**RECORD NO. 21-CV-0894**

# D.C. 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 REPLY BRIF

***Corey J. Zinman, Esq.***
***E-Mail: JDZinman1@gmail.com***
***175 Sedona Way,***
***Palm Beach Gardens, FL 33418***
***Telephone: (561) 566-9253***

***Pro Se Plaintiff***

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Caselaw:**

**Statutes:**



**Other:**

## ARGUMENT

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

#### A. Citizens have protectable privacy interests in their identifying information, but not in their images, voices, or statements which don't identify them by name or otherwise.

Although the District correctly notes that, in *Lesar v. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), the D.C. Circuit observed that the law-enforcement personal privacy exemption is intended "to preserve the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure … [which] ensures that citizens are not robbed of their privacy interests simply for helping police investigate potential crimes," *see* Appellee's Brief at 16 (citing *Lesar*, 636 F.2d at 488) (internal citations and quotation marks omitted), it failed to mention that in *Lesar*, *supra*, at issue were redactions of *names and other identifying information* of persons involved in the investigation of Dr. King's assassination, including informants and lower-level FBI personnel, as well as *information of a personal nature*, the disclosure of which allegedly could embarrass Dr. King's family and associates or damage their reputations. *Lesar*, 636 F.2d at 477 (emphasis added). It's unclear how the court's holding in *Lesar* is somehow applicable to the case at bar wherein the individuals weren't confidential informants assisting law enforcement with a high-profile investigation but rather complaining witnesses accusing Zinman of committing a crime, and where the information sought is not of a personal nature. However, the District's failure to develop this argument renders it both meritless and forfeited. *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("Issues adverted to in a perfunctory manner, unaccompanied by

some effort at developed argumentation, are deemed waived") (internal quotation marks, brackets omitted)).

Additionally, according to the District, "Zinman asserts (Br. 22-24) that citizens have no privacy interest in their images or voices when they are in public, because FOIA's law-enforcement exemption reaches only preexisting statutory or constitutional privacy rights[,] [y]et Zinman's own cases confirm just the opposite—namely, that this exemption 'goes beyond the common law and the Constitution.'" *see* Appellee's Brief at 17 (quoting *NARA v. Favish*, 541 U.S. 157, 170 (2004)). Notably, however, although the Supreme Court has stated in dicta that the statutory privacy right protected by the law enforcement personal privacy exemption "goes beyond the common law and the Constitution," it did so in the context of a citizen's request for death-scene photographs of the deputy counsel to President Clinton. In doing so, it was holding that the law enforcement personal privacy exemption "extends to family members who object to the disclosure of graphic details surrounding their relative's death," not that the exemption recognizes privacy interests which aren't somehow founded in law. To be clear, whereas courts have consistently recognized that relatives of a decedent have a protectable privacy interest over their body and death images, *Favish* 541 U.S. at 168-69, no court has ever held that individuals have a protectable privacy interest in their images or voluntary statements made while in public.

Furthermore, although the District correctly notes that "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure," *see* Appellee's Brief at 17 (quoting *U.S. Dep't of Justice v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 763, 764 n.16, 770 (1989) (internal quotation marks omitted),

the District's argument that "no citizens waived their privacy here by giving recorded statements to police," *id.*, is nevertheless misguided. Notably, Zinman never suggested that the individuals depicted in the requested BWC footage "waived their privacy" by giving recorded statements to law enforcement; rather, Zinman stated 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").

Moreover, the District's argument that, if the BWC footage at issue were subject to disclosure, "every witness would lose their privacy simply by giving police on-the-record statements— thus chilling the very sort of cooperation the law-enforcement exemption was meant to foster," *see* Appellee's Brief at 18 (citing *FBI v. Abramson*, 456 U.S. 615, 628-30(1982)), is misguided as well. To be clear, the purpose of the law enforcement personal privacy exemption is to "halt the disclosure of information that might deprive an individual of a fair trial, interrupt a law enforcement investigation,

safeguard confidential law enforcement techniques, or even protect the physical well-being of law enforcement personnel," and to otherwise "compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure." *Abramson*, 456 U.S. at … It's unclear how any of these goals are somehow served by redacting images of and statements made voluntarily by individuals with full knowledge that such statements could be used against Zinman in a criminal proceeding, but the District's failure to develop this argument renders it both meritless and forfeited. *Comford,* 947 A.2d at 1188.

**B. <u>Images and statements which don't identify individuals by name or otherwise isn't the type of information which is exempt from disclosure.</u>**

The District accuses Zinman of making an "about-face" by suggesting that no citizens' "identities would be at risk from disclosure of their images and statements," because he "had never encountered the civilians depicted in the BWC footage" before January 18. *See* Appellee's Brief at 18. Toward that end the District asserts that "it does not matter whether Zinman can identify anyone in the video because 'disclosure would release the contested materials to the world at large,'" *id.* (quoting *Sussman v. U.S. Marshalls Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007), and further that "[f]rom that perspective, the citizens' images, statements, and voices unquestionably constitute identifying information, especially 'in today's society,' where 'the computer can accumulate and store information that would otherwise have surely been forgotten,'" *id.* at 18-19 (quoting *Reporters Comm.*, 489 U.S. at 771(1989). As an initial matter, however, no court has ever suggested that redaction of an individual's identifying information isn't

sufficient to protect them from the "world at large." Conversely, courts have consistently held that, 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. *Horvath v. U.S. Secret Serv.*, 419 F. Supp.3d 40, 47 (D.D.C. 2019). Notwithstanding, aside from stating in purely conclusory fashion that "the citizens' images, statements, and voices unquestionably constitute identifying information," the District otherwise makes no attempt to explain how statements which do not identify individuals by name, address, or otherwise somehow constitutes "identifying information." *Comford,* 947 A.2d at 1188. Moreover, in stark contrast to the District's specious assertion that Zinman suggested on pages 27 and 43 of his Initial Brief that the citizens could be identified from the unredacted BWC footage, *see* Appellee's Brief at 19, Zinman clearly stated that "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." *See* Zinman's Initial Brief at 28.

Additionally, with respect to Zinman's argument that, even if the District can "redact identifying information (e.g., names or addresses) of the civilians," it cannot redact "images or statements made by those individuals solely on the ground that such footage happens to identify them by name or otherwise," the District contends that "[t]his argument collapses on itself" because "[i]nformation in investigatory records that 'happens to identify' citizens 'by name or otherwise' is precisely the sort of 'identifying information' that the law enforcement exemption categorically protects." *See* Appellee's Brief at 19. Ironically, however, the District apparently missed Zinman's point which is

that, just because identifying information (e.g., names or addresses) of individuals depicted in BWC footage may be exempt from disclosure, does not mean that other non-identifying statements made by such individuals are also exempt. *See Nation Mag., Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) ("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"). To be clear, any statement made by the civilians depicted in the BWC footage at issue which does not specifically identify them by name or otherwise is not the type of information which qualifies for exemption from disclosure under D.C. Code § 2–534(a)(2) (i.e., the personal privacy exemption) or D.C. Code § 2-534(a)(3)(C) (i.e., the law enforcement personal privacy exemption). *Padou v. District of Columbia*, 29 A.3d 973, 982 (D.C. Cir. 2011) ("the privacy interest that is protected under D.C. Code § 2–534(a)(2) encompasses the individual's control of information concerning his or her person, including his or her name and home address") (internal quotation marks omitted).

### C. Zinman produced evidence that would warrant a belief by a reasonable person that Government impropriety may have occurred.

According to the District, Zinman "offers no evidence, let alone compelling evidence, of illegal conduct," and further that "any perceived inaccuracies or omissions in the police report hardly bespeak impropriety, as the report expressly says it 'is not a verbatim or complete account' and 'is not meant to reflect the entirety of the event.'" *See* Appellee's Brief at 20. As an initial matter, however:

> 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*.

*Favish*, 541 U.S. at 174 (emphasis added). As such, contrary to the District's apparent implication, Zinman wasn't required to produce "compelling evidence of illegal conduct." To be clear, Zinman was only required to produce evidence that would warrant a belief by a reasonable person that government impropriety may have occurred.

Far from offering "no evidence," 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 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." Appendix C (Plaintiff's Motion for Summary Judgement; App. 25a-59a) at 34a. Although the District suggests otherwise due to the fact that Officer Hussain's report expressly says it "is not a verbatim or complete account" and "is not meant to reflect the entirety of the event," *see* Appellee's Brief at 20, the fact that Officer Hussain falsely stated in his report that Zinman was unable to remember how his hand got cut while simultaneously failing to mention anything about Zinman's destroyed property suggests that Officer Hussain went out of his way to prevent Zinman from having any recourse for his damages, which is obviously improper.

Additionally, although the District contends that it wasn't improper for Sergeant

Robinson to berate Zinman regarding his intentions for traveling to D.C. or to suggest that Black Lives Matter Boulevard somehow belonged to those who assaulted Zinman and destroyed his property by stating that that was "their area" because he was merely "trying to keep the peace," *id.,* the fact that Sergeant Robinson seemingly believes that certain individuals have a greater right of access to public areas than any other individual based upon the length of time that they've frequented that area is totally improper as well.

Lastly, with respect to Zinman's claim that 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," the District contends that this was not improper because "Zinman admittedly had no video of the male protestor who allegedly assaulted him," but instead "showed the officers edited video 'clips,' which in their view, showed Zinman 'actually approaching' a female protestor who merely 'stood her ground.'" *Id.* at 21. Toward that end, the District contends that, "[t]hat Zinman sees the evidence differently and disagrees with the officers' definition of 'assault' does not remotely suggest police misconduct, especially since 'the proper understanding of the elements of simple assault' under District law was in flux then and now." *Id.* (quoting *Perez Hernandez v. United States*, 207 A.3d 605, 606 (D.C. 2019) (en banc) (per curiam)). As an initial matter, however, in *Perez Hernandez* the issue was whether the single act of touching someone on the arm after being asked not to do so amounts to an assault. Although courts may have differing interpretations of what

constitutes an assault under such circumstances, no court has ever suggested that grabbing an item of property attached to an individual's person doesn't constitute an assault so long as the individual intended to touch the property and not the individual's person.[1] Furthermore, contrary to the District's specious assertion that "Zinman admittedly had no video of the male protestor who allegedly assaulted him," not only did Zinman never make such an admission, but Zinman did in fact produce video evidence which showed the male protestor grabbing the camera attached to Zinman's person and turning it in a different direction. *See* App. 16; Exhibit F (BWC footage). To be clear, Zinman admittedly had no video evidence of the male protestor subsequently smashing the camera

1. In fact, according to hornbook law:

> The protection [afforded a plaintiff by an action for the tort of battery] extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand, will be sufficient … His interest in the integrity of his person includes all those things which are in contact or connected with it.

W. Prosser, Law of Torts § 9 at 34 (4th ed. 1971). (Emphasis added.) Additionally, Commentators have stated that the above common law rule also applies to the crime of battery:

> The rules that to be held liable for a battery the offender need not directly effect the unlawful contact with the person of the victim, and that a battery need not be committed directly against the person of the victim, but may be committed against anything so intimately connected with the person of the victim as in law to be regarded as a part of that person, are applicable in criminal prosecutions for battery, as are the principles that there may be a battery in the legal sense of the term even though no physical harm resulted therefrom . . . .

6 Am. Jur. 2d Assault and Battery § 37 at 38 (Footnotes omitted and emphasis added). Similarly, in 6A C.J.S. Assault and Battery, § 70 at 440-41, it's said that: "It is essential to the [criminal] offense of battery . . . that there be a touching of the person of the prosecutor, or something so intimately associated with, or attached to, his person as to be regarded as a part thereof . . . The contact may have been . . . with something carried by him." (Footnotes omitted and emphasis added). Moreover, the eighteenth-century criminal case, *Respublica v. DeLongchamps*, wherein the defendant struck the victim's cane, lends support to the logical and reasonable proposition of criminal law that there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body. In affirming the defendant's conviction for assault and battery, the Supreme Court of Pennsylvania said that the assault and battery "[a]nything attached to the person, partakes of its inviolability. *See Stokes v. State*, 115 N.E.2d 442, 443 (1953) (upholding a conviction for battery where a bullet did not touch the victim's person but rather perforated his tie because "one's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person"); *see also Malczewski v. State*, 444 So. 2d 1096, 1099 (Fla. 2d DCA 1984) (holding that the word "person" in Florida's battery statute means person or anything intimately connected with the person).

to the ground given that such footage couldn't be recovered. *Id.* Additionally, the phrase "stand your ground" refers to self-defense which is an affirmative defense that should be raised by a defendant in a criminal proceeding, not by law enforcement in refusing to pursue charges against an individual for hitting another individual with a bullhorn because, in their view, that individual "merely stood her ground." As such, it was improper for Sergeant Robinson and Detective J. Ellis to substitute their opinion for that of a jury by unilaterally deciding that an individual who committed a battery against Zinman was acting in self-defense. Moreover, the fact that multiple officers of the Metropolitan Police Department apparently don't understand what constitutes a battery, including a sergeant and a detective, bespeaks impropriety as well.

**D. <u>The public interest in disclosure of the BWC footage at issue outweighs any privacy concern that individuals depicted in such footage may have.</u>**

Given that the individuals depicted in the BWC footage have no cognizable privacy interest in their images or voluntary non-identifying statements, it's unnecessary for this Court to consider whether the public interest in disclosure of such images or statements outweighs nonexistent privacy concerns. Nevertheless, the District correctly notes that "Zinman posits (Br. 30-33) various 'interests' related to the bodycam footage, include[ing] fostering police 'accountability' and 'performance'; promoting 'fair administration of justice'; uncovering 'preferential treatment from government investigators'; creating 'more accurate and transparent records'; and enforcing compliance with FOIA itself." *See* Appellee's Brief at 23. However, according to the District, "Zinman offers little more than those conclusory assertions," and "does not explain in any meaningful detail how his asserted interests would be advanced by

disclosing citizens' information." *Id.* Toward that end the District contends that, "[g]iven Zinman's inability to present evidence of government impropriety … the disclosed footage is as 'accurate' as FOIA demands; it tells the public all that FOIA requires about police "accountability" and "performance" and the "administration of justice"; and it belies any assertion of "preferential treatment," since everyone, including Zinman, received the same opportunity to speak with police. *Id.* at 23-24. Notably, however, the District apparently misunderstood Zinman's point again. To be clear, if law enforcement officers are aware that their official actions are being recorded and that such footage is subject to public records requests, it goes without saying that that would tend to foster accountability and enhance performance by law enforcement. Likewise, officers would also be discouraged from lying or misrepresenting facts in their reports, which clearly tends to promote the fair administration of justice in civil and criminal proceedings. Moreover, given that the BWC footage at issue in this case depicts law enforcement's interactions with the public, disclosure of such footage obviously tends to create more accurate and transparent records of law enforcement's interactions with the public. Conversely, if this Court were to hold that BWC is exempt from disclosure, accountability, performance, and transparency would all suffer, which is inconsistent with the District's expressly stated purpose in enacting BWC legislation.[2]

**E. <u>Zinman produced evidence that would warrant a belief by a reasonable person that Government impropriety may have occurred.</u>**

According to the District, "contrary to Zinman's assertions (Br. 9, 13, 17), the

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).

District redacted only the officers' images, not their statements." *See* Appellee's Brief at 24. Notably, however, although the District did disclose some statements made by the officers in the BWC footage at issue, to be clear, numerous other statements made by those officers were in fact redacted. *See* Exhibits C, D, and F.

Additionally, the District contends that "in focusing exclusively on the privacy interests of officers 'in a public place' or 'upon a public street' (Br. 13, 16-17, 24), Zinman challenges only the redactions to footage from January 18, and has forfeited any challenge to the redactions of bodycam video recorded at the MPD stationhouse on January 19." *See* Appellee's Brief at 24. As a practical matter, however, a police department is in fact a public place, therefore the District's assertion that Zinman somehow forfeited his challenge to redactions of BWC footage from the MPD stationhouse on January 19th is clearly without merit.

1. **Police officers do not have a reasonable expectation of privacy while engaged in their official duties in public.**

According to the District, "[t]he Superior Court correctly held that MPD officers had a privacy interest in their images." *Id.* at 25 (internal quotation marks omitted). Toward that end, in conclusory fashion, the District asserts that "[t]hat conclusion follows straightforwardly from the text of the law-enforcement exemption as well as this Court's precedents," and cites to *District of Columbia v. FOP*, 75 A.3d 259 (D.C. 2013) to support that proposition. *See* Appellee's Brief at 25. Notably, however, in *District of Columbia v. FOP*, *supra*, this Court held that MPD employees who relied on a "pledge of confidentiality" in expressing their personal concerns to the Chief of Police "have a cognizable privacy interest in the nondisclosure of their *names and identifying*

*information*," but in doing so it expressly emphasized that "we do not suggest that the government may use this privacy interest to maintain a veil of administrative secrecy." 75 A.3d at 267 (emphasis added) (internal quotation marks omitted). It's unclear how this Court's holding that MPD officers who relied upon a pledge of confidentiality in expressing their personal concerns to the Chief of Police have a cognizable privacy interest in the nondisclosure of their identifying information somehow supports the proposition that MPD officers have an unqualified privacy interest in the nondisclosure of their images while engaged in their official duties in a public place, but the District's failure to develop this argument renders it both meritless and forfeited. *Comford,* 947 A.2d at 1188.

Furthermore, although the District correctly notes that "[t]he law-enforcement exemption protects interests the Constitution does not," *see* Appellee's Brief at 28, tellingly, the District cannot muster a single FOIA case to support the proposition that officers have cognizable privacy interests in their recorded images while performing their official duties in a public place, and for good reason. To be clear, DC FOIA doesn't create any substantive privacy interests; rather, it merely recognizes those privacy interests which already exist pursuant to caselaw, statute, or the penumbras created by the specific guarantees of the First, Third, Fourth, and Ninth Amendments.

The District also accuses Zinman of overlooking "critical differences between FOIA privacy interests and the constitutional right to gather information on one's own." *Id.* Toward that end the District notes that "Hikers, for example, likely have a First Amendment right to photograph a body they find in a public park, yet the government's

photos of that scene still implicate significant privacy interests," *id.* (citing *Favish*, 541 U.S. at 166-72), and further that "[j]ournalists have a First Amendment right to report on every charge against an alleged drug kingpin, and yet that person, too, has a privacy interest in his rap sheet," *id.* (citing *Reps. Comm.*, 489 U.S. at 762-71). On that basis, the District asserts that "[p]olice officers should have at least the same privacy interests in their recorded images that felons do in their criminal records." *Id.* at 30. As an initial matter, however, whereas courts have consistently recognized significant privacy interests in both death scene photographs and criminal rap sheets, no court has ever recognized that officers have cognizable privacy interests in the nondisclosure of their images while engaged in their official duties in public places. Furthermore, Zinman never suggested that the BWC footage at issue was subject to disclosure merely because citizens have a constitutional right to film law enforcement. Rather, Zinman's point in referencing caselaw recognizing the constitutional right to film police was to demonstrate that officers do not have a reasonable expectation of privacy while engaged in their official duties in public. Additionally, there's good reason why individuals have cognizable privacy interests in their criminal rap sheets while officers engaged in their official duties in public places have no such interest in their recorded images. To be clear, whereas criminal rap sheets contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject, *Reporters Comm.*, 489 U.S. at 752, an officer's recorded image on BWC contains no such information. Moreover, whereas Congress has enacted legislation specifically limiting to whom criminal rap sheets may be released to, *id.* at 753, Congress

has never sought to limit whom BWC footage may be released to.

Lastly, the District asserts that "Zinman offers no reason to think that, by regulating nameplates and badges in another statute, D.C. Code § 5-337.01, the D.C. Council obliquely divested officers of any privacy interest in their images while in public," and further that, "[w]ere that true, even bodycam videos of an officer being killed in the line of duty would raise no privacy concerns simply because her nameplate and badge were visible on her uniform." *See* Appellee's Brief at 30-31. As an initial matter, however, BWC videos of an officer being killed in the line of duty would in fact raise privacy concerns for the same reasons as death scene photographs of any other individual would. Notwithstanding, just because privacy concerns may be implicated under such circumstances doesn't mean that officers generally have cognizable privacy interests in their recorded images while performing their official duties in public.

**2. <u>The District produced no evidence to suggest that disclosure of the officers' images is likely to subject them to harassment or harm.</u>**

The District asserts that "[d]isclosing an officer's image from a bodycam video … can put a target on her back, exposing her to harassment and even physical harm," *id.* at 27 (citing *Wood v. FBI*, 432 F.3d 78, 85-88 (2d Cir. 2005), and further that "[g]iven the advent of facial-recognition technology, unredacted videos of an officer investigating a crime may now be one of the easiest ways to identify and associate her with an investigation," *id.* at 26. As an initial matter, however, in *Wood*, *supra*, the court upheld the FBI's decision to withhold from a reporter the identities of specific FBI agents who conducted an investigation into other FBI agents because the public interest in "revealing the identities of the investigators assigned to the case would add little to the public's

understanding of how the [government] performed its duties," especially when the employees "are of relatively low rank and the identities of the decision-makers have already been disclosed." 432 F.3d at 88. Notably, however, in doing so, the court explicitly stated that "[n]ames and other identifying information do not always present a significant threat to an individual's privacy interest," *id.*, and cited to *United Stated Dep't of State v. Ray*, 502 U.S. 164 (1991) wherein the Supreme Court noted that it was "not implying that disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals on the list" but that it instead agreed with the D.C. Circuit that whether disclosure of names is a "significant or a de minimis threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue," *id.* at 177 n. 12. (internal quotation marks omitted). Thus, it cannot be said that officers' generally have cognizable privacy interests in the nondisclosure of their names and other identifying information if the disclosure of such information isn't likely to produce any harmful consequences. Notwithstanding, besides stating in conclusory and speculative fashion that disclosing an officer's image "can put a target on her back, exposing her to harassment and even physical harm," the District's brief is otherwise devoid of "developed argumentation" which would warrant a reasonable belief that such consequences are likely to ensue from disclosure of the officers' images. *Comford*, 947 A.2d at 1188. Moreover, not only is facial-recognition technology generally inaccessible to the public, but the identifies of the officers depicted on the BWC footage at issue are already known and have been identified numerous times throughout these proceedings. To be clear, *if* Zinman wished to harass or harm any of the officers, he

could've attempted to do so at any point.

**3. <u>The public interest in disclosure outweighs nonexistent privacy concerns.</u>**

Given that officers have no cognizable privacy interest in their recorded images while engaged in their official duties in public places, it's unnecessary for this Court to consider whether the public interest in disclosure of such images outweighs the officers' nonexistent privacy concerns. Nevertheless, the District contends that "the incremental value of disclosing the officers' images is nil." *See* Appellee's Brief at 32. Toward that end the District argues that "[s]eeing their faces would not improve police 'accountability' or 'performance,' much less the 'administration of justice' (Br. 33), since the disclosed videos already show that these are MPD officers, and so the public can already draw its own conclusions about MPD's operations and activities … [n]or would disclosing the officers' images ferret out "preferential treatment from government investigators" (Br. 30), as discovering such treatment does not depend on what the officers look like. *Id.* at 32-33. Also, according to the District, "because the redactions do not obscure the recorded factual events, showing the officers' faces will not make the videos 'more accurate' or 'transparent' (Br. 33) in any sense relevant to FOIA." *Id.* at 33.

As an initial matter, however, not only does the public have a distinct interest in what the government is up to, but it also has an interest in who acts on behalf of it, and therefore disclosing the officers' images would in fact increase transparency in a sense relevant to FOIA. Additionally, disclosing the officers' images would in fact enhance police accountability and performance for the same reason that surveillance cameras enhance accountability and performance in any other job. Employees would surely be

more inclined to see what they could get away with if they knew that their employers couldn't identify them on camera. As such, since police officers work for the public, they should be held accountable to the public just as any other employee is held accountable to their employer. Moreover, the public doesn't only have an interest in "discovering" preferential treatment from government investigators, but it also has a significant interest in "discovering" who rendered such treatment and preventing it from happening in the first place. To be clear, if officers know that their official actions were being recorded and that such recordings are subject to public records requests, they would be less inclined to render preferential treatment in any given scenario.

## II. ZINMAN'S CHALLENGE TO THE MPD'S RELIANCE UPON DC CODE § 2-534(3)(A)(III) IS NOT MOOT

Given that the District has yet to produce all non-exempt records responsive to Zinman's FOIA request, this case is obviously not moot. Notwithstanding, this case is also not moot for an independent reason; namely, a live controversy still exists with respect to whether the MPD's reliance upon DC Code § 2-534(3)(A)(iii) to deny Zinman's FOIA request was justified. However, according to the District, the issue of whether "blanket exemptions" are permissible "is not presented here." *Id.* at 35. Toward that end, the District argues that, "[f]ar from treating the ongoing-investigation provision as a 'blanket exemption' (Br. 36), MPD reasonably explained to Zinman that the requested bodycam footage was 'part of an ongoing' OPC investigation, and that its release 'could interfere with' OPC's process by 'revealing the direction and pace of the investigation' as well as 'information about potential witnesses,'" and further that "[n]othing more was required." *Id.* Notwithstanding, such ambiguous explanations are

insufficient to meet the district's burden to show that disclosure of the requested BWC footage would somehow interfere with ongoing OPC investigations. *See*, e.g., *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"). To be clear, other than stating in conclusory fashion that the MPD "reasonably explained" to Zinman that disclosure of the requested BWC footage "could interfere with' OPC's process by 'revealing the direction and pace of the investigation' as well as 'information about potential witnesses,'" the District's brief is otherwise devoid of "developed argumentation" as to how "revealing the direction and pace of the investigation" or "information about potential witnesses" was somehow likely to interfere with an ongoing OPC investigation. *Comford*, 947 A.2d at 1188.

Additionally, the District contends that *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (1988) is distinguishable from the instant case because "Zinman has not shown that he is a repeat FOIA requester, and he has not challenged any policy or practice of the District, much less one that is improper or that inflicts continuing injury," *see* Appellee's Brief at 36, but rather he merely "challenged MPD's initial invocation of the ongoing-investigation exemption in this single case, and one allegedly improper action does not [constitute] a pattern or practice, *id.* at 37 (citing *Porup v. CIA*, 997 F.3d 1224, 1233 (2021)). As an initial matter, however, in *Payne Enterprises*, the D.C. Circuit didn't hold that it was an absolute requirement for a plaintiff to show that they are a

"repeat FOIA requester" or to identify a formal policy or practice; rather the proper inquiry is whether the government "has met the heavy burden of showing that there is no reasonable expectation that the wrong will be repeated." *Payne Enterprises, Inc.*, 837 F. 2d at 492 (internal quotation marks omitted). Moreover, whereas in *Porup* government counsel represented to the court at oral argument that CIA personnel are required to adhere to a mandatory policy stating that it would "no longer decline FOIA requests based solely on its perception that requested records implicate activities outside the Agency's primary and legislatively authorized mission," *see Porup*, 997 F.3d at 1232, here government counsel has not only made no such representation, but he has instead vigorously defended the MPD's actions and its underlying reasoning. As such, Zinman's challenge to the MPD's reliance upon DC Code § 2-534(3)(A)(iii) clearly falls within the-so called *Payne Enterprises* exception.

## CONCLUSION

For the foregoing reasons, and for those set forth in Zinman's Initial Brief, 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.

November 14, 2022

Respectfully submitted,

/s/ *Corey J. Zinman*

COREY J. ZINMAN, Esq.
Pro Se Plaintiff
175 Sedona Way,
Palm Beach Gardens, FL 33418
561-566-9253
JDZinman1@gmail.com
cb2770@mynsu.nova.edu

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14th day of November 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:

Bryan J. Leitch, Esq.
Assistant Attorneys General
400 6th St. N.W.
Washington, D.C. 20001
Bryan.Leitch@dc.gov

*Counsel for Appellee*

Corey J. Zinman