RECORD NO. 21-CV-0894

District of Columbia
Court of Appeals

COREY J. ZINMAN,

Plaintiff – Appellant,

v.

THE DISTRICT OF COLUMBIA

Defendant – Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

APPELLANT'S INITITAL BRIF

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STATEMENT PURSUANT TO RULE 28(A)(2)(A)

The parties in this case are Corey J. Zinman, Esq., the Appellant, and the District of Columbia, the Appellee.

Appellant appeared *pro se* before the Superior Court in the matter underlying this appeal. (No. 2021 CA 000750 B)

Appellee was represented in the Superior Court by Assistant Attorney General John Bardo, Esq. Appellee is now represented in this Court by Solictor General Caroline VanZile, Esq.

There are currently no intervenors or amici curiae in this matter.

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QUESTIONS PRESENTED

This appeal raises the following questions:

1. Did the Superior Court err by granting summary judgement in favor of the district?
2. Did the Superior Court err by concluding that MPD officers and the other individuals depicted in the Body Worn Camera ("BWC") footage at issue had cognizable privacy interests in the nondisclosure of such footage?
3. Did the Superior Court err by holding that the District was justified in withholding any and all images of and statements made by individuals depicted in the BWC footage at issue?
4. Did the Superior Court err by holding that the privacy interests in the redactions of the BWC footage at issue outweigh the public's interest in the full unredacted disclosure of such footage?
5. Did the Superior Court err by holding that Zinman's request for declaratory relief was moot?
6. Did the Superior Court err by refusing to award Zinman his costs incurred in litigating this matter?

STATEMENT OF THE CASE

By way of background, Plaintiff, Corey J. Zinman, Esq. ("Zinman") travelled to Washington D.C. on January 18th, 2021. *See* Appendix B (Complaint; App. 13a-24a) at ¶ 9 (App. 15a). While lawfully recording upon a public street, Zinman was assaulted. *Id.* at ¶ 10 (App. 15a). Shortly thereafter, several officers from the Metropolitan Police Department (hereinafter referred to as, "MPD") arrived and separated Zinman from his assailants and took statements from all witnesses separately. *Id.* at ¶ 11 (App. 15a). After taking statements from all witnesses, the responding officers informed Zinman that his assailants alleged that he had pushed a female witness and that's why one of the male witnesses decided to snap Zinman's selfie stick in half and smash his GoPro camera to the ground. *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 32a. On that basis, the responding officers concluded that they did not have probable cause to issue a citation or to make an arrest for assault or destruction of property, even though Zinman's hand was gashed open, and both his selfie stick and camera were destroyed as well. *Id.* The next day, on January 19th, 2021, Zinman traveled to the Second District MPD to present video evidence showing a female shoving a bullhorn into Zinman's chest as well as a male grabbing Zinman's camera. *Id.* at 33a. Notwithstanding, Zinman was informed that such evidence did not constitute assault because the female was apparently just "standing her ground," and the male apparently intended to grab Zinman's camera and not his person, despite the fact that Zinman's camera was clearly attached to his person. *Id.*

Suspecting that he had been discriminated against for traveling to Washington D.C. from out of state, on January 22, 2021, Zinman submitted a complaint against with the Office of Police Complaints (hereinafter referred to as, "OPC"). *Id.* at 34a. Seeking to substantiate his suspicions and to potentially identify his assailants as well, on the same day, Zinman filed a request under the District of Columbia Freedom of Information Act (hereinafter referred to as, "DC FOIA") for the BWC "footage recorded by … Sergeant Phillip Robinson, Officer Syed Hussain, as well a third unidentified black male officer … on Tuesday, January 19th, 2021 at approximately 11:00 PM (CCN # 21008200)," in addition to "copies of all surveillance footage from the lobby of the Second District [MPD] recorded between the hours of 3 and 4 PM during [Zinman's] interaction with Sergeant Robinson and Detective J. Ellis on Wednesday, January 20th, 2021." *Id.* Nevertheless, on February 17, 2021, Zinman received a response from "FOIA Specialist," Ms. Tara Branch, denying his request for the body worn footage in which he sought. *Id.*; *see also* Appendix E (Letter from Ms. Tara Branch; App. 62a-63a).

Thereafter, on March 10, 2021, Zinman brought this action in the Superior Court of the District of Columbia seeking to compel Defendant, the District of Columbia ("the District"), to release all records requested in Zinman's January 22, 2021 FOIA request (Request Number 2021-BWC-00118)." *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 32a. Additionally, Zinman sought to recover his costs associated with the filing and litigation of this action pursuant to D.C.

Code § 2-537(c). *Id.* Notably, however, during the pendency of that action, MPD eventually released various BWC video clips responsive to Zinman's January 21, 2021, request for records on July 2, 2021, August 9, 2021, and September 3, 2021, albeit heavily redacted video clips. *Id.* at 35a. On that basis, the District filed a Motion for Summary Judgement arguing that Zinman "received all non-exempt information responsive to his D.C. FOIA request," and further that "Plaintiff's claims for violation of the D.C. Freedom of Information Act are moot" *Id.* Nevertheless, Zinman filed his own Motion for Summary Judgment arguing that he's entitled to disclosure of all BWC footage responsive to his request for records as well as an award of his costs incurred in litigating this case. *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a).

On November 29, 2021, the Honorable Judge Anthony C. Epstein issued an Order, *inter alia*, granting the District's Motion for Summary Judgement and denying Zinman's Motion for Summary Judgement. *See* Appendix A (Order; App. 1a-12a). In doing so, Judge Epstein held that "the record demonstrates that the District properly withheld limited information pursuant to two FOIA exemptions when MPD redacted certain parts of the footage that it provided to Mr. Zinman." *Id.* at 7. Furthermore, according to Judge Epstein, the District "met its burden to establish that the privacy interests in the redactions of the responsive footage outweigh the public interest in the full unredacted disclosure of this footage of a relatively routine encounter between the police and civilians." *Id.* at 11. Moreover, Judge Epstein held that, "[b]ecause the

District complied with its obligations under DC FOIA, Mr. Zinman's request for injunctive relief is moot." *Id.* Thereafter, on December 29, 2021, Zinman filed a Notice of Appeal to this Court seeking review of Judge Epstein's Order.

RULE 28(a)(5) STATEMENT

This is an appeal from a final order of the Superior Court that disposed of all parties' claims, or information establishing this court's jurisdiction on some other basis.

STATEMENT OF FACTS

As previously noted, Zinman travelled to Washington D.C. on January 18th, 2021, and was assaulted while lawfully recording upon a public street. *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 32a. In the process of this assault, Zinman's "selfie stick," which was attached to his person and protruding through his jacket, was snapped in half and his GoPro camera which was attached to the end of the selfie stick was smashed to the ground. *Id.* Additionally, Zinman's hand was sliced open by his broken selfie stick while attempting to defend his property. *Id.* Shortly thereafter, Officer Syed Hussain, Sergeant Phillip Robinson, as well as a third unidentified male officer arrived and separated Zinman from his assailants and took statements from all witnesses separately. *Id.* After taking statements from all witnesses, the responding officers informed Zinman that his assailants alleged that he had pushed a female witness and that's why one of the male witnesses decided to snap Zinman's selfie stick in half and smash his GoPro camera

to the ground. *Id.* On that basis, the responding officers concluded that they did not have probable cause to issue a citation or to make an arrest for assault or destruction of property, even though Zinman's hand was gashed open, and both his selfie stick and camera were destroyed as well. *Id.* When Zinman attempted to ask the Officers questions regarding their refusal to issue a citation or to make an arrest, Sergeant Robinson became belligerent and stated that "you know what you're your intent was coming down here." *Id.* When Zinman replied that his intent in travelling to D.C. was to do "independent journalism," Sergeant Robinson scoffed and stated that "you can do independent journalism, but once somebody says leave or wear a mask, you should at least practice social distance" *Id.* Additionally, when Zinman stated that his assailants were free to "stand 6 feet back," Sergeant Robinson responded by stating that the public street that he was standing upon (Black Lives Matter Boulevard) belonged to those who had assaulted him because they had apparently been using that area to protest for some time and further that his assailants were justified in shoving a bullhorn into his chest to prevent him from entering "their area." *Id.* at 32a-33a. Moreover, although the responding officers assured Zinman that their report would include the identifying information of his assailants, their report failed to include such information. *Id.* at 33a. Compounding matters further, their report failed to even mention Zinman's broken camera or selfie stick. Id.; *see also* Appendix D (Police Report; 61a).

The next day, on January 19th, 2021, Zinman traveled to the Second District

Metropolitan Police Department ("MPD") and presented video evidence to Sergeant Robinson and Detective J. Ellis showing a female shoving a bullhorn into Zinman's chest as well as a male grabbing Zinman's camera. *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 33a.Notwithstanding, Sergeant Robinson and Detective Ellis informed Zinman that such evidence did not constitute assault because the female was apparently just "standing her ground," and the male apparently intended to grab Zinman's camera and not his person, despite the fact that his camera was clearly attached to his person. *Id.* Additionally, when Zinman asked Sergeant Robinson why the officers' report stated that he was unsure of how he hurt his hand and didn't mention a single word about his broken camera, Sergeant Robinson outright lied by stating "you never told me nothing about the broken camera," and further that Zinman had allegedly stated "I don't know" when asked how he had gotten the cut on his hand. *Id.* Notably, however, BWC footage disclosed by the MPD clearly shows that, not only did Sergeant Robinson never even ask how Zinman's hand had gotten cut, but Zinman never stated that he didn't know how his hand had been cut either; rather, he stated that "I don't even know why … they did that." *Id.* Moreover, even if Zinman had never directly told Sergeant Robinson that his camera had been destroyed, Sergeant Robinson clearly acknowledged that he knew "the selfie stick was broken." *Id.* Nevertheless, as noted above, the officers report failed to mention a single word about Zinman's broken selfie stick even though BWC footage clearly shows Officer Hussain—the officer who actually wrote the report—clearly stating that "your stuff

got broken, you got a cut on your hand, I don't blame you for being emotionally distressed." *Id.* at 33a-34a.

Suspecting that he was being discriminated against for traveling to Washington D.C. from out of state, on January 22, 2021, Zinman submitted a complaint against Sergeant Robinson, Officer Hussain, as well as Detective Ellis with the Office of Police Complaints ("OPC"). *Id.* at 34a. Seeking to substantiate his suspicions and to potentially identify his assailants as well, on the same day, Zinman filed a FOIA request for the BWC "footage recorded by … Sergeant Phillip Robinson, Officer Syed Hussain, as well a third unidentified black male officer … on Tuesday, January 19th, 2021 at approximately 11:00 PM (CCN # 21008200)," in addition to "copies of all surveillance footage from the lobby of the Second District [MPD] recorded between the hours of 3 and 4 PM during [Zinman's] interaction with Sergeant Robinson and Detective J. Ellis on Wednesday, January 20th, 2021." *Id.* Nevertheless, on February 17, 2021, Zinman received a response from "FOIA Specialist," Ms. Tara Branch, denying his request for the body worn footage in which he sought. *Id.* According to Ms. Branch, because the footage in which he sought is part of an ongoing OPC investigation, "the release of this footage could interfere … by revealing the direction and pace of the investigation … 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 could place witnesses in danger." *See* Appendix E (Letter from Ms. Tara Branch; App. 62a-63a) at 62a. On that

basis, Ms. Branch asserted that the body worn camera footage in which Zinman sought is exempt from disclosure pursuant to D.C. Code §2-534(3)(A)(iii). *Id.*

On March 10, 2021, Zinman brought this action seeking to compel Defendant, the District of Columbia ("the District") to release all records requested in Zinman's January 22, 2021 FOIA request (Request Number 2021-BWC-00118)." *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 34a. Additionally, Zinman sought to recover his costs associated with the filing and litigation of this action pursuant to D.C. Code § 2-537(c). *Id.* Notably, however, during the pendency of this action, MPD eventually released various BWC video clips responsive to Zinman's January 21, 2021, request for records on July 2, 2021, August 9, 2021, and September 3, 2021, albeit MPD redacted images of and statements made by various individuals including MPD officers as well as witnesses pursuant to the personal privacy exemption, D.C. Code §§ 2-534(a)(2), and the law enforcement personal privacy exemption, D.C. Code 2-534(a)(3)(c). *Id.* at 35a.

STANDARD OF REVIEW

This Court reviews de novo the trial court's grant of summary judgment in a FOIA case. *See* Padou v. District of Columbia, 29 A.3d 973, 980 (D.C. 2011) (citation omitted). "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.* (citations, internal quotation marks, and ellipsis omitted). "In the FOIA context[,] this

requires that [this Court] ascertain whether the agency has sustained its burden of demonstrating the documents requested are exempt from disclosure under the FOIA." *See Multi Ag Media LLC v. Dep't of Agric.*, 380 U.S. App. D.C. 1, 4, 515 F.3d 1224, 1227 (2008) (citations, internal quotation marks, brackets, and ellipsis omitted). This is a question of law. *See* e.g., *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005); *Horowitz v. Peace Corps*, 368 U.S. App. D.C. 192, 199, 428 F.3d 271, 278 (2005).

SUMMARY OF ARGUMENT

Judge Epstein erred by granting summary judgement in favor of the District. In doing so, Judge Epstein erred by holding that the individuals depicted in the BWC footage at issue have cognizable privacy interests in the nondisclosure of such footage, and further that those interests outweigh the public's interest in the full unredacted disclosure of such footage. Moreover, Judge Epstein erred by holding that Zinman's request for declaratory relief was moot. Lastly, Judge Epstein erred by holding that Zinman wasn't entitled to be awarded his costs incurred in litigating this matter.

ARGUMENT

I. ALL PERSONS ARE ENTITLED TO FULL AND COMPLETE INFORMATION REGARDING THE OFFICIAL ACTS OF PUBLIC OFFICIALS AND EMPLOYEES

Although the D.C. FOIA declares it to be "[t]he public policy of the District of Columbia … that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees," D.C. Code § 2-531, "[i]nformation of a personal nature

where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" is nevertheless exempt from disclosure, D.C. Code § 2-534(a)(2). Similarly, "[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints" are also exempt from disclosure, "but only to the extent that the production of such records would … [c]onstitute an unwarranted invasion of personal privacy." *See* D.C. Code § 2-534(a)(3)(C). Notwithstanding, the provisions of D.C. FOIA giving citizens the right of access are to be generously construed, while the statutory exemptions from disclosure are to be narrowly construed, with ambiguities resolved in favor of disclosure. *See* e.g., *Riley v. Fenty*, 7 A.3d 1014, 1018 (D.C. 2010); *Fraternal Order of Police v. D.C.*, 79 A.3d 347, 354 (D.C. 2013).

A. Judge Epstein erred by concluding that MPD officers and the other individuals depicted in the BWC footage at issue have a cognizable privacy interest in the nondisclosure of such footage.

The privacy interest that is protected under D.C. Code § 2–534(a)(2) (i.e., the personal privacy exemption) encompasses the individual's control of information concerning his or her person, including his or her name and home address. *See* D.C. Code § 2–534(a)(2); *see also Padou*, 29 A.3d at 982. Likewise, D.C. Code § 2-534(a)(3)(C) (i.e., the law enforcement personal privacy exemption) exempts from disclosure materials compiled for law enforcement purposes when disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. *See* D.C. Code § 2-534(a)(3)(C). To determine whether either exemption applies, courts

first "balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." *See Davis v. U.S. DOJ*, 968 F.2d 1276, 1281 (D.C. Cir. 1992). "On one side of the scale, the exemption protects the privacy interests of all persons mentioned in law enforcement records, whether they be investigators, suspects, witnesses, or informants." *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115 (D.C. Cir. 2007) (citing *Schrecker v. U.S. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003)). On the other side, "the only public interest relevant for purposes of [the exemption] is one that focuses on the citizens' right to be informed about what their government is up to." *See Davis*, 968 F.2d at 1282 (quoting *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)) (internal quotation marks omitted).

According to Judge Epstein, "[u]nder DC FOIA, 'MPD employees have a cognizable privacy interest in the nondisclosure of their names and identifying information.'" *See* Appendix A (Order; 1a-12a) at 8a (quoting *District of Columbia v. Fraternal Order of Police*, 75 A. 3d 259, 267 (D.C. 2013). Notably, however, *District of Columbia v. Fraternal Order Police*, 75 A.3d 259 (D.C. 2013) concerned MPD "employees who submitted questions, comments, or concerns to the Chief of Police through an email account. *Id.* at 262. As such, this Court did not hold that police officers generally have a privacy interest in the nondisclosure of their names and identifying information, but rather that in the context of that case, the MPD employees at issue had a heightened privacy interest because they "relied on the government's

pledge of confidentiality" in sending the emails. *Id.* at 267. Notwithstanding, even in that case, the District "disclosed the content of the emails to the Fraternal Order of Police, Metropolitan Police Department Labor Committee ("FOP"), but redacted the authors' identifying information," *id.* at 262, whereas in the case at bar, the District refused to disclose even the contents of the statements made by the MPD officers in the course of their official duties in a public place, even though those officers did not rely on any pledge of confidentiality in making such statements.

Additionally, although Judge Epstein correctly noted that, in certain circumstances, "[t]he privacy interest that is entitled to protection encompasses the individual's control of information concerning his or her person, including names, addresses, and other identifying information," *id.* (internal quotations omitted) (quoting *Fraternal Order of Police v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015)), for the reasons set forth in the following sections, his reliance upon *Horvath v. U.S. Secret Service*, 419 F. Supp.3d 40 (D.D.C. 2019) and *Skinner v. U.S. Department of Justice*, 744 F. Supp.2d 185 (D.D.C. 2010) was nevertheless misplaced.

i. *The privacy interest recognized by the Horvath Court is inapplicable to the case at bar.*

In *Horvath*, *supra*, a special agent with the United States Secret Service (hereinafter referred to as, "Horvath") filed a class action lawsuit seeking overtime and related compensation on behalf of himself and other similarly situated special agents of the Secret Service. *Id.* at 44. Shortly thereafter, Horvath claimed that his supervisor retaliated against him for filing the class action lawsuit and therefore he filed a

complaint with the Secret Service's Office of Integrity. *Id.* Horvath later learned that the Secret Service had conducted a fact-finding investigation into his allegation and deemed the matter closed. *Id.* However, Horvath was never informed of the findings from said investigation, so he submitted a FOIA request for all records associated with it. *Id.* Although his request was forwarded to the Secret Service's FOIA Office, over a year later, Horvath still had not received any documents despite repeatedly requesting updates. As a result, Horvath brought suit in the D.C. District Court, alleging that the Secret Service's failure to respond to his records request violated FOIA. *Id.*

A little over a month after Horvath filed suit, the Secret Service eventually produced a sixty-five-page case file concerning the Secret Service Inspection Division's investigation of a third-party employee based on Horvath's allegation that the employee had subjected him to workplace harassment and retaliation. *Id.* at 44-45. Notably, however, pursuant to FOIA Exemptions 5, 6, and 7(C), certain information was redacted. *Id.* at 45. In particular, the Secret Service fully withheld the substance of five sworn statements by Secret Service agents and two memoranda of interviews with Secret Service agents prepared as part of the investigation. *Id.* Thereafter, the Secret Service claimed it had released all responsive, nonexempt information and therefore moved for summary judgment arguing "that the witnesses involved in the investigation have a substantial privacy interest in the non-disclosure of their identifying information, which includes not only their names and titles, but also their 'knowledge about facts and events' because disclosing such information 'would allow

those familiar with the events to readily identify these individuals.'" *Id.* However, Horvath opposed the motion, arguing "that he seeks the factual information uncovered by the fact-finding investigation related to his allegation of workplace harassment, not any personally identifying information." *Id.* at 46.

In agreeing with the Secret Service, the D.C. District Court noted that "[i]dentifying information is not limited to names, social security numbers, and other discrete pieces of information." *Id.* at 47 (internal quotation marks omitted) (citing *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 30-31 (D.D.C. 2012)). Toward that end, the Court recognized that "while the redaction of an individual's name may be sufficient to protect his identity and privacy from the public, it may not be sufficient to protect him in the smaller community of his school or work." *Id.* (quoting *Nat'l Whistleblower Ctr.*, 849 F. Supp. 2d 13 at 30-31). Thus, because the Court found that "the information withheld under Exemption 6 concerns a small group of individuals who are known to each other and to [Horvath] and who are easily identifiable from the details contained in the withheld information," the Court ultimately held that "disclosure of the information would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 48-49 (internal quotation marks omitted).

Significantly, because the *Horvath* Court found that the Secret Service's redactions were proper under FOIA Exemption 6, it declined to address "whether that same information is also properly withheld under Exemption 7(C)." *Id.* at 49.

Notwithstanding, even *assuming arguendo* that the Court would've upheld such redactions under Exemption 7(C), the circumstances before the Court in that case are clearly distinguishable from those surrounding the case at bar. As an initial matter, while police officers subject to intradepartmental proceedings have more than a de minimis privacy interest in not being publicly identified, *see Fraternal Order Police*, 124 A.3d at 77, it's equally as axiomatic that government officials and employees do not have a reasonable expectation of privacy while performing their duties in public places, *see* e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing that there's a First Amendment interest in videotaping government officials performing their duties in public places); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) ("under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas"). Notably, however, the records sought by Zinman have nothing to do with intradepartmental proceedings, but rather concern police officers engaged in the performance of their duties upon a public street. Consequently, the privacy interest recognized by the *Horvath* Court is clearly inapplicable to the case at bar.

Additionally, not only has the MPD itself acknowledged that its officers have no legitimate expectation of privacy while performing their duties in public by issuing a General Order that prohibits MPD officers from preventing members of the public

from recording officers engaged in the performance of their duties in a public place,[1] but the D.C. Council has acknowledged the same by enacting D.C. Code § 5–337.01 which mandates that "[e]very member of the [MPD], while in uniform, shall wear or display the nameplate and badge issued by the MPD, or the equivalent identification issued by the MPD, and shall not alter or cover the identifying information or otherwise prevent or hinder a member of the public from reading the information." Therefore, the MPD's redaction of images of and statements made by its officers engaged in their duties upon a public street in the name of concealing their identities doesn't just contradict its own stated policy, but it's also inconsistent with D.C. Law.

Lastly, it should be noted that, in contrast to the identities of those involved with the Secret Service investigation at issue in *Horvath,* the names of those involved with the so-called "investigation" in the case at bar are already known, at least with respect to Officer Syed Hussain, Sergeant Phillip Robinson, and Detective J. Ellis.

ii. <u>The circumstances before the Court in *Skinner* are clearly inapposite to the case at bar.</u>

In *Skinner*, *supra*, a man (hereinafter referred to as, "Skinner") was arrested and convicted for shooting two Drug Enforcement Administration ("DEA") agents as they were executing a search warrant which uncovered several types of drugs including LSD, marijuana and methamphetamine, in addition to materials suspected to be used in the manufacture of methamphetamine and other drug paraphernalia as well. *Id.* at

[1]. Section II B.2 of the July 19, 2012 General Order (Topic: OPS, Series 304, Number 19) states: "[A] bystander has the right under the First Amendment to observe and record members in the public discharge of their duties."

206-07. Thereafter, Skinner submitted FOIA requests to numerous law enforcement agencies, including the DEA, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), and the Federal Bureau of Investigation ("FBI"), for copies of any and all records created and received by those agencies in regard to himself. *Id.* at 188-94. Although the respective agencies released various records to Skinner, certain information was redacted or withheld pursuant to FOIA Exemption 7(C), among other FOIA Exemptions as well. *Id.* at 207-11.

Namely, the BATFE withheld the names of law enforcement agents and other law enforcement employees, as well as information by which those individuals could be identified because disclosure of their identities "might seriously prejudice their effectiveness in conducting investigations to which they are assigned and subject them to unwarranted harassment." *Id.* at 208. Likewise, the FBI withheld "the names and/or identifying information (such as telephone numbers and social security numbers) of FBI [Special Agents], individuals who served as task force officers, and support personnel who were responsible for conducting, supervising, and/or maintaining the investigative activities reported in the documents concerning plaintiff and others" because disclosure of their identities "may seriously impact their effectiveness in conducting other investigations." *Id.*

Additionally, the BATFE withheld names of and identifying information about third parties investigated by the BATFE, who were "described in sufficient detail to allow for … identification … by persons familiar with the circumstances and facts of

the [BATFE's] investigation." *Id.* at 209. In doing so, the BATFE explained that it did so in order "to protect the individual from identification by handwriting, voice and … witness accounts which could be attributed only to that individual," and further that disclosure of information about witnesses has "the very real potential to endanger [them] or cause harassment and harm to [their] lives and reputation." *Id.* Additionally, according to the BATFE, disclosure of witness information "may well discourage future witnesses from cooperating with [the BATFE]." *Id.* Applying a similar rationale, the FBI withheld "the names of and identifying information (such as addresses, dates of birth, social security numbers, and telephone numbers) about third parties 'interviewed by the FBI during the course of the FBI's investigation of plaintiff and others,' … individuals 'only incidentally mentioned in these investigative records,' … and third parties 'of investigative interest' to the FBI." *Id.* Toward that end, the FBI explained that "[t]he largest roadblock to successfully obtaining the desired information through an interview" is the interviewee's "fear … that his/her identity will … be exposed and consequently [that] he/she could be harassed, intimidated, or threatened with legal, economic …, or possible physical harm." *Id.* at 209-10. To address this fear, the FBI seeks to assure interviewees "that their names and personal identifying information will be held in the strictest confidence." *Id.* at 210. Moreover, "[t]he DEA also withh[eld] the names of and identifying information about 'innocent third parties, witnesses, suspects, co-defendants, and confidential sources of information' under Exemption 7(C) … [because] … release of this information 'may

[cause them to] suffer undue invasions of privacy, harassment, and humiliation from disclosure of their identities in the context of a criminal law enforcement investigatory file.'" *Id.*

In holding that "the BATFE, the FBI and the DEA properly withheld the names of and identifying information about federal and local law enforcement officers and support personnel, confidential sources, witnesses, interviewees, persons of investigative interest, and innocent third parties mentioned in the law enforcement records relevant to this case," *id.* at 211, the District Court noted that "Exemption 7(C) recognizes that the stigma of being associated with any law enforcement investigation affords broad privacy rights to those who are connected in any way with such an investigation unless a significant public interest exists for disclosure," *id.* at 210, and further that "[t]he exemption 'takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity,'" *id.* (quoting *Dunkelberger v. U.S. Dep't of Justice*, 906 F.2d 779, 781, 285 U.S. App. D.C. 85 (D.C. Cir. 1990) (internal quotation marks omitted)).

In stark contrast to the circumstances before the Court in *Skinner* where the investigatory records at issue were part of an extensive multiagency operation "which targeted a drug distribution criminal enterprise in Harrison County, Mississippi," *id.* at 207, as Judge Epstein aptly noted, the records at issue here concern "a relatively routine encounter between the police and civilians," *see* Appendix A (Order; App. 1a-12a) at

11a. Furthermore, in *Skinner*, disclosure of information concerning individuals "described in sufficient detail to allow for … identification … by persons familiar with the circumstances and facts of the … investigation" posed "the very real potential to endanger [those individuals] or cause harassment and harm to [their] lives and reputation," especially considering Skinner's "criminal history, particularly the assault on federal officers, as evidence of a propensity to violence and a capacity to harm human beings." *See Skinner*, 744 F. Supp. 2d at 209. Conversely, however, images of and statements made by the individuals depicted in the BWC footage at issue in the instant case do not describe such individuals in sufficient enough detail to allow for their identification. Thus, for the foregoing reasons, the circumstances before the Court in *Skinner* are clearly inapposite to the case at bar.

iii. <u>There is no rule establishing that police investigations generally implicate the privacy interests of officers and civilians.</u>

According to Judge Epstein, "Zinman basically argues that civilians have no privacy interest in interactions with the police in public areas, but accepting that argument would mean that the exception would swallow the rule that police investigations of possible criminal activity generally implicate the privacy interests of officers and civilians." *See* Appendix A (Order; App. 1a-12a) at 9a. As an initial matter, however, there is no such rule establishing that police investigations generally implicate the privacy interests of officers and civilians. To be clear, if disclosure of investigatory records compiled for law enforcement purposes automatically constituted an unwarranted invasion of personal privacy, it would've been unnecessary

and redundant for the legislature to specifically state that such records are exempt "only to the extent that the production of such records would … [c]onstitute an unwarranted invasion of personal privacy." *See* D.C. Code § 2-534(a)(3)(C). Furthermore, Zinman never suggested that "civilians have no privacy interest in interactions with the police in public areas." Conversely, Zinman argued that "because the individuals in the BWC footage that Zinman requested not only had full knowledge that they were being recorded when they voluntarily gave false statements to the police, but were also standing upon a public street blaring loud music, protesting with obscene signs, and otherwise calling attention to themselves when they assaulted Zinman and destroyed his property, … those individuals had absolutely no subjective expectation of privacy in their images or statements, let alone one that society is prepared to accept as objectively reasonable." See Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 40a (quoting *Holt v. United States*, 675 A.2d 474, 480 (D.C. 1996)) (recognizing that it's "well settled that what a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection, because the exposure withdraws any expectation of privacy") (internal quotation marks omitted).

iv. <u>DC FOIA doesn't create any substantive privacy interests but rather recognizes those existing by statute or pursuant to the Constitution.</u>

In *Holt*, after a jury had convicted a man of various crimes, he appealed arguing that, *inter alia*, the trial court erred in admitting in evidence clothing seized from him while he was receiving emergency medical treatment at Washington Hospital Center. *See Holt*, 675 A.2d at 476–77. In rejecting that argument, this Court acknowledged

that it's "well settled that 'what a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection,' because the exposure withdraws any expectation of privacy. *Id.* at 480 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)). Accordingly, because the man had "voluntarily walked into Washington Hospital Center's emergency room wearing—for everyone to see—the clothing the police later inspected," this Court ultimately held that "[j]ust as [appellant] had no reasonable expectation of privacy in his *physical appearance*, handwriting, *or voice*, he had no reasonable expectation of privacy in the appearance of his publicly worn clothing." *Id.* (emphasis added). Notwithstanding, according to Judge Epstein, "the privacy interests protected by DC FOIA are broader than those subject to constitutional protection." Notably, however, in contrast to that conclusory assertion, DC FOIA doesn't create any substantive privacy interests; rather, it merely recognizes those privacy interests which already exist by statute or pursuant to the "penumbras" created by the specific guarantees of the First, Third, Fourth, and Ninth Amendments. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Additionally, according to Judge Epstein, "Ms. Quon-Hyden's declaration establishes that (1) the MPD officers had a privacy interest in their images, and (2) both the voices and images of the civilian suspects and witnesses are 'personally identifiable' and would 'amount to an unwarranted invasion of personal privacy.'" *See* Appendix A (Order; App. 1a-12a) at 8a (citing Appendix F (Quon-Hyden Declaration; App. 64a-66a) at ¶¶ 10-14 (66a)). As an initial matter, however, neither Judge Epstein

nor Ms. Quon-Hyden cite to any authority holding that police officers have a privacy interest in their images while performing their duties in a public place. Furthermore, although in certain circumstances the redaction of an individual's name may not be sufficient to protect them in the smaller community of their school or work, *see Horvath*, 419 F. Supp.3d at 47, in contrast to the circumstances before the Court in *Horvath*, this is not a case where individuals identities would be at risk from disclosure of their images and statements alone. To be clear, prior to the incident on January 18th, 2021, Zinman had never encountered the civilians depicted in the BWC footage at issue. Consequently, contrary to the District's assertion that "the voices and images of the civilian suspects and witnesses are 'personally identifiable' and would 'amount to an unwarranted invasion of personal privacy,'" images of and statements made by individuals depicted in the BWC footage at issue are not "personally identifiable." Moreover, individuals have no reasonable expectation of privacy in what they voluntarily expose to the public, and disclosure of such information would not "amount to an unwarranted invasion of personal privacy." *See Holt*, 675 A.2d at 480 (recognizing that individuals have no reasonable expectation of privacy in their "*physical appearance … or voice*").

B. <u>Disclosure of personal information pertaining to the individuals depicted in the BWC footage at issue would not be unwarranted.</u>

Personal information of individuals contained in law enforcement records is presumptively exempt from disclosure "unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names

of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant." *See SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205–06 (D.C. Cir. 1991). Significantly, however, this presumption does not apply where an individual has voluntarily disclosed his involvement in the records at issue. *See Nation Mag., Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) (holding that an individual's public statements that he was involved with federal drug interdiction operations "effectively waive [his] right to redaction of his name from documents on events that he has publicly disclosed").

In *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180 (D.D.C. 2010), a nonprofit organization dedicated to the protection of animals submitted FOIA requests for information about the criminal investigation of Lee Marvin Greenly and Troy Lee Gentry for hunting and transporting a bear in violation of federal law. *Id.* at 184–85. Although various responsive documents were eventually disclosed, the names and faces of Gentry and Greenly were redacted from many of those documents and three video recordings were also withheld. *Id.* at 188-190. When the organization sued to compel disclosure of the redacted information, the D.C. District Court recognized that "Greenly and Gentry have some privacy interest in preventing the disclosure of inculpatory video recordings containing their likenesses." *Id.* at 193. Nevertheless, given the particular circumstances of the case, this Court

concluded that "Gentry's and Greenly's privacy interests [were] quite attenuated." *Id.* Towards that end, the Court noted that "[u]nlike surveillance tapes that capture a person's image without their consent, the videos at issue here were created by Gentry and Greenly expressly for distribution to the public," and further that "[t]here is nothing in the record to suggest … that Gentry and Greenly appeared in these videos without their knowing consent." *Id.* Accordingly, the Court ultimately held that "neither Gentry nor Greenly could have expected that their appearances on these videos would remain private." *Id.* at 193. Perhaps more notably, however, in rejecting the government's argument that "Gentry's privacy interests are substantial because the release of the videos could reasonably be expected to lead to embarrassment or harassment," the Court emphasized that "the relevant question is not whether there is likely to be an intrusion, but whether any intrusion is 'unwarranted,'" and further that "[t]o the extent that Defendants seek to protect Gentry and Greenly from opprobrium based on their unlawful conduct, such an invasion of privacy is not necessarily unwarranted." *Id.* (quoting 5 U.S.C. § 552(b)(7)(C)). Moreover, in rejecting the government's argument that certain videos should be withheld to the extent that they show the interior of Gentry's family home to protect the privacy interests of his family members, the Court emphasized that "Gentry allowed this video to be filmed in the home, and Defendants have produced no evidence that the family members … objected to this footage." *Id.* at 194.

Similar to the circumstances before the Court in *Showing Animals Respect &*

Kindness, in the instant case, there's no evidence that any of the witnesses who gave statements to MPD officers regarding the incident in question ever objected to their statements being recorded on camera. In fact, although they were under no legal obligation to provide any statements to MPD officers, Zinman's assailants voluntarily chose to do so, apparently in an attempt to have Zinman arrested or at least to prevent him from having any recourse for his injuries or destroyed property. More importantly, however, as the D.C. District Court aptly noted in *Showing Animals Respect & Kindness*, "the relevant question is not whether there is likely to be an intrusion, but whether any intrusion is 'unwarranted.'" *Id.* (quoting 5 U.S.C. § 552(b)(7)(C)). Accordingly, to the extent that the District seeks to prevent Zinman's assailants from being identified to protect them from opprobrium based on their unlawful conduct, such an invasion would not be unwarranted as the public has a distinct interest in the proper administration of justice and seeing individuals who break the law held accountable for doing so.

C. Judge Epstein erred by holding that the District was justified in withholding any and all images of and statements made by individuals depicted in the BWC footage at issue.

In *Nation Mag., supra*, the D.C. Circuit Court of Appeals recognized that agencies aren't permitted "to exempt from disclosure all of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address." *See Nation Mag., Washington Bureau*, 71 F.3d at 896 ("Because such a blanket exemption

would reach far more broadly than is necessary to protect the identities of individuals mentioned in law enforcement files, it would be contrary to FOIA's overall purpose of disclosure").

Even *assuming arguendo* that the District was permitted to redact identifying information (e.g., names or addresses) of the civilians depicted in the BWC footage, the District cannot lawfully justify its complete nondisclosure of images or statements made by those individuals solely on the ground that such footage happens to identify them by name or otherwise. *See Showing Animals Respect & Kindness*, 730 F. Supp. 2d at 200 (recognizing that FOIA requires that an agency produce "any reasonably segregable portion" of a record that is not exempt from disclosure) (quoting 5 U.S.C. § 552(b)). Thus, Zinman is entitled to disclosure of any reasonably segregable portion of BWC footage that isn't exempt.

D. Judge Epstein erred by concluding that the privacy interests in the redactions of the BWC footage at issue outweighs the public interest in the full unredacted disclosure of such footage.

Because Judge Epstein concluded that "Zinman's FOIA request implicates 'more than [a] *de minimis* interest in the privacy of personal information,'" he then considered whether "disclosure of the withheld information would advance a significant public interest, and [whether] the public interest in disclosure outweighs the privacy concern." *See* Appendix A (Order; App. 1a-12a) at 9a (quoting *Fraternal Order of Police*, 124 A.3d at 77). Toward that end, Judge Epstein noted that "[t]he only relevant public interest in disclosure to be weighed … is the extent to which

disclosure would serve the core purpose of FOIA, which is contributing significantly to public understanding of the operations or activities of government," and further that "the requestor must show at a minimum that the withheld information will shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* (quoting *Fraternal Order of Police,* 124 A.3d at 77).

i. <u>Zinman's rights under DC FOIA are neither increased nor decreased by reason of the fact that he may have an interest in the BWC footage greater than that shared by the average member of the public.</u>

According to Judge Epstein, "Mr. Zinman admits that he is seeking the redacted information for personal reasons – specifically to try to 'substantiate his suspicions [about discriminatory treatment by MPD] and to potentially identify his assailants.'" *See* Appendix A (Order; App. 1a-12a) at 10a (quoting Appendix B (Complaint; App. 13a-24a) at ¶ 20 (App. 17a). Notably, however, Zinman admitted no such thing. To be clear, although Zinman originally filed his *FOIA request* to substantiate his suspicions that the MPD had discriminated against him and to potentially identify his assailants as well, see Appendix B (Complaint; App. 13a-24a) at ¶ 20 (App. 17a) (emphasis added), that was not necessarily his purpose in maintaining this action. Rather, at this point, Zinman is more interested in preventing the District from continuing to arbitrarily deny lawful requests for public records by treating D.C. Code §2-534(3)(A)(iii) as a blanket exemption for any BWC footage that may be relevant to an ongoing OPC investigation, and from arbitrarily redacting such footage on the basis of nonexistent privacy interests, so that the next law abiding citizen who makes a lawful

request for public records, who may have neither the financial means nor the legal knowledge to challenge the District's noncompliance with DC FOIA, doesn't have to go through what Zinman did to get the District to comply with the law.

Additionally, regarding Zinman's argument that "[t]he public has a distinct interest in the proper administration of justice as well as finding out whether and under what circumstances certain individuals receive preferential treatment from government investigators," *see* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 46a, Judge Epstein averred that "that interest is no greater here than it is in other garden variety cases where the police conduct interviews about an alleged crime," *see* Appendix A (Order; App. 1a-12a) at 10 (App. 10a). However, it's not entirely clear what Judge Epstein's point there was. Zinman doesn't dispute whether the public's interest in the proper administration of justice is any greater here than it is in other "garden variety cases." Notwithstanding, the public's interest in the proper administration of justice is certainly no less here than it would be in any other case.

Lastly, according to Judge Epstein, "[a]lthough DC FOIA mandates a broad policy of disclosure, it was not designed as a discovery device for requesters with a potential claim." *Id.* at 10-11 (App. 10a-11a) (citing *Changzhou Laosan Group v. U.S. Customs & Border Protection Bureau,* 2005 U.S. Dist. LEXIS 7075, at *21-*22 (D.D.C. April 20, 2005)). However, while it's not lost upon Zinman that he may have a potential claim against the District, Zinman's rights under D.C. FOIA "are neither increased nor decreased by reason of the fact that [he] claims an interest in the [BWC

footage] greater than that shared by the average member of the public." *See Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975). As such, the BWC footage at issue here is not exempt from disclosure simply because it may be relevant in a potential lawsuit against the District.

ii. Zinman established more than a bare suspicion of police misconduct.

Although Judge Epstein acknowledged that Zinman makes "allegations of police misconduct," he nevertheless concluded that Zinman "does not make the 'meaningful evidentiary showing' that FOIA requires." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004)). Thus, on that basis, Judge Epstein held that "the District has met its burden to establish that the privacy interests in the redactions of the responsive footage outweigh the public interest in the full unredacted disclosure of this footage." *Id.* Notably, however, in *Favish*, the Supreme Court held that:

> where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

See Favish, 541 U.S. at 174. Here, Zinman easily satisfied that standard.

Far from merely establishing "a bare suspicion" that government impropriety may have occurred, not only did Zinman produce evidence that warrants a reasonable belief that such impropriety may have occurred, but he produced video evidence showing that it did in fact occur. To be clear, it was improper for Officer Hussain to

fail to mention a single word about Zinman's destroyed property in his report of the January 18th, 2021, incident when the BWC footage disclosed by the District clearly shows him stating to Zinman that, "your stuff got broken, you got a cut on your hand, I don't blame you for being emotionally distressed." *See* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 34a. Furthermore, it was also improper for Sergeant Robinson to falsely state that Zinman had said, "I don't know" in response to questions regarding how he got the cut on his hand, when the BWC footage shows that, not only did Sergeant Robinson never even ask how Zinman's hand had gotten cut, but Zinman also never stated that he didn't know how his hand had been cut; rather, he stated that "I don't even know why … they did that." *Id.* at 33a. Additionally, not only was it entirely improper for Sergeant Robinson to berate Zinman about his "intent" in traveling to D.C. as if to suggest that Zinman somehow deserved to be assaulted and have his property destroyed for simply traveling to our nation's capital from out-of-state, but it was also improper for Sergeant Robinson to suggest that Black Lives Matter Boulevard belonged to those who had assaulted Zinman and destroyed his property by stating that that was "their area" *Id.* at 32a-33a. Lastly, it was improper for Sergeant Robinson and Detective J. Ellis to dismiss Zinman's video evidence showing a female shoving a bullhorn into Zinman's chest as well as a male grabbing Zinman's camera by stating that the female was just "standing her ground," and that the male intended to grab Zinman's camera and not his person, despite the fact that his camera was clearly attached to his person. *Id.* at 33a. Thus,

Judge Epstein erred by concluding that Zinman wasn't entitled to disclosure because he failed to "make the meaningful evidentiary showing that FOIA requires." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a) (internal quotation marks omitted).

iii. Disclosure of the BWC footage is fully consistent with the District's expressly stated purpose in enacting BWC legislation and would clearly advance several significant public purposes.

The District has enacted BWC legislation to serve the following purposes: "(1) to foster accountability and enhance performance by law enforcement; (2) to improve police-community relations; (3) to promote the fair administration of justice in civil and criminal proceedings; (4) to create more accurate and transparent records of law enforcement's interactions with the public; (5) to improve evidence collection; and (6) to discourage and defend complaints against law enforcement officials."[2] Accordingly, disclosure of the requested BWC footage would be fully consistent with the District's expressly stated purpose in enacting BWC legislation and would clearly advance several significant public purposes; namely, fostering accountability and enhancing performance by law enforcement, promoting the fair administration of justice in civil and criminal proceedings, and creating more accurate and transparent records of law enforcement's interactions with the public. Therefore, Judge Epstein erred by concluding that "the privacy interests in the redactions of the responsive footage outweigh the public interest in the full unredacted disclosure of this footage." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a).

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[2]. Report of the Committee on the Judiciary and Public Safety on Bill 21-0351, the Body-Worn Camera Amendment Act of 2015, at 6 (Council of the District of Columbia November 19, 2015).

II. JUDGE EPSTEIN ERRED BY HOLDING THAT ZINMAN'S REQUEST FOR DECLARATORY RELIEF WAS MOOT

"Courts have agreed to hear otherwise moot cases … where the issues are capable of repetition, yet evading review …" *See Nat'l Broad. Co. v. Communications Workers of Am.*, 860 F.2d 1022, 1023 (11th Cir. 1988). Notwithstanding, according to Judge Epstein, "[b]ecause the District complied with its obligations under DC FOIA, Mr. Zinman's request for injunctive relief is moot." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a) (citing *Fraternal Order of Police*, 113 A.3d 195, 199 (D.C. 2015)). Toward that end, Judge Epstein concluded that "Zinman does not demonstrate that that his experience on the streets of Washington or with his FOIA request is likely to recur." *Id.*

A. Zinman's request for declaratory relief falls squarely within the "capable of repetition, yet evading review" doctrine.

Regarding the capable of repetition yet evading review exception to the mootness doctrine, a case is "not moot if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *See Ctr. for Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 130 F.Supp.3d 1, 8 (D.D.C. 2015) (alterations in original) (quoting *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 102 F.Supp.2d 21, 23 (D.D.C. 2000)). Furthermore, "[v]oluntary cessation of allegedly illegal conduct does not render a case moot unless the defendant can demonstrate that 'there is no reasonable

expectation that the wrong will be repeated.'" *See Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 747 (7th Cir. 1999) (quoting *DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999)). Moreover, the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

i. The District's nondisclosure of documents responsive to Zinman's FOIA request pursuant to § 2–534(a)(3)(A)(i) was in its duration too short to be fully litigated.

In *Brock*, Gulf Oil Corporation ("Gulf") sought to enjoin the Department of Labor ("DOL") from disclosing the 1973 affirmative action plan for Gulf's Houston Headquarters, which had been requested by the National Organization for Women ("NOW"). *See Gulf Oil Corp. v. Brock*, 778 F.2d 834, 835 (D.C. Cir. 1985). After the District Court enjoined disclosure of the 1973 plan, the Government appealed. *Id.* However, in 1984, after waiting more than eleven years due to litigation delays, NOW withdrew its request for the 1973 Headquarters plan. *Id.* Therefore, the D.C. Circuit dismissed as moot the portion of the appeal pertaining to the order that enjoined public disclosure of Gulf's 1973 affirmative action plan. Moreover, in response to Golf's argument that the case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine "because future agency decisions may threaten disclosure of other affirmative action plans," the Court noted that "[t]he prolonged proceedings of this case are testimony that the first requirement under the 'capable of

repetition, yet evading review' exception is not met." *Id.* at 839.

In the instant case, Zinman submitted his request for records as well as his complaint with the OPC on January 22, 2021, however, his request for records was denied on February 17, 2021; consequently, on March 10, 2021, Zinman brought this action seeking to challenge the District's reliance upon D.C. Code §2-534(3)(A)(iii) to deny his request for records. Nevertheless, at some point thereafter, the OPC apparently closed its investigation and MPD eventually released various BWC video clips responsive to Zinman's request for records on July 2, 2021, August 9, 2021, and September 3, 2021, albeit in part only. Thus, in stark contrast to the unique facts before the Court in *Brock*, the District's reliance upon D.C. Official Code §2-534(3)(A)(iii) was in its duration too short to be fully litigated prior to its cessation. As such, separate and apart from the outstanding question as to whether the District's untimely disclosure was complete, it's clear that this matter is not moot because significant legal issues remain unresolved; namely, whether DC Code §2-534(3)(A)(iii) creates a blanket exemption for all records which may be pertinent to ongoing OPC investigations. If this Court were to hold otherwise, then the District could effectively avoid review of its nondisclosure of public records pursuant to §2-534(3)(A)(iii) by simply closing an OPC investigation after litigation has been commenced. Such a precedent would not only encourage the District to treat §2-534(3)(A)(iii) as a blanket exemption for all records which may be relevant to OPC investigations, but it would also tend to discourage individuals from filing valid OPC complaints against MPD officers.

ii. There is a reasonable expectation that Zinman will be subjected to the same action again.

In *Nat'l Broad. Co.*, the Communications Workers of America ("CWA") leased the Miami Beach Convention Center for a 3-day convention wherein several candidates for President of the United States were slated to speak. *See Nat'l Broad. Co.*, 860 F.2d at 1022–23. However, at the time the convention was being held, employees of National Broadcasting Company, Inc., ("NBC") were on strike. *Id.* at 1023. While CWA admitted various members of the press, in solidarity with the striking NBC employees, CWA refused to grant NBC access to the convention. *Id.* The next day, NBC filed suit to enjoin CWA from excluding it from meetings to which other media organizations were admitted. *Id.* That same day, the district court entered a TRO against CWA which CWA chose to immediately appeal despite ultimately complying with it. *Id.* On appeal, the Eleventh Circuit noted that the standard for the first exception to the mootness doctrine "may be met by controversies based on expectations that, while reasonable, were hardly demonstrably probable." *Id.* (*quoting Honig v. Doe and Smith*, 108 S.Ct. 592, 601 n. 6 (1988)). Accordingly, the Court held that "it would be contrary to Supreme Court precedent to dismiss this case merely because CWA complied with an injunction which has now expired." *See Nat'l Broad. Co.*, 860 F.2d at 1024.

Although it's "hardly demonstrably probable" that Zinman will again be in a situation wherein he submits a FOIA request for BWC footage after filing an OPC complaint, it's at least reasonable to expect that the District would once again rely upon

§2-534(3)(A)(iii) to deny Zinman's request if Zinman ever did find himself in such a situation, especially considering the fact that Judge Epstein held that the District was justified in doing so. *See Honig*, 108 S.Ct. at 601 n. 6. Thus, this is in fact the quintessential case falling squarely within the "capable of repetition, yet evading review" doctrine and it was contrary to Supreme Court precedent for Judge Epstein to dismiss Zinman's claim for declaratory relief merely because the District partially complied with his request for records after forcing him to waste his time and resources pursuing this matter. *See Nat'l Broad. Co.*, 860 F.2d at 1024.

B. <u>The MPD's voluntary cessation of reliance upon §2-534(3)(A)(iii) to deny Zinman's request for BWC footage does not render moot Zinman's challenge to its practice of unjustified delay.</u>

In *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (1988), officers at Air Force Logistics Command ("AFLC") bases refused to supply Payne Enterprises, Inc. ("Payne") with copies of bid abstracts when, in their judgment, competition for contracts was so limited that release of the abstracts might result in higher prices in the future. *Id.* at 487. The base officers perfunctorily invoked FOIA Exemptions 4 and 5 in justifying their denials. *Id.* Payne appealed such denials to the Secretary of the Air Force, who without exception ordered disclosure because neither FOIA exemption applied to the material Payne had requested. *Id.* Nevertheless, in July 1986, Payne filed suit challenging the Air Force's unjustified delay and seeking declaratory and injunctive relief to compel the defendants to release abstracts of negotiated acquisitions. *Id.* However, Payne's suit was dismissed on the ground that it had

received all the material it had requested through the administrative appeals procedure specified by the FOIA. *Id.* at 488. After Payne filed a notice of appeal with the D.C. Circuit, the officers at AFLC bases began granting Payne's requests for bid abstracts even where there existed limited competition for contracts. Additionally, the Air Force conceded that Exemptions 4 and 5 do not apply to the material Payne desired, and an Air Force officer has promised release of the abstracts by AFLC bases in the future. Notwithstanding, the D.C. Circuit held "that the claimed voluntary cessation of the Air Force practice of refusing to release bid abstracts … does not render moot Payne's challenge to the Air Force's practice of unjustified delay," and therefore "reverse[d] the District Court's dismissal and remand[ed] with instructions to afford Payne declaratory relief." *Id.*

Here, the MPD perfunctorily invoked D.C. Code §2-534(3)(A)(iii) in justifying their denial of Zinman's request for BWC footage. However, as was the case in *Payne Enterprises*, the MPD eventually reversed course and partially complied with Zinman's request after he filed suit seeking to challenge its practice of unjustified delay. Nevertheless, even if the MPD had fully complied with Zinman's request, its voluntary cessation of reliance upon §2-534(3)(A)(iii) in denying that request did not render moot Zinman's challenge to the MPD's practice of unjustified delay, and it was error for Judge Epstein to conclude that it did.

III. JUDGE EPSTEIN ERRED BY DECLINING TO AWARD ZINMAN HIS COSTS INCURRED AS A RESULT OF LITIGATING THIS MATTER

In denying Zinman's request for his costs incurred in litigating this action, Judge

Epstein concluded that, although "Zinman received thirteen BWC clips after he filed this case, … the District demonstrated that it produced them when it did not because he filed this case but because its internal investigation had ended after he filed this case," and therefore "[t]he District's initial withholding of the footage requested by Mr. Zinman was … justified under the ongoing investigations exemption in § 2-534(a)(3)(A)(III)." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a). Notably, however, for § 2–534(a)(3)(A)(iii) to apply, the District had the burden of showing: (1) the documents requested have been compiled for law enforcement purposes, and (2) disclosure of those documents would interfere with OPC investigations. *See Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014); *see also id.* at 815 (recognizing that "where an agency fails to [demonstrate] that the ... documents [sought] relate to any ongoing investigation or ... would jeopardize any future law enforcement proceedings, [the investigatory records exemption] would not provide protection to the agency's decision"); *id.* (recognizing that a "blanket exemption," that is, "an exemption claimed for all records in a file simply because they are in a file," is impermissible under the investigatory records exemption). As such, Judge Epstein applied the wrong standard in upholding the District's initial withholding of the BWC footage at issue under § 2–534(a)(3)(A)(iii). To be clear, the proper inquiry was not whether the District produced the videos because Zinman filed suit or whether it produced the videos because the OPC closed its internal investigation; rather, the proper inquiry is whether disclosure of the videos

would've somehow interfered with the OPC's ongoing investigation. Notwithstanding, Ms. Branch's letter denying Zinman's FOIA request made no indication that the District intended to disclose the BWC footage at issue upon completion of the OPC's investigation into Zinman's complaint. *See* Appendix E (Letter from Ms. Tara Branch; App. 62a-63a). As such, there's no evidence to support Judge Epstein's conclusion that the District disclosed the BWC footage "when it did not because [Zinman] filed this case but because its internal investigation had ended after he filed this case." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a).

Additionally, although the BWC footage responsive to Zinman's D.C. FOIA request was in fact "compiled for law enforcement purposes," the MPD's reasoning as to why the records were exempt from disclosure is wholly speculative and merely served as a pretext for arbitrarily denying a lawful request for public records. To be clear, Ms. Branch's assertion that "release of this footage could interfere … by revealing the direction and pace of the investigation" fails to explain how "revealing the direction and pace of the investigation" could conceivably "interfere with enforcement proceedings." Furthermore, Ms. Branch's assertion that "release of this footage could … lead to attempts to destroy or alter evidence" is patently absurd and fails to explain how disclosure of a copy of a public record could possibly lead to attempts to destroy or alter evidence within the MPD's exclusive possession. Moreover, Zinman has no criminal history, and there are various laws which prohibit harassment, intimidating witnesses, as well as interference with police investigations.

Accordingly, Ms. Branch's irrational fear that "release of this footage could … reveal information about potential witnesses who could then be subjected to intimidation as part of an effort to frustrate future investigative activities or could place witnesses in danger" is insufficient to outweigh the District of Columbia's strong public policy in favor of transparency regarding the affairs of government and the official acts of those who represent them as public officials and employees. As such, MPD's reliance upon D.C. Code § 2-534(3)(A)(iii) was patently unreasonable and evinces government recalcitrance. *See* e.g., *Seegull Mfg. Co. v. Nat'l Labor Relations Bd.*, 741 F.2d 882, 886 (6th Cir. 1984) (where there was no public benefit other than vindication of the general objectives of FOIA, fees still awarded because of government obduracy); *Read v. F.A.A.*, 252 F.Supp.2d 1108, 1112 (W.D. Wash. 2003) ("In extreme circumstances, the government's obduracy ... permits a court to ignore factors that weigh against an award of attorney's fees."); *Horsehead Indus., Inc. v. United States E.P.A.*, 999 F.Supp. 59, 69 (D.D.C. 1998) (sufficiently "mulish" behavior may "require slapping on [the government] the costs of [the plaintiff's] attorneys' fees without consideration of the other factors"); *Wheeler v. I.R.S.*, 37 F.Supp.2d 407, 414 (W.D. Pa. 1998) (obduracy "can make the last factor dispositive without consideration of any of the other factors.... [I]t is this type of behavior that can allow a court to overlook a complete lack of public benefit"). Thus, it was error for Judge Epstein to uphold the District's initial withholding of the BWC footage at issue under § 2–534(a)(3)(A)(iii), and to deny Zinman's request to be reimbursed for his costs incurred in litigating this matter, in the

absence of any showing as to how disclosure of such footage would've somehow interfered with the OPC's ongoing investigation.

Lastly, according to Judge Epstein, "the Court would not exercise its discretion to award Mr. Zinman any costs under the four-factor balancing test." *See* Appendix A (Order; App. 1a-12a) at 11 (App. 11a). Toward that end, Judge Epstein reasoned that "[d]isclosure of the redacted information would not significantly advance the public interest, and further that "Zinman … is pursuing the case primarily to advance his personal interests." *Id.* at 11-12 (App. 11a-12a). As an initial matter, however, as previously noted, disclosure of the requested BWC footage would be fully consistent with the District's expressly stated purpose in enacting BWC legislation and would clearly advance several significant public purposes; namely, fostering accountability and enhancing performance by law enforcement, promoting the fair administration of justice in civil and criminal proceedings, and creating more accurate and transparent records of law enforcement's interactions with the public. Furthermore, while Zinman doesn't deny that he has a personal stake in seeking disclosure of the requested BWC footage—namely, identifying those who assaulted him and destroyed his property as well as holding the law enforcement officers who refused to do anything about it accountable—as previously noted, Zinman's rights under D.C. FOIA "are neither increased nor decreased by reason of the fact that [he] claims an interest in the [BWC footage] greater than that shared by the average member of the public." *See Sears, Roebuck & Co.*, 421 U.S. at 144 n.10. Moreover, in contrast to Judge Epstein's

assertion that Zinman is pursuing this case "primarily to advance his personal interests," Zinman has pursued this matter primarily to prevent the District from continuing to arbitrarily deny lawful requests for public records by treating D.C. Code §2-534(3)(A)(iii) as a blanket exemption for any BWC footage that may be relevant to an ongoing OPC investigation, and from otherwise arbitrarily redacting such footage on the basis of nonexistent privacy interests. As such, it would be tantamount to a penalty to require Zinman to bear the expense of litigating this matter to make the District comply with DC FOIA. *See Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm.*, 52 A.3d at 835 ("[I]t would seem tantamount to a penalty to require the wronged citizen to pay his [costs] to make the government comply with the law").

CONCLUSION

For the foregoing reasons, the final order of the Superior Court should be reversed and this matter remanded with instructions that Zinman's Motion for Summary Judgment, *see* Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a), should be granted, and the District should be ordered to: 1) disclose all BWC footage responsive to Zinman's January 22, 2021, D.C. FOIA request, unredacted in its entirety; and 2) to pay Zinman's costs incurred in litigating this matter in the amount of $621.90, *id.* at 29a.

May 4, 2022

Respectfully submitted,

/s/ *Corey J. Zinman*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May 2022, I electronically filed the foregoing with the Clerk of the Court for the District of Columbia Court of Appeals. I certify that a true and correct copy of the foregoing was served via electronic mail to:

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