish*, where the Supreme Court noted that "a different set of considerations would [have] control[led]" if the parties had presented arguments regarding the decedent's right to protect "his own posthumous reputation or some other interest personal to him." 541 U.S. at 166.

Moreover, this interest is reflected in several of the District's statutes enacted to preserve the privacy of its citizenry. For example, FOIA exempts disclosure of death certificates—which reveal far less personal information than autopsy reports—regardless of whether the decedent is survived by family. D.C. Code §§ 2-534(d)(1) (FOIA exemption), 7-231.24(a) (Vital Records Act); *see* Comm. Report at 7 (Chief Medical Examiner's testimony that "a death certificate only contains information on the decedent's demographics, cause of death, manner of death, and other pertinent public health information"). And other privacy laws allow

---

as medical records, that is not available to the general public. Such information is kept confidential through protective orders.

release of a decedent's medical records only to family members or estate executors. D.C. Code § 3-1210.11(a); *see Padou*, 29 A.3d at 980 (finding privacy interest under FOIA supported by other statutes' confidentiality provisions); *Riley*, 7 A.3d at 1016 (similar). Even the American Medical Association has weighed in on the issue, declaring in its code of ethics that "patients are entitled to the same respect for the confidentiality of their personal information after death as they were in life." Am. Med. Ass'n, Code of Medical Ethics, ch. 3, Opinion 3.2.2 (Confidentiality Postmortem), https://tinyurl.com/3hrty65w.

3. The Post has not proffered any public interest in Officer Sicknick's autopsy report, much less one that outweighs these strong privacy interests.

"Like its federal counterpart, [FOIA] was designed to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *D.C. 2013*, 75 A.3d at 264 (quoting *Wash. Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989)). In balancing the interests of the public against the privacy interests of third parties, "[t]he only relevant 'public interest in disclosure' to be weighed . . . is the extent to which disclosure would . . . 'contribut[e] significantly to public understanding *of the operations or activities of the government*.'" *FOP 2015*, 124 A.3d at 77 (quoting *U.S. Dep't of Def.*, 510 U.S. at 495 (emphasis in original)).

The Post does not identify *any* such public interest. It does not suggest that the medical examiner who conducted the autopsy was negligent or dishonest, nor does it seek to expose any other purported misconduct on the part of OCME. Instead, the Post's only stated purpose is to help the public "understand and reconcile" the medical examiner's conclusion that Officer Sicknick died of natural causes with the Chief Medical Examiner's statement that "all that transpired played a role in his condition" and a similar statement made by a Capitol Police spokesperson. Br. 23.

This, however, is nothing more than a desire to learn whether and how the events of January 6 contributed to Officer Sicknick's death. FOIA does not protect this interest because it does not expose "agency action" to public scrutiny. *D.C. 2013*, 75 A.3d at 264. Officer Sicknick was assaulted by private citizens, not governmental actors, so the public does not have a FOIA-protected interest in learning whether his assailants caused his death. And the Post does not seek to expose any governmental act or omission that made Officer Sicknick particularly vulnerable to assault that day. *Cf. Charles*, 935 F. Supp. 2d at 90 (finding FOIA-protected interest in "investigating the effectiveness of the body armor that the United States military issues to its troops").

Nor can the public have a FOIA-protected interest in "reconcil[ing]" the finding that Officer Sicknick died of natural causes with Chief Medical Examiner Diaz's statement that "all that transpired played a role in his condition." Br. 23.

There is nothing to "reconcile" because these statements can both be accurate. The phrase "cause of death" is a medical term of art that describes "the immediate physiological processes that precipitate the death of an individual." *Reibenstein v. Barax*, 286 A.3d 222, 225 (Pa. 2022); *see OCME-FAQs*, Off. of the Chief Med. Exam'r, https://ocme.dc.gov/page/ocme-faqs.meaning (describing "cause of death" as the "medical disease, injury, or poison (alcohol, drug or toxic substance) that caused the physical death of a person"). As Diaz explained to the Washington Post, Officer Sicknick died of "natural causes" as the result of two strokes at the base of his brain stem. 12/23/22 Opp'n to Mot. for Summ. J., Ex. 1. And, Diaz noted, the autopsy found no evidence that Officer Sicknick had suffered an allergic reaction to chemical irritants, nor was there evidence of any internal or external injuries. *Id.*

There is no meaningful conflict between these statements and Diaz's additional, informal comment that Officer Sicknick was among the officers who engaged with the mob and that "all that transpired played a role in his condition." *Id.* Indeed, this comment is so vague that it is practically a truism—significant events will typically have *some* impact on a person's "condition" that day and the next. Again, the public's FOIA-protected interest is limited to "open[ing] agency action to the light of public scrutiny." *D.C. 2013*, 75 A.3d at 264. Such an interest could conceivably exist if Diaz's comment had raised meaningful doubt about the accuracy of the autopsy report. But his stray remark—that Officer Sicknick's

defense of the U.S. Capitol against a violent mob "played a role in his condition" that day and the next—does not contradict the medical examiner's findings. The public therefore has no FOIA-recognized interest in the autopsy report.[5]

Given the Post's failure to articulate a FOIA-protected public interest, this Court "need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time." *Horner*, 879 F.2d at 879. But even if the Post had proffered an interest in reconciling inconsistent statements by OCME, that interest could not possibly outweigh the powerful privacy interests of Officer Sicknick and his family. As discussed, the intimate medical details contained in autopsy reports are so private that the Council has now removed them from *any* balancing test under FOIA. Given that the public release of Officer Sicknick's autopsy report would likely lead to a frenzy of Internet and media attention that would, in turn, cause emotional anguish and other potential harm to Officer Sicknick's family, intrusion into these privacy interests is clearly unwarranted.

Alternatively, if this Court is unconvinced that this invasion of privacy is "*clearly* unwarranted," D.C. Code § 2-534(a)(2) (emphasis added), it should apply

---

[5] Any interest in "reconcil[ing]" the cause of death with the Capitol Police statement is even weaker because the Post has offered no evidence that the person who made that statement had *seen* the final autopsy report. And even if the Post could point to some inconsistency between the statements, "some variation among . . . the reports" of different agencies does not necessarily suggest illegality or deliberate government falsification. *Accuracy in Media*, 194 F.3d at 124.

the less-strict balancing test of the investigatory-records exemption, which asks only whether the invasion of privacy is "unwarranted," *id.* § 2-534(a)(3)(C). This exemption plainly applies. Officer Sicknick's death had to be investigated because it initially appeared to have been caused by injuries he suffered defending the Capitol, and therefore the autopsy report qualifies as an investigatory record. *See* D.C. Code § 5-1405(b) (requiring OCME investigation of "[v]iolent deaths," "[s]udden, unexpected or unexplained deaths," and "[d]eaths . . . resulting from employment or on-the-job injury").[6]

III. The District Conducted An Adequate Search For WhatsApp Messages Sent By Mayor Bowser.

The trial court reasonably found, based on uncontradicted evidence, that the District adequately searched for the requested WhatsApp messages. "An agency's search conducted in response to a FOIA request 'need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific

---

[6] Although the District mistakenly failed to assert this particular privacy exemption in the Superior Court, any forfeiture should be excused "[g]iven the primacy of protecting the privacy interests of third parties." *District of Columbia v. Fraternal Ord. of Police* ("*D.C. 2011*"), 33 A.3d 332, 337 (D.C. 2011). In *D.C. 2011*, this Court excused a comparable mistake where strict adherence to forfeiture rules would have barred consideration of non-litigants' privacy interests. *Id.* at 337-38. And in *August*, the D.C. Circuit excused an agency's forfeiture of FOIA exemptions to protect "'sensitive, personal private information' pertaining to third parties," 328 F.3d at 700, noting that "[t]he law does not require that third parties pay for the Government's mistakes," *id.* at 701 (citing similar holdings by other courts). If needed, this Court should take similar steps to protect the privacy interests of Officer Sicknick and his family.

request.'" *FOP 2013*, 79 A.3d at 360 (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)). To satisfy its burden, the District need only 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." *Id.* (quoting *Doe*, 948 A.2d at 1220). This can be accomplished through affidavits that demonstrate, "with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Id.* After that, "the FOIA requester can prevail in a motion for summary judgment only by showing that the agency search was not made in good faith." *Id.* (citing *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993)). "'Purely speculative claims about the existence and discoverability of other documents' are not sufficient to rebut the presumption of good faith accorded to an agency affidavit." *Id.* (quoting *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

The District has provided sworn evidence proving that it conducted an adequate search, and the Post has offered nothing but speculation that expanding the search will reveal records responsive to its request. The Mayor's General Counsel's Office handles all FOIA requests for the Mayor's records, JA 145, and the request for Mayor Bowser's WhatsApp messages was handled by Associate General Counsel Christina Sacco, JA 75-79. Sacco testified that, when she received the Post's request, she emailed it verbatim to General Counsel Betsy Cavendish, which

was the protocol established for all FOIA requests involving text messages, JA 117-18, 126-27. Although Sacco could not provide an exact date, she testified that she submitted the request to Cavendish during the "relevant time," "maybe a month before" she responded to the Post at the end of August 2021. JA 144.

Cavendish's sworn interrogatory answers describe what happened next. She asked the Mayor to search for all messages she sent via WhatsApp between January 5 and January 8, 2021. JA 78. The Mayor "search[ed] . . . her phone for WhatsApp messages sent during the time period specified" but found "no messages in her WhatsApp message history." JA 84; *see* JA 78. Mayor Bowser then told Cavendish "that her search of her WhatsApp account yielded no responsive records." JA 84. Cavendish relayed this information to Sacco, JA 134, who told the Post that the Mayor had no documents responsive to its FOIA request, JA 80.

Cavendish also explained why additional searching would not have uncovered any responsive messages. She attested that "Mayor Bowser's WhatsApp messages are stored on her WhatsApp account on her phone," "no individuals other than Mayor Bowser have permission or authorization to use [her] mobile phone," and "no individuals other than Mayor Bowser have sent or received messages via WhatsApp on her behalf." JA 86-88. And Mayor Bowser did not recall deleting any WhatsApp messages that she had sent between January 5 and January 8, 2021, and had "never enabled the 'disappearing messages' setting on her WhatsApp account." JA 85-86.

The Post has responded to this evidence with nothing but "[p]ur[e] speculati[on]" that any relevant records exist. *FOP 2013*, 79 A.3d at 360. Citing a news article, the Post claims that it is "commonplace" for EOM employees to communicate via WhatsApp. Br. 4. But the only record evidence is Sacco's testimony that she uses WhatsApp herself "for communications for work purposes." JA 122. Sacco did not say when or how often this occurred, or to whom she communicated. *See* JA 122-23. But it was clearly not the Mayor with whom she communicated, because Sacco had no knowledge as to whether Mayor Bowser "ever used WhatsApp to communicate with District employees." JA 123.

The Post argues that the District did not "provide any details about the search, including even when it was conducted," but does not explain why the precise date is relevant. Br. 26. Sacco testified that Mayor Bowser searched her phone sometime in August 2021. *See* JA 80, 144. The Post has not alleged anything that happened during that time that could have affected the adequacy of the search. *See* Br. 26. It sought no messages sent after January 8, so the search could not have been conducted too soon. And Mayor Bowser did not delete messages or use the "disappearing messages" feature, so it could not have been conducted too late. Regardless of *when* during August the search was conducted, the result would have been the same.

The Post does not identify any additional "details" that the District needed to provide to establish that it had conducted a simple search of message history via a

particular platform on a single device. Br. 26. And no details are missing. As the Superior Court explained, the sworn testimony established that:

> (1) the Mayor's phone is the device she uses to communicate via WhatsApp; (2) no other individual sends or receives messages on her behalf on that phone; (3) she has never enabled 'disappearing messages[]'; (4) she does not recall deleting any messages from the specified time period . . . ; (5) there are no back-ups; (6) . . . the Mayor herself conducted the search; and ([7]) this search revealed nothing.

JA 218-19.

The Post complains that the District has not articulated "each and every step" that Mayor Bowser took to search for responsive messages. Br. 26. But she "conducted the search of her phone" and found "no messages *in her WhatsApp message history* for the time period specified." JA 84 (emphasis added). It is not clear what additional "step" the Post thinks that the District should have identified—if any responsive messages existed, they would have been stored in Mayor Bowser's WhatsApp message history, and that is precisely where Mayor Bowser looked.

Every other question posed by the Post has likewise been answered. It asks 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." Br. 26. Cavendish answered this, attesting that, because "Mayor Bowser's WhatsApp messages are stored on her WhatsApp account on her phone and . . . the District does not maintain a back-up system for archiving such messages," JA 86, Mayor Bowser "conducted the search of her phone for WhatsApp messages sent during the time

period specified," JA 84. The Post asks whether Mayor Bowser "searched her computer files or cloud storage for responsive records contained within backup copies of her 'chat history.'" Br. 26-27. This too has been answered—Mayor Bowser did not delete messages from her message history, so there was no need to search WhatsApp cloud storage for deleted records. JA 85. And her WhatsApp account was never linked to her computer or any other device, so there was no need to search additional devices for responsive records. JA 84.

The Post *now* asks whether the Mayor "was part of any WhatsApp group where *other* members could have turned on the 'self-deleting' messages option." Br. 27 (emphasis in original). But the Post did not request messages sent by other people, *see* JA 33, and it has offered no evidence that WhatsApp allows a recipient to delete messages from the sender's WhatsApp history. Nor, in any event, did the Post ask for this information in its interrogatories—it focused only on whether *Mayor Bowser* had used the "disappearing messages" setting on her own phone. *See* JA 86 (asking for the "periods of time . . . during which the WhatsApp 'disappearing messages' setting was enabled on Mayor Bowser's mobile phone(s)"). The Post cannot fault the District for failing to answer a question that it did not ask.

Because the District has more than satisfied its own burden that it conducted an adequate, good faith search, the Post must now show that the District's search

was "not made in good faith." *FOP 2013*, 79 A.3d at 360. None of its three remaining arguments comes close to satisfying this burden.

First, the Post suggests that the District's search was unreasonable because it was conducted by Mayor Bowser herself, rather than some other District employee. Br. 25. But it offers no authority, or even reasoned argument, suggesting that an official cannot reasonably search her *own* device, especially if that is the only device on which responsive records are likely to be found. The Post notes that, unlike the WhatsApp search, OCTO conducted the search for Mayor Bowser's emails. Br. 25. But emails sent through the District's computer system are recorded and stored in a central location managed by OCTO, putting that agency in the best position to search for responsive emails. *See* JA 116, 124-25. Text messages, in contrast, are not captured by this system, so the search protocols are different. *See* JA 116, 124-25.

Second, the Post claims that, by conducting the search herself, Mayor Bowser has put her "personal knowledge directly at issue in the litigation." Br. 28. But the Post does not appeal the Superior Court's entry of a protective order or argue that it was an abuse of discretion. *See* Br. 2 (statement of issues), 25-28 (argument); *McFarland*, 935 A.2d at 351. And even if the Post had not forfeited this argument, it would lack merit. The Supreme Court has established that, "absent extraordinary circumstances," high-ranking government officials should not be subject to oral depositions. *Simplex Time Recorder Co. v. Sec'y of Lab.*, 766 F.2d 575, 586 (D.C.

Cir. 1985) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)).[7] Courts thus excuse high-ranking officials from attending depositions unless "the information could [not] be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008). Here, Cavendish properly provided the information requested by the Post, and it has not offered any extraordinary circumstances that could justify subjecting Mayor Bowser to a duplicative and unnecessary deposition.

The Post instead appears to argue that the District can show that Mayor Bowser conducted an adequate search only by producing her for deposition. *See* Br. 26-28. But the Post offers no authority suggesting that the person who actually conducted the FOIA search must appear for a deposition. On the contrary, this Court has held that the District can satisfy its burden through sworn affidavits, such as Cavendish's answers to interrogatories. *See FOP 2013*, 79 A.3d at 360.

The Post does not dispute that Cavendish asked Mayor Bowser to search her WhatsApp message history or that Mayor Bowser told Cavendish that her search had revealed no responsive messages. Nor does the Post suggest that Mayor Bowser did not search her WhatsApp message history or was untruthful when she told

---

[7] "In interpreting the applicable discovery rules, [this Court is] guided generally by decisions construing the Federal Rules of Civil Procedure, which are substantially the same as the rules of the trial court." *Plough Inc. v. Nat'l Acad. of Scis.*, 530 A.2d 1152, 1155 n.5 (D.C. 1987) (quoting *Dunn v. Evening Star Newspaper Co.*, 232 A.2d 293, 295 (D.C. 1967)).

Cavendish that the search had revealed no responsive messages. And even if the Post had made these baseless allegations, it could not support them with anything other than pure speculation, which is insufficient on summary judgment to rebut the presumption of good faith to which the District is entitled. *Id.*

Third, and finally, the Post argues that the District has conceded that it had to produce a sworn statement by Mayor Bowser by arguing in the Superior Court that it could produce Mayor Bowser's declaration in lieu of her oral deposition. JA 189. But the District made clear that it was arguing *in the alternative* and that no further discovery of any kind was warranted. *See* JA 194 ("We don't think it's necessary. We think we've answered all the outstanding questions here already. But certainly a deposition is not necessary to answer these kinds of objective questions."). And the Post did not itself ask the Court to issue this alternative ruling, either during the hearing or by filing a motion for reconsideration after the court entered the protective order. *See* JA 189-95. At this point in litigation, it is far too late for the Post to suggest a right to this alternative relief. At any rate, a sworn declaration is not warranted for all of the same reasons described above.

CONCLUSION

The Superior Court's entry of summary judgment in favor of the District should be affirmed.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

/s/ Holly M. Johnson
HOLLY M. JOHNSON
Senior Assistant Attorney General
Bar Number 476331
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
(202) 715-7713 (fax)
holly.johnson@dc.gov

April 2024

CERTIFICATE OF SERVICE

I certify that on April 29, 2024, this brief was served through this Court's electronic filing system to:

Chad R. Bowman
Charles D. Tobin
Maxwell S. Mishkin
Margaret N. Strouse

/s/ Holly M. Johnson
HOLLY M. JOHNSON

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/ Holly M. Johnson
Signature

23-CV-488
Case Number(s)

Holly M. Johnson
Name

April 29, 2024
Date

holly.johnson@dc.gov
Email Address