No. 21-CV-894

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

COREY J. ZINMAN,
APPELLANT,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

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

BRIEF FOR APPELLEE

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

GRAHAM E. PHILLIPS
Deputy Solicitor General

*BRYAN J. LEITCH
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6524 (office)
(202) 741-0649 (fax)
bryan.leitch@dc.gov

*Counsel expected to argue

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STATEMENT OF THE ISSUES

The Metropolitan Police Department ("MPD") initially denied Corey Zinman's D.C. Freedom of Information Act ("FOIA") request for footage from certain MPD officers' body-worn cameras. As MPD explained, that footage was covered by FOIA's ongoing-investigation exemption because releasing it at that time would have interfered with the Office of Police Complaints' ("OPC") investigation of Zinman's own complaint based on events allegedly shown in the same footage. Zinman sued to challenge MPD's reliance on that exemption. But after OPC's investigation ended, MPD disclosed the bodycam videos. Under FOIA's law-enforcement exemption, MPD redacted from the videos certain information identifying private citizens and police officers to prevent an unwarranted invasion of personal privacy. The Superior Court upheld MPD's redactions and denied Zinman's request for costs. The questions presented are:

1. Whether the Superior Court correctly held that the identifying information of private citizens and police officers redacted from the bodycam footage was exempt from disclosure under FOIA's law-enforcement exemption.

2. Whether the Superior Court correctly found Zinman's challenge to the initial denial of his request under the ongoing-investigation exemption was moot.

3. Whether the Superior Court soundly exercised its discretion in denying Zinman's request for costs under FOIA.

STATEMENT OF THE CASE

Zinman submitted a FOIA request and filed an OPC complaint on January 22, 2021. Appendix ("App.") 2, 17. MPD denied Zinman's request in a letter he received on February 17, 2021. App. 62-63. Zinman sued the District on March 10, 2021. App. 13-24. OPC ended its investigation before Zinman served his complaint, and MPD disclosed the requested bodycam videos on July 2, 2021, August 9, 2021, and September 3, 2021. App. 65. The Superior Court granted the District's motion for summary judgment, and denied Zinman's request for costs, on November 29, 2021. App. 1-12. Zinman timely appealed on December 29, 2021.

STATEMENT OF FACTS

1. Legal Framework.

A. FOIA and relevant exemptions.

FOIA provides for the release of public records to inform citizens about "the affairs of government and the official acts of those who represent them." D.C. Code §§ 2-531, 2-532. The statute "was inspired by and modeled on" the federal FOIA. *Fraternal Order of Police v. District of Columbia* (*FOP 2012*), 52 A.3d 822, 829 (D.C. 2012); *see* 5 U.S.C. § 552. Its provisions are accordingly construed based on "case law interpreting the federal FOIA." *Fraternal Order of Police v. District of Columbia (FOP 2015 I)*, 113 A.3d 195, 200 (D.C. 2015).

Under FOIA, "persons are not entitled to any and all information contained in public records." *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005).

Many records are exempt from disclosure based on the nature of the information they contain or the consequences of release. D.C. Code § 2-534(a). When a record contains exempt information, the District can redact the protected portions and release the rest. *Id.* § 2-534(b). Several exemptions are relevant here.

The ongoing-investigation exemption covers "records compiled for law-enforcement purposes, including . . . investigations conducted by [OPC], but only to the extent that the production of such records would . . . [i]nterfere with . . . ongoing investigations." D.C. Code § 2-534(a)(3)(A)(iii). Like federal Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), this provision looks for "a rational link" between the requested record and the likely interference. *Fraternal Order of Police v. District of Columbia*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation marks omitted).

The law-enforcement exemption covers "[i]nvestigatory records compiled for law-enforcement purposes, . . . but only to the extent that the production of such records would . . . [c]onstitute an unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(3)(C). Like federal Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), this provision protects the "identifying information" of "witnesses, informants, and the investigating agents." *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 587-88 (D.C. Cir. 1987) (R.B. Ginsburg, J.). Unlike the personal-privacy exemption, however, the law-enforcement exemption is not limited to "[i]nformation of a *personal* nature" and does not require a "*clearly* unwarranted

invasion of personal privacy." D.C. Code § 2-534(a)(2) (emphases added); 5 U.S.C. § 552(b)(6) (Exemption 6); *see Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 67 (D.C. Cir. 2018) (noting that the law-enforcement exemption "establishes a lower bar for withholding material" (internal quotation marks omitted)).

B. FOIA fees-and-costs provision.

After the timely denial of a FOIA request, parties typically must exhaust administrative remedies by petitioning for mayoral review. D.C. Code §§ 2-537(a), 2-532(e); *see id.* § 2-532(c)(2)(A) (giving MPD 25 business days to respond to requests for "a body-worn camera recording"). If the Mayor denies the petition or fails to make a timely determination, the requester can sue in the Superior Court. *Id.* § 2-537(a). At the end of such litigation, courts "may" award reasonable fees and costs to a plaintiff who "prevails in whole or in part in such suit." *Id.* § 2-537(c).

Courts are not required to award costs under FOIA. *Vining v. District of Columbia*, 198 A.3d 738, 745 (D.C. 2018). Such awards are allowed as a matter of discretion only when plaintiffs show that they are *eligible* for costs, that they are *entitled* to costs, and that their costs are *reasonable*. *Id.* To be eligible, plaintiffs must establish a "causal nexus" between their suit and the disclosed records. *FOP 2015 I*, 113 A.3d at 200. To be entitled to costs, plaintiffs must show, among other things, that their suit benefited the public and that the initial withholding of records

was unreasonable. *FOP 2012*, 52 A.3d at 828-36. For costs to be reasonable, they must bear a rational connection to the litigation. *See Vining*, 198 A.3d at 745.

C. MPD's body-worn camera policies.

MPD officers wear body cameras while on duty. 24 DCMR § 3900. These devices record the audio and visual details of the officers' interactions with each other and the public, including interviews with witnesses, suspects, and victims. *Id.* §§ 3900.2-.8, 3999.1. Under the Body-Worn Camera Program Amendment Act of 2015 ("Bodycam Act"), officers wear such devices in part to "ensure the safety of both MPD members" and "the public." *Id.* § 3900.2; *see* D.C. Law 21-83, 63 D.C. Reg. 774 (2016) (codified primarily at D.C. Code § 5-116.31 *et seq.*).

By law, MPD must "strictly control access to BWC [body-worn camera] recordings." 24 DCMR § 3903.4. Only a few government agencies can view unredacted bodycam footage, *id.* §§ 3902.1-.4, and many must follow MPD's "individual privacy protections," *id.* § 3903.3; *see id.* § 3903.1(d) (requiring MPD to ensure "proper protection of individuals' privacy rights"). MPD also closely monitors its own officers' access to such recordings, and it does not allow them to view bodycam footage before preparing initial police reports. *Id.* §§ 3900.9, 3903.4.

Bodycam videos are generally not available to the public, either. Nearly all such recordings must pass FOIA review, *see id.* § 3900.10(a), and the Bodycam Act recognizes that requests "for body-worn camera recordings" may well result in

"denial" or "redaction," D.C. Code § 5-116.33(a)(7); *see* Committee Report on Bill 21-351, at 16 (Nov. 19, 2015) (noting that even bodycam recordings "in public space" may require pre-disclosure "redactions"), https://tinyurl.com/mr3recxv. Only the Mayor can override FOIA's exemptions to "publicly release the names and BWC recordings" of MPD officers, and only in cases of "officer-involved death or the serious use of force," or "in matters of significant public interest" after consulting with law-enforcement agencies. 24 DCMR § 3900.10(a).

In light of the privacy interests at stake, the Bodycam Act amended FOIA to categorically exempt from disclosure bodycam recordings "[i]nside a personal residence," and those "involving domestic violence," "stalking," or "sexual assault." D.C. Code § 2-534(a)(2A). This amendment, however, was "not intended to be exhaustive." Committee Report on Bill 21-351, at 21. Given "the intrusiveness of BWCs," it was recognized that "there are other situations in which [MPD] might assert the personal privacy exemption" to withhold bodycam footage. *Id.* It was thus unnecessary "to add further bright-line exemptions" for "personally identifiable information" in bodycam footage, "as the existing FOIA is broad and would already contemplate exempting such information" from disclosure. *Id.*

2. Factual Background.

A MPD officers respond to an incident involving Zinman but find no probable cause to make an arrest.

On the night of January 18, 2021, three MPD officers responded to a disturbance near Black Lives Matter Boulevard. App. 15, 61. Several individuals were involved, and witnesses told the police different stories. App. 15. Some reported that a suspect pushed a female protestor and had a physical altercation with a male protestor. App. 32. The suspect, appellant Corey Zinman, denied those accusations. His hand was cut, and he told police that, following a disagreement about wearing masks, a male protestor grabbed the camera Zinman was using to film them, resulting in damage to the camera and the selfie stick attached to it. App. 15; *see* Exh. C at 00:15-1:40, 3:35-4:00.[1]

Given these conflicting reports, the officers concluded that they lacked probable cause to arrest anyone. App. 15; *see* Exh. D at 00:10-1:15. The officers explained that they would open an investigation into the incident, and they invited Zinman to send them his videos. Exh. D at 3:40-4:00. Noting that they were "just trying to keep the peace," the officers urged Zinman to "be respectful" and to "at

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[1] Exhibits C, D, and F are the three bodycam videos Zinman cited in his summary-judgment filings, App. 32-34, and are the source of certain quotes in his opening brief, pp. 2, 5-8, 32. For the reasons explained in the District's motion to supplement the record, this Court may consider those videos in deciding this case.

least practice social distancing" if he spoke with the protestors again, as "this COVID stuff is serious." Exh. D at 1:45, 2:50-3:30, 7:24.

The officers then drafted an initial police report. It noted that on January 18 "MPD was flagged down for an altercation" around 10:15 p.m., and that Zinman (identified as "Sub-1") reported that "he injured his left hand in front of the listed location but was unsure of how the injury occurred." App. 61. The report stated that it was "not a verbatim or complete account of the event," and that it was "not meant to reflect the entirety of the event." App. 61.

B. MPD officers meet with Zinman the next day to discuss the incident and address his concerns.

At an MPD stationhouse the next day, a detective and one of the officers from the night before met with Zinman. App. 16-17. During their meeting, the officers addressed Zinman's concerns that the police report was incomplete, reminding him that the report was not final, that the investigation was pending, and that Zinman was welcome to provide more information. Exh. F at 1:55-3:10, 12:15-12:45. Zinman in fact did provide more information during this meeting, telling the officers for the first time that, "I know I didn't tell you guys that last night because . . . it didn't even occur to me. But I guess . . . when they say that I pushed her, she pushed me with her little, uh, noise amplification device." Exh. F at 3:25.

The officers also reviewed "clips" of an edited video recovered from Zinman's camera. Exh. F at 4:00-5:00; App 16. Zinman admittedly had not

recovered video of the male protestor's actions, App. 16; Exh. F at 6:30-7:25, and in the officers' view, the video he did have showed that the female protestor "stood her ground" while Zinman was "actually approaching her," Exh. F at 5:15-5:30. The officers told Zinman that if he recovered video showing that a man "grabbed the camera and destroyed the camera," they would "charge him with destruction of property" and issue "a warrant for his arrest." Exh. F at 7:30-7:45, 9:00-9:15.

The officers also fielded Zinman's questions about whether he had alleged assault or destruction of property. Zinman believed it was assault if the male protestor broke his camera and selfie-stick. Exh. F at 9:30-10:15. The officers disagreed. One noted that, in nearly a decade of service, "I have yet to charge" or "hear[] of an individual touching somebody else's property, and charging them with simple assault." Exh. F at 10:30-10:50. At the end of the meeting, Zinman thanked the officer and detective: "I appreciate you . . . talking to me." Exh. F at 15:50.

C. Zinman files a complaint with OPC while also submitting a FOIA request for MPD video footage.

A few days later, Zinman filed a complaint with OPC based on his suspicion that, as a Florida resident, "he was being discriminated against." App. 17. The same day, he submitted a FOIA request "to substantiate his suspicions" and "potentially identify his assailants." App. 17. Zinman sought bodycam footage from January 18 and 19, and surveillance video of the MPD lobby on January 19. App. 14, 17.

MPD denied Zinman's request for the bodycam footage under the ongoing-investigation exemption. App. 62-63, 65. MPD explained that disclosing the footage at that point would have interfered with OPC's investigation of Zinman's complaint: the footage was part of the investigation, and its release could reveal the investigation's "direction and pace," "lead to attempts to destroy or alter evidence," and disclose "information about potential witnesses who could then be subjected to intimidation" or be put "in danger." App. 62. MPD also noted that Zinman's request for the MPD lobby footage was "still being processed," and that he would "receive a separate response" about that material. App. 62.

3. Procedural History.

A. Zinman sues the District, but once OPC's investigation ends, MPD releases the bodycam videos.

Zinman sued the District following MPD's denial. App. 13-24. He alleged that the bodycam videos were not protected by the ongoing-investigation exemption, and that the District violated FOIA by withholding the MPD lobby footage. App. 18-23. Zinman requested the release of those records, a declaration that the District violated FOIA, and an award of costs. App. 23-24.

After OPC's investigation ended, MPD disclosed the bodycam footage. In total, MPD released eleven videos from January 18, and one from January 19, with redactions under the personal-privacy and law-enforcement exemptions. App. 65-66. In particular, the officers' faces were blurred, but their voices and statements

were not. App. 66. In the four videos that depicted private citizens, MPD blurred the faces and muted the voices of all citizens other than Zinman. App. 66.

Zinman's other requested materials were unavailable. Detectives do not wear bodycams, and footage of the MPD lobby had automatically been overwritten by MPD's security system on January 29. App. 65. With the officers' bodycam videos disclosed, Zinman had "received all non-exempt records in possession of MPD that are responsive to his FOIA request." App. 66.

B. The Superior Court grants summary judgment to the District and denies Zinman's request for costs.

The District moved for summary judgment, arguing that it had now disclosed all nonexempt responsive records, and that Zinman's challenge to the initial withholding of those records under the ongoing-investigation exemption was moot. App. 2-3. Zinman in turn filed a cross-motion for summary judgment. App. 25-60.

The Superior Court granted the District's motion and denied Zinman's cross-motion. App. 1. The court held that the "limited information" redacted from the bodycam footage was protected by both the personal privacy and law-enforcement exemptions, because the officers' and witnesses' privacy interests "outweigh" any "public interest in the full unredacted disclosure of this footage." App. 7-11. The District therefore had "complied with its obligation under DC FOIA." App. 11. Zinman's challenge to MPD's initial invocation of the ongoing-investigation

exemption was moot, given his failure to demonstrate "that his experience on the streets of Washington or with his FOIA request is likely to recur." App. 11.

The court denied Zinman's request for costs. Recognizing that costs are allowed "only when" plaintiffs "fully or partially" prevail, the court noted that "[t]he District is the prevailing party," and that it released the bodycam video "when it did not because [Zinman] filed this case but because [OPC's] internal investigation had ended." App. 11. The court also noted that, even if Zinman had prevailed, it "would not exercise its discretion to award Mr. Zinman any costs." App. 11.

STANDARD OF REVIEW

Summary judgment on a FOIA claim is reviewed de novo. *District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 264 (D.C. 2013). The denial of costs under FOIA is reviewed for abuse of discretion. *FOP 2012*, 52 A.3d at 827.

SUMMARY OF ARGUMENT

Zinman makes three claims on appeal: (1) MPD improperly redacted portions of the bodycam footage under FOIA's law-enforcement exemption; (2) his challenge to MPD's initial invocation of the ongoing-investigation exemption is not moot despite the release of all nonexempt bodycam footage; and (3) the Superior Court erred in denying him costs. All three arguments lack merit.

1. The identifying information of citizens and police officers captured on the bodycam footage was protected by FOIA's law-enforcement exemption, D.C. Code § 2-534(a)(3)(C), and thus properly redacted.

a. The citizens' names, images, voices, and statements are categorically exempt from disclosure given the significant privacy interests inherent in such information, and given Zinman's failure to show that disclosing that information is necessary to confirm compelling evidence of government illegality. Moreover, even if not categorically exempt, Zinman has not shown that disclosure would advance a significant public interest, much less one that outweighs the substantial privacy interests of the citizens in their identifying information.

b. The images of police officers are likewise exempt from disclosure. Officers have privacy interests in their images under the law-enforcement exemption because, among other things, disclosure of such information could subject them to harassment and physical harm. No public interest would be served by revealing the officers' faces, either. FOIA is concerned with the *actions* of government officials—not their appearances—and the disclosed videos fully inform the public about the government's actions without showing what the officers look like.

2. Zinman's declaratory-relief claim is moot now that he has all nonexempt bodycam videos and MPD cannot reinvoke the ongoing-investigation exemption. Zinman's contrary arguments lack merit, and no more so than his strained reliance

on the exception for issues capable of repetition yet evading review. It is far from clear that invocations of the ongoing-investigation exemption typically evade review, and Zinman offers no reason to expect any likelihood of recurrence.

3. Zinman has not shown that the Superior Court abused its discretion or clearly erred in denying his request for costs. He is not eligible for costs given his failure to show a causal nexus between his FOIA suit and disclosure of the bodycam videos. Nor is he entitled to costs since, as the Superior Court correctly found, Zinman's suit did not benefit the public; he sued primarily for personal reasons; and MPD's reliance on the ongoing-investigation exemption was reasonable. Finally, Zinman fails to argue the necessary point that his requested costs were reasonable, thus forfeiting the issue and effectively abandoning his claim to recover costs.

ARGUMENT

I. The Superior Court Correctly Held That The Information Redacted From MPD's Bodycam Videos Is Exempt From Disclosure Under FOIA's Law-Enforcement Exemption.

Under FOIA's law-enforcement exemption, the District need not disclose "[i]nvestigatory records compiled for law-enforcement purposes" when "the production of such records would" "[c]onstitute an unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(3)(C).[2] This exemption categorically protects

[2] While MPD also invoked the personal-privacy exemption in redacting the bodycam footage, App. 7, 66, this Court can affirm the judgment below based solely on the law-enforcement exemption, *see supra* pp. 3-4.

certain information, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991), while subjecting other materials to a case-by-case analysis in which plaintiffs must show that disclosure "would advance a significant public interest, and that the public interest in disclosure outweighs the privacy concern," *Fraternal Order of Police v. District of Columbia* (*FOP 2015 II*), 124 A.3d 69, 77 (D.C. 2015).

The Superior Court correctly applied these principles here. Zinman does not deny that the bodycam videos are investigatory records compiled for law-enforcement purposes; he offers no sound reason to discount the privacy interests implicated in that footage; and he has not shown that disclosure of the redacted information would advance a cognizable public interest, let alone an interest that outweighs the significant privacy interests at stake. This Court should affirm, both as to the redactions related to private citizens and those related to MPD officers.

A. The District properly redacted the identifying information of private citizens depicted in the bodycam videos.

1. The citizens' information is categorically exempt from disclosure given Zinman's failure to present evidence of government impropriety.

As Zinman acknowledges (Br. 24-25, 31-33), the identifying information of private citizens in law-enforcement records is "categorically" exempt from disclosure, unless plaintiffs show that such information "is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard*, 926 F.2d at 1206. That category of protected information includes all

data that could serve an identifying function, including the citizens' names, images, statements, and voices. *See, e.g.*, *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) ("FOIA makes no distinction between information in lexical and that in non-lexical form."); *Sack v. CIA*, 53 F. Supp. 3d 154, 173 (D.D.C. 2014) ("Images of an individual may implicate a privacy interest."). This case falls squarely within that rule, and Zinman has presented no serious evidence that MPD "engaged in illegal activity," much less that the citizens' information is "necessary" to confirm such evidence. *See SafeCard*, 926 F.2d at 1206.

a. Citizens have significant privacy interests in their names, images, voices, and statements.

The Superior Court correctly held that citizens who cooperate with police investigations have a substantial privacy interest in their "personally identifiable" information, including their names, images, statements, and voices. App. 8-9. Courts construe the law-enforcement exemption to preserve "the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 628-30 & n.12 (1982). This approach ensures that citizens are not robbed of their privacy interests simply for helping police investigate potential crimes. *Lesar v. Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980). Because that is all the citizens in this case were recorded doing, their identifying information should remain private. Zinman's contrary arguments lack merit.

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. Yet Zinman's own cases confirm just the opposite—namely, that this exemption "goes beyond the common law and the Constitution." *NARA v. Favish*, 541 U.S. 157, 170 (2004); *Horowitz v. Peace Corps*, 428 F.3d 271, 279 (D.C. Cir. 2005) (same under Exemption 6). In the FOIA context, privacy encompasses not just *what* information is disclosed, but also "*when*, *how*, and *to what extent*" it is disclosed, and therefore "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure." *U.S. Dep't of Justice v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 763, 764 n.16, 770 (1989) (emphasis added) (internal quotation marks omitted). Under the law-enforcement exemption, then, the passing display of a citizen's image and voice while speaking to police in public does not destroy all privacy interests in that information. *See Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1491 (D.C. Cir. 1984) (holding that revealing informants' names to Congress "in no way undermines" their "privacy interests").

Similar logic explains why no citizens waived their privacy here by giving recorded statements to police. *Contra* Br. 22, 25-28. Waiver cannot occur in the creation of a record without some other "permanent" disclosure "in the public domain." *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992). For

FOIA purposes, "information is in the public domain if it is generally available to the public at large, not simply if it happens to be known by select members of the public." *Knight First Amend. Inst. v. U.S. Citizenship & Immigr. Servs.*, 30 F.4th 318, 332-33 (2d Cir. 2022). This is why unaired recordings of a reputed mob boss remain exempt, *Davis*, 968 F.2d at 1278-82, while a political candidate waives FOIA privacy interests "by publicly claiming to have done the very things that documents responsive to the request discuss," *Nation Mag. Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 894-96 & nn.8-10 (D.C. Cir. 1995); *see Showing Animals Respect & Kindness v. U.S. Dep't of the Interior*, 730 F. Supp. 2d 180, 193-96 (D.D.C. 2010) (similar, video "broadcast three times on national television"). Otherwise, 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. *Abramson*, 456 U.S. at 628-30. With nothing in the public domain revealing these citizens' involvement in the investigation, no waiver occurred.

In an about-face, Zinman next insists (Br. 24) 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. But it does not matter whether Zinman can identify anyone in the video because "disclosure would release the contested materials to *the world at large*." *Sussman v. U.S. Marshalls Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007). From 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," *Reps. Comm.*, 489 U.S. at 771; *see Detroit Free Press Inc. v. U.S. Dep't of Justice*, 829 F.3d 478, 482 (6th Cir. 2016) (en banc) ("[M]odern technology only heightens the consequences of disclosure."). In any event, Zinman undercuts his own assertion by suggesting elsewhere (Br. 27, 43) that the citizens *can* be "identified" from the unredacted videos and that they should subject to "opprobrium" for their conduct.

Also flawed is Zinman's claim (Br. 28) 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." This argument collapses on itself. Information 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—whether the information is a visual image, *see Favish*, 541 U.S. at 160-73, or a voice recording, *see Davis*, 968 F.2d at 1278-82. Zinman's contrary assertions provide no reason to question the District's redactions. *See Sussman*, 494 F.3d at 1117 ("Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.").

b. Zinman offers no compelling evidence of police misconduct nor any reason to think that the citizens' information would confirm his allegations.

To overcome the categorical rule protecting private citizens' information, Zinman must show that such information "is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard*, 926 F.2d at 1206. Zinman flunks that test for at least two independent reasons.

First, he offers no evidence, let alone *compelling* evidence, of illegal conduct. To begin, 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." App. 61. Also, to the extent an officer misremembered how Zinman cut his hand, a police officer's inability to recall every detail of a suspect's statement is a far cry from the sort of government malfeasance that justifies disclosure of private citizens' information.

Nor was it improper for the officers to question Zinman's intent and to encourage decorum in the area near Black Lives Matter Boulevard. Contrary to Zinman's assertions (Br. 32), no officer suggested that he "deserved to be assaulted" or "have his property destroyed." The officers acknowledged that no one had "the right to assault" Zinman, but in hopes of "trying to keep the peace," they asked him to "be respectful" of other people "if you're going to come over here," and to "at

least practice social distancing," as "this COVID stuff is serious." Exh. D at 1:45, 2:50-3:30, 7:24.

The officers' response to Zinman's "video evidence" was also anything but improper. Zinman admittedly had no video of the male protestor who allegedly assaulted him. App. 16; Exh. F at 6:30-7:25. Instead, he showed the officers edited video "clips," which in their view, showed Zinman "actually approaching" a female protestor who merely "stood her ground." Exh. F at 4:00-5:00, 05:15-5:30. That 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, *see Perez Hernandez v. United States*, 207 A.3d 605, 606 (D.C. 2019) (en banc) (per curiam) (vacating panel opinion to decide this issue en banc).

Second, Zinman has not shown that any citizen's information is necessary to confirm the "misconduct" he alleges. *SafeCard*, 926 F.2d at 1206. Nor could he. The citizens' names, images, voices, and statements have no bearing on whether the police report overlooked any information; whether an officer accurately recalled Zinman's statements; or whether the officers were unpersuaded by Zinman's accusations and edited video clips (*see* Br. 32).

2. Even if the citizens' identifying information is not categorically exempt, Zinman has not shown that disclosing it would advance any public interest.

Because the citizens' information is categorically exempt from disclosure, this Court need not consider whether releasing it would further a public interest. *See SafeCard*, 926 F.2d at 1205-06. But even if it does, the outcome is the same. Zinman has not shown that any cognizable public interest would be advanced by disclosing the names, images, statements, and voices of citizens in the bodycam footage. Nor has he shown that any such interest would outweigh their privacy concerns.

FOIA plaintiffs must show that disclosure would advance a "significant" public interest beyond simply "having the information for its own sake," and that this public interest outweighs any privacy interests. *Favish*, 541 U.S. at 172-73. As Zinman acknowledges (Br. 12, 28-29), "the *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles v. Oregon Nat. Desert Ass'n*, 519 U.S. 355, 355-56 (1997) (internal quotation marks, brackets omitted); *see FOP 2015 II*, 124 A.3d at 77 (same). When disclosure would not advance such an interest, balancing is unnecessary, since "something . . . outweighs nothing every time." *Horowitz*, 428 F.3d at 278 (internal quotation marks omitted).

The Superior Court correctly held that Zinman had not shown that disclosing the information of private citizens would advance any public interest. App. 9-11. On appeal, Zinman posits (Br. 30-33) various "interests" related to the bodycam footage. These include 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.

Yet Zinman offers little more than those conclusory assertions. Most notably, he does not explain in any meaningful detail how his asserted interests would be advanced by disclosing citizens' information. *See FOP 2015 II*, 124 A.3d at 77 ("[T]here is no cognizable public interest in 'information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.'" (quoting *Reps. Comm.*, 489 U.S. at 773)). Zinman's failure to develop his claims renders them 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)).

His arguments fail either way, however. Given Zinman's inability to present evidence of government impropriety, *supra*, pp. 20-21, 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. Further, Zinman's desire for more "transparent records" and less "noncompliance" with FOIA is entirely circular and would effectively absolve plaintiffs of their burden to show that disclosure would advance a significant public interest. Were those purported interests enough, no plaintiff would ever fail to carry their burden, since eliminating redactions will *always* make records more "transparent" in some sense and *every* FOIA case will involve an allegation of "noncompliance" with FOIA.

B. The District properly redacted the identifying information of police officers depicted in the bodycam footage.

The officers' images were also properly redacted under the law-enforcement exemption, and Zinman offers no sound reason to conclude otherwise. Two points of clarification at the outset. First, contrary to Zinman's assertions (Br. 9, 13, 17), the District redacted only the officers' images, not their statements, App. 66. Second, 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.

1. Officers have a privacy interest in their images.

The Superior Court correctly held that "MPD officers had a privacy interest in their images." App. 8. That conclusion follows straightforwardly from the text of the law-enforcement exemption as well as this Court's precedents. *See, e.g.*, *District of Columbia v. Fraternal Order of Police (FOP 2013)*, 75 A.3d 259, 267 (D.C. 2013) ("MPD employees have a cognizable privacy interest in the nondisclosure of their names and identifying information."); *see also Lesar*, 636 F.2d at 487 (holding that law-enforcement officers retain their privacy interests).

The law-enforcement exemption's text naturally encompasses the images of officers on bodycam video. The exemption protects "[i]nvestigatory records" that, if disclosed, would result in "an unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(3)(C). It draws no distinction among written, audio, or video "records." *Id.* It sets no limits on whose "privacy" is protected from "unwarranted invasion." *Id.* And unlike the personal-privacy exemption, it covers more than just "[i]nformation of a *personal* nature," *id.* § 2-534(a)(2) (emphasis added). By its terms, then, the law-enforcement exemption is perfectly consistent with a privacy interest in information about officers, whether it is the officer's name scribbled in a witness interview or her recorded image on a bodycam video. *See Stone v. FBI*, 727 F. Supp. 662, 664 (D.D.C. 1990) (declining "to write a 'public official' exception into" Exemption 7(C)), *aff'd*, 1990 WL 134431 (D.C. Cir. 1990).

This Court's precedents point in the same direction. Even as to the narrower personal-privacy exemption, the "bar is low" for FOIA privacy interests. *FOP 2013*, 75 A.3d at 266 (internal quotation marks omitted). Such an "interest need only be more than *de minimis*," and need not entail "embarrassing or intimate" information. *Id.* Rather, because every individual has an interest in the "control of information concerning his or her person," FOIA recognizes a privacy interest in the "identifying information" of both private citizens and police officers alike. *Id.* at 265-67 (internal quotation marks omitted); *see FOP 2015 II*, 124 A.3d at 76-79 (holding that officers have a privacy interest in their "gender" and "race" data).

These principles further confirm that officers have a protectable privacy interest in their images on bodycam videos. After all, "identifying information" means just that—information that can identify officers and associate them with an investigation. *See Senate of the Commonwealth of Puerto Rico*, 823 F.2d at 588 (holding that FBI agents had "substantial" privacy interests in such information). Given 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. *See Sack*, 53 F. Supp. 3d at 171-74 (recognizing federal workers' privacy interests in "thermal images" showing "gender, age, facial shape").

The textual and doctrinal strength of this rule is matched only by its real-world imperatives. Police routinely handle "dangerous and sensitive tasks such as arrests,

searches, and undercover work." *New England Apple Council v. Donovan*, 725 F.2d 139, 143 (1st Cir. 1984). The lawful performance of those duties can garner the animosity of criminals looking for reprisal, *id.*, and many FOIA requests are in fact filed by inmates seeking information about the investigations that led to their convictions, *e.g.*, *Peltier v. FBI*, 563 F.3d 754 (8th Cir. 2009). Disclosing an officer's image from a bodycam video, therefore, can put a target on her back, exposing her to harassment and even physical harm. *See Wood v. FBI*, 432 F.3d 78, 85-88 (2d Cir. 2005) (Sotomayor, J.) (holding that FBI investigators' "identifying information" implicated "a measurable privacy concern" for this reason). Such an outcome contravenes not only FOIA's law-enforcement exemption but also the District's bodycam program, which was created in part to "ensure the safety" of MPD officers, *see* 24 DCMR § 3900.2. An officer's image on bodycam video thus implicates a more than *de minimis* privacy interest, to say the least. *See Hines v. D.C. Bd. of Parole*, 567 A.2d 909, 912 (D.C. 1989) (recognizing the "privacy interests" of "those who may be harmed by [the] release" of records).

Zinman resists this conclusion but does not meaningfully dispute the principles that underlie it. Instead, he urges the Court to suspend those principles because the officers' images in this case were captured by each other's bodycams while in "public," where Zinman and others could see them, and without a "pledge of confidentiality." Zinman Br. 12-13, 16-17, 23-24. Those arguments fail.

Relying on inapposite First Amendment cases, Zinman again conflates constitutional rights and FOIA privacy interests in arguing (Br. 16) that officers have no "expectation of privacy" when "performing their duties in public places." Tellingly, he cannot muster a single FOIA case to support that theory, and for good reason. The law-enforcement exemption protects interests the Constitution does not, including "the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Reps. Comm.*, 489 U.S. at 767; *see, e.g.*, *id* at 762-71 (rap sheets compiling "bits of information" available in underlying "public records"); *Favish*, 541 U.S. at 164-73 (photos of suicide victim, where "other pictures had been made public"); *Detroit Free Press*, 829 F.3d at 480 (mug shots of "criminal defendants who have appeared in court"). The same rule protects the images of police officers recorded in public on body-worn cameras, regardless of the Constitution's "penumbras" (Br. 23).

Indeed, Zinman overlooks critical differences between FOIA privacy interests and the constitutional right to gather information on one's own. 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, *see Favish*, 541 U.S. at 166-72. Journalists 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, *see Reps. Comm.*, 489 U.S. at 762-71. The local

gossip has a First Amendment right to record the faces of arrestees as they enter a police station, but that does not eliminate the arrestees' privacy interests in their mug shots, *see Detroit Free Press*, 829 F.3d at 480-85.

So too here. Regardless of any right to film police in public, officers retain a FOIA privacy interest in their unredacted images on bodycam videos, as MPD's regulations confirm, 24 DCMR § 3903.4 ("[MPD] shall strictly control access to BWC recordings."). Few government agencies can obtain unredacted bodycam footage, *id.* §§ 3902.1-.4; MPD monitors its own officers' access to the recordings, *id.* §§ 3900.9, 3903.4-.5; and no person depicted in such footage can make an unredacted copy of it, *id.* § 3902.5(a)(1). These rules underscore that a bodycam video "implicates privacy concerns," and that "police officers" likewise "have a legitimate privacy interest" in such recordings. *See United States v. Kingsbury*, 325 F. Supp. 3d 158, 159-60 (D.D.C. 2018) (restricting use of "body-worn camera footage" under Federal Rule of Criminal Procedure 16(d) "to protect the privacy of *noncivilian* witnesses (i.e., the police)") (internal quotation marks omitted). The District's program thus reflects the same "careful and limited pattern" of disclosure for officers' images that has given rise to protectable privacy interests in related contexts. *See Reps. Comm.*, 489 U.S. at 764-66; *Hines*, 567 A.2d at 912-14.

The same logic forecloses Zinman's artificial distinction (Br. 16) between records of "intradepartmental proceedings" and records of officers "in public." The

law-enforcement exemption "is not limited to cases involving 'private facts.'" *Donovan*, 725 F.2d at 142. While officers subject to "internal" MPD investigations certainly have an "interest in not being publicly identified," *FOP 2015 II*, 124 A.3d at 71-78, that hardly suggests they have *no* privacy interests in records involving events in public. Even convicted criminals have protectable privacy interests in their "rap sheets," and those records, like bodycam footage, principally comprise "bits of information" that "have been previously disclosed." *Reps. Comm.*, 489 U.S. at 762-64. Police officers should have at least the same privacy interests in their recorded images that felons do in their criminal records, even if those images were captured during "public" events rather than "intradepartmental" ones. *See FOP 2013*, 75 A.3d at 266-67 & n.5 (holding that MPD officers had a privacy interest in their authorship of work-related emails sent on MPD's "public" email system).

Nothing about this analysis changes, moreover, simply because officers must wear nameplates and badges while in uniform. *Contra* Br. 17. Nameplates and badges display a uniformed officer's professional credentials during face-to-face encounters or to on-lookers within an observable distance. But the temporary visibility of such information is different in kind and degree from the permanent disclosure of an officer's image in a bodycam video—just as the temporary visibility of a body in a park (*Favish*) or an arrestee's face in open court (*Detroit Free Press*) does not diminish the privacy interests in that once-public information. 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. Were 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. That cannot be right.

The absence of an express "pledge of confidentiality" is likewise immaterial. *Contra* Br. 13. Such pledges are at most "a factor" in "assessing the *significance* of the privacy interest"; they are not a precondition for recognizing such interests in the first place. *FOP 2013*, 75 A.3d at 267 & nn.6-7 (emphasis added). Zinman cannot downplay this Court's observation in *FOP 2013* that "MPD employees have a cognizable privacy interest in the nondisclosure of their names and identifying information" just because that case involved express confidentiality assurances. *Id.* at 266-67. As this Court held, "the pledge of confidentiality" there simply "*heightened*" the officers' "greater than *de minimis* privacy interest in keeping their identities from being disclosed." *Id.* (emphasis added). The absence of such a pledge here therefore cannot *eliminate* any officer's privacy interests.[3]

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[3] Zinman's labored attempt (Br. 13-21) to distinguish *Horvath* and *Skinner* also fails, as both cases recognize the privacy interests of law-enforcement officers in "information by which those individuals could be identified." *Skinner v. U.S. Dep't of Justice*, 744 F. Supp. 2d 185, 208 (D.D.C. 2010); *see Horvath v. U.S. Secret Serv.*, 419 F. Supp. 3d 40, 48 (D.D.C. 2019) (same for "information about facts and events that would identify" federal agents (internal quotation marks omitted)).

2. No cognizable public interest would be advanced by the incremental disclosure of the officers' images.

Because the officers have a protectable privacy interest in their images, Zinman must show that disclosing such information would contribute to public understanding of the government, and that this public interest outweighs any privacy concerns. *FOP 2015 II*, 124 A.3d at 77. He cannot make either showing.

In assessing whether disclosure would contribute to public understanding of government conduct, the inquiry "focuses 'not on the general public interest in the subject matter of the FOIA request, but rather on the *incremental value* of the specific information being withheld.'" *Niskanen Ctr. v. FERC*, 20 F.4th 787, 791 (D.C. Cir. 2021) (quoting *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added)); *see FOP 2013*, 75 A.3d at 268-69 (same). Zinman must explain, then, how unblurring the officers' images will advance public understanding of the government's actions beyond what the redacted videos already show.

He fails entirely to do so. Other than a few conclusory assertions (Br. 33) about disclosure being "consistent" with the Bodycam Act, Zinman's brief is devoid of "developed argumentation." *Comford*, 947 A.2d at 1188. And he has no good argument to make anyways, for the incremental value of disclosing the officers' images is nil. Seeing 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. *FOP 2013*, 75 A.3d at 266-69. Nor 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. *See Wood*, 432 F.3d at 89 (noting that any "bias in the investigation" would surface "in the actions taken or not taken by the FBI," not the investigators' identities). Also, 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.

No balancing of interests is therefore needed. Because Zinman has not shown that disclosing the officers' images would contribute to public understanding of the government's actions, the officers' privacy interests must prevail. *Horowitz*, 428 F.3d at 278. But even if unblurring the officers' faces would serve some marginal interest, Zinman offers no reason to believe that such a vanishingly slight benefit could outweigh the officers' interest in staying out of the public eye. *See Favish*, 541 U.S. at 166 (noting the privacy interest in "refuge from a sensation-seeking culture"). In short, Zinman received everything FOIA entitled him to.

II. The Superior Court Correctly Found That Zinman's Challenge To MPD's Invocation Of The Ongoing-Investigation Exemption Was Moot.

A. Zinman's challenge to the initial withholding of bodycam footage is moot now that he has all nonexempt footage.

As the Superior Court held, Zinman's attack on MPD's initial invocation of the ongoing-investigation exemption, D.C. Code § 2-534(a)(3)(A)(iii), is moot. App. 11. MPD is no longer invoking that exemption, and Zinman has received all available, nonexempt records. He does not deny that his injunctive claim is moot. Yet he insists (Br. 34-39) that he still has a live claim for declaratory relief against MPD's initial withholding of the now-released videos. Zinman is wrong. Declaratory-relief claims under FOIA are "moot once the trial court determines that the District has adequately and completely complied with the FOIA request." *FOP 2015 I*, 113 A.3d at 199; *see Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982).

That is precisely the situation here. Zinman's complaint demanded the release of "public records responsive to Zinman's FOIA request," and it asked the Superior Court to "[d]eclare" that "the District violated the DC FOIA" by initially withholding bodycam video under the ongoing-investigation exemption. App. 23-24. But as Zinman admits (Br. 36), once OPC's investigation ended, MPD released "video clips responsive to Zinman's request" with limited redactions. Because Zinman has received the nonexempt records he requested, his claim is now moot.

Zinman denies little of this. He instead suggests (Br. 36) that the Court should ignore mootness to decide a "significant" and "unresolved" issue about the permissibility of "blanket exemptions." Yet that issue is not presented here, and its purported significance is all the more reason not to decide it in an advisory opinion. *In re Wyler*, 46 A.3d 396, 400 (D.C. 2012) (stressing that "an advisory opinion" is "especially" improper "on important questions" (internal quotation marks omitted)). Far 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," App. 62. Nothing more was required. *See Fraternal Order of Police v. District of Columbia*, 82 A.3d 803, 815 (D.C. 2014) (requiring "a rational link between the nature of the document and the alleged likely interference" (internal quotation marks omitted)).

Contrary to Zinman's assertions (Br. 34-35, 38-39), his claim is moot not because of any "voluntary cessation," but because effective relief is no longer available. *See FOP 2015 I*, 113 A.3d at 199; *Perry*, 684 F.2d at 125. Regardless of what happens in this case, the District cannot reinvoke the ongoing-investigation exemption to resume its withholding of Zinman's requested materials now that they are disclosed. The voluntary-cessation doctrine simply does not apply in such

circumstances. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 15-16 (D.C. Cir. 2019) (rejecting similar argument where defendants lacked "the unilateral power" to "cease and restart the conduct complained of").

Nor can Zinman escape mootness under *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988). Unlike here, that case involved a repeat FOIA requester challenging the Air Force's concededly "impermissible practice" of citing inapplicable exemptions to cause "unjustified delay" and inflict "continuing injury." *Id.* at 487-91 & n.8. The court acknowledged that disclosure generally moots challenges to the "initial refusal to disclose requested information." *Id.* at 491. Yet it fashioned a narrow exception for cases where "an agency *policy or practice* will impair the party's lawful access to information in the future." *Id.* For this exception to apply, then, "repeat requesters" must show that they "will suffer continuing injury" from a "*policy or practice*" that violates FOIA—otherwise, "disclosure of the requested information will moot a FOIA claim." *Khine v. U.S. Dep't of Homeland Sec.*, 943 F.3d 959, 965 (D.C. Cir. 2019) (internal quotation marks omitted); *see Porup v. CIA*, 997 F.3d 1224, 1233 (D.C. Cir. 2021) (same).

This case does not fit the *Payne Enterprises* exception. 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 Khine*, 943 F.3d at 965-66. Rather, Zinman challenged MPD's initial invocation of

the ongoing-investigation exemption in this single case, App. 18-22, and one allegedly improper action does not a pattern or practice make, *see Porup*, 997 F.3d at 1233 (holding that "two FOIA response letters," even if "fallacious," did not "show that the CIA has been following a *practice*"). While he now asserts (Br. 39) for the first time on appeal that he is contesting a "practice of unjustified delay," Zinman offers no evidence of such a practice and he cannot, in any event, belatedly amend his complaint on appeal to avoid mootness, *see J.T. v. District of Columbia*, 983 F.3d 516, 527 (D.C. Cir. 2020) (rejecting "the assertion of broader injuries than those alleged in a complaint" when "evaluating mootness").

B. Zinman's challenge to challenge to the initial withholding of bodycam footage is not capable of repetition yet evading review.

As a last-ditch effort to avoid mootness, Zinman argues (Br. 34-38) that his claim for declaratory relief is capable of repetition, yet evading review. Not so. To invoke this narrow exception, Zinman must show that (1) invocations of the ongoing-investigations exemption are by their nature too short in duration "to be fully litigated," and (2) there is a "reasonable expectation" that Zinman himself "will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks, brackets omitted). Zinman cannot satisfy either element.

1. Invocations of the ongoing-investigation exemption are not so inherently short as to evade review.

Zinman has not shown that invocations of the ongoing-investigation exemption are "always so short as to evade review." *Id.* at 18. Under this element, "the challenged activity" must be "*by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *Pharmachemie B.V. v. Barr Lab'ys, Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002) (internal quotation marks omitted).

Rather than make that showing, Zinman asserts (Br. 35-36) that MPD's reliance on the exemption *in this case* was "too short to be fully litigated." But that just explains why *Zinman's* claim is moot; it does not show that similar claims will always or even typically evade review. *Southern Co. Servs. v. FERC*, 416 F.3d 39, 43-44 (D.C. Cir. 2005) (holding that "two instances" of mootness "do not suffice"). And nothing in *Gulf Oil Corporation v. Brock* suggests otherwise. That the FOIA claim there was moot given the eleven-year history of that case, 778 F.2d 834, 839 (D.C. Cir. 1985), hardly supports Zinman's inverse assertion that the issues here will evade review simply because *his* FOIA dispute was short-lived, *see Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (finding case moot even if "particular activity complained of ended before there was an opportunity to fully litigate"). Otherwise, the "evading review" element would be meaningless, as this exception is only invoked in cases where the claim at issue expired before litigation ended.

Equally meritless is Zinman's contention (Br. 36) that mooting his claim will let the District "avoid review" of this issue in future cases "by simply closing an OPC investigation after litigation has been commenced." Given OPC's independent investigatory authority, the District cannot simply close an OPC investigation to cut off FOIA litigation. *See* D.C. Code § 5-1102 (authorizing OPC to conduct "independent review of citizen complaints"). Regardless, Zinman offers no reason to believe the District would engage in such antics, especially since it did not do so here: the record shows that OPC ended its investigation *before* the District was even served with this lawsuit, App. 2, 65. Zinman's failure on this issue is dispositive.

2. Zinman has not shown any reasonable expectation that the same underlying events will recur.

Zinman's theory fails for the independent reason that he has not shown he "will be subject to the same action again." *Spencer*, 523 U.S. at 17. A "theoretical possibility" of repetition is not enough—there must be "a 'reasonable expectation' or 'demonstrated probability'" of recurrence. *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1088 (D.C. Cir. 2017). Because this inquiry turns on the precise conduct alleged in the complaint, "a legal controversy so sharply focused on a unique factual context will rarely present a reasonable expectation that the same complaining party would be subjected to the same actions again." *J.T.*, 983 F.3d at 524 (internal quotation marks, brackets omitted).

Here, Zinman's complaint challenged MPD's withholding of footage under the ongoing-investigation exemption. App. 18-22. It alleged no broader theory of injury, and it sought no relief beyond disclosure of the now-released records and a declaration of wrongdoing. *See* App. 23-24. Such a fact-specific controversy is exceedingly unlikely to recur, and Zinman offers no reason to conclude otherwise.

In fact, Zinman admits (Br. 37-38) that recurrence is "hardly demonstrably probable." The most he can say is that MPD might invoke the ongoing-investigation exemption again "if Zinman ever did" submit another "FOIA request for BWC footage after filing an OPC complaint." But that attenuated chain of events barely suggests a theoretical possibility of recurrence, much less a reasonable expectation. *See Ferrer*, 856 F.3d at 1088. By his own account, Zinman's claim cannot arise again unless, among other things, he travels to the District again, he is involved in a situation that warrants police intervention again, he complains to OPC again, and he submits a FOIA request again. Yet Zinman has not even alleged an intention of visiting the District again, let alone submitting another FOIA request. *See Pharmachemie*, 276 F.3d at 633 (mooting case where "several contingencies would have to occur for the same issues to arise again").

Neither of Zinman's cited cases is apposite. In *Honig v. Doe*, a disabled student's challenge to his suspension was likely to recur because his disability made it almost certain that he would engage in similar "misconduct" and "be subjected to

the same unilateral school action for which he initially sought relief." 484 U.S. 305, 320-21 (1988). Recurrence was likely in *NBC v. CWA* for similar reasons: NBC had an institutional interest in reporting on public political events (which it routinely protected through emergency injunctions), and CWA regularly held such public political events (from which it was likely to exclude NBC in the future). 860 F.2d 1022, 1022-24 (11th Cir. 1988). Nothing about Zinman's personal characteristics or future intentions suggests any similar sort of likelihood of recurrence.

III. The Superior Court Soundly Exercised Its Discretion In Denying Zinman's Request For Costs.

Trial courts can award costs only if FOIA plaintiffs are *eligible* for costs, they are *entitled* to costs, and the costs are *reasonable*. *Vining v. District of Columbia*, 198 A.3d 738, 745 (D.C. 2018). Zinman did not make these showings below, and he has not shown on appeal that the denial of his request was an abuse of discretion. Zinman in fact ignores the deferential standard of review for this issue and argues the matter as if it were reviewed de novo. That is wrong. This Court should affirm.

A. Zinman has not shown that the Superior Court abused its discretion in deeming him ineligible for costs.

To be eligible for costs, FOIA plaintiffs must establish that they "prevail[ed] in whole or in part in [their] suit." D.C. Code § 2-537(c). This requires at the very least a "causal nexus" between the plaintiff's FOIA suit and the disclosure of records. *FOP 2015 I*, 113 A.3d at 200-01. It is not enough for plaintiffs to show

that their pre-litigation FOIA request played a role in prompting certain disclosures. *See id.* They must instead prove as a factual matter that their "*lawsuit* caused" "the production of documents." *Id.* at 200 (emphasis added).

Zinman did not attempt to show a causal nexus below, App. 52-59, and on appeal, he suggests that no such requirement exists, arguing that "the proper inquiry was not whether the District produced the videos *because* Zinman filed suit," Br. 40 (emphasis added). That is incorrect. *See FOP 2015 I*, 113 A.3d at 200-01. Zinman's failure to argue this issue properly is reason enough to affirm. *Charmed, LLC v. D.C. Dep't of Health*, 263 A.3d 1028, 1034 n.7 (D.C. 2021) (declining to address issues not raised below or adequately briefed on appeal).

In any case, the Superior Court reached the correct result. The District was "the prevailing party," App. 11, and no causal nexus exists between Zinman's suit and the release of the bodycam footage. As the Superior Court found, MPD produced the bodycam footage when it did not because Zinman filed suit but because OPC's investigation ended. App. 11. That finding is amply supported by the record, unlike Zinman's challenge to it (Br. 41). MPD's denial expressly depended on the existence of "*an ongoing* [OPC] investigation," thus indicating that disclosure would occur once the investigation was no longer "ongoing." App. 62 (emphasis added). And that is precisely what happened: once "OPC closed the investigation," MPD "produced responsive footage." App. 65. The Superior Court did not clearly err in

finding that the former caused the latter. *See Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (en banc) (deferring to "the trial court's judgment" even if "the facts admit of more than one interpretation").

B. Zinman has not shown that the Superior Court abused its discretion in finding that he is not entitled to costs.

Zinman loses for the separate and independent reason that he cannot show the Superior Court abused its discretion in finding that he was not *entitled* to costs. A plaintiff's entitlement to costs under FOIA depends on "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding." *Vining*, 198 A.3d at 745 & n.5 (internal quotation marks omitted); *see Morley v. CIA*, 894 F.3d 389, 391 (D.C. Cir. 2018) (applying similar test). The Superior Court found that nearly all of these factors weighed against Zinman's request, App. 11-12, and that finding warrants considerable deference on appeal, *see Morley*, 894 F.3d at 392-96; *Vining*, 198 A.3d at 745 n.6 ("[O]ur court generally follows federal precedent regarding FOIA fee awards.").

1. Zinman's suit did not advance the public interest.

The Superior Court correctly held that Zinman's suit did "not significantly advance the public interest." App. 11-12. Zinman misses the point in asserting (Br. 43) that the disclosed bodycam footage advanced certain "public purposes." The question is whether the public benefited from Zinman's *lawsuit*, not whether it

benefited from the records. The answer to the former question is clearly no. The bodycam footage was disclosed because OPC ended its investigation, not because Zinman filed suit, *see* App. 11-12, and therefore the public could have derived no benefit from this litigation. *See FOP 2012*, 52 A.3d at 835 (denying fees where "there was no indication" that FOIA suit "benefited the public interest").

2. Zinman filed suit primarily for personal reasons.

The Superior Court also correctly found that Zinman "is pursuing the case primarily to advance his personal interests." App. 12. While Zinman now purports (Br. 43-44) to have filed suit for many reasons, he does not deny his "personal stake in seeking disclosure of the requested BWC footage." That is reason enough to weigh this factor against him. *See FOP 2012*, 52 A.3d at 835 (denying fees where, "although the request was not made in pursuit of any obvious commercial benefit, it did seem self-interested in nature"). Paying his own costs would not be "tantamount to a penalty" (Br. 44), moreover, since Zinman received all nonexempt records (and thus was not "wronged"), and the District's disclosures were prompted by the end of OPC's investigation, not this lawsuit (and thus Zinman's litigation did not "make the District comply with DC FOIA").

3. MPD's initial invocation of the ongoing-investigation exemption was reasonable.

The Superior Court correctly weighed the reasonableness factor against Zinman because MPD's "initial withholding" was "justified under the ongoing

investigations exemption." App. 11. Invocation of a FOIA exemption is reasonable if it has a colorable basis in law. *FOP 2012*, 52 A.3d at 830. The question is "not whether the agency acted correctly, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the relevant material." *Morley*, 894 F.3d at 394 (denying fees because "the CIA's ultimately incorrect legal view was not unreasonable") (internal quotation marks omitted).

That standard is satisfied here. OPC's investigation was based on Zinman's complaint, and Zinman's complaint was based on events captured by the requested bodycam footage. App. 2, 17, 27-28, 62. MPD thus had every reason to conclude that disclosure would interfere with OPC's investigation, and thus every reason to invoke the ongoing-investigation exemption.

Without denying those facts, Zinman claims (Br. 40-41) that the Superior Court "applied the wrong standard" in not deciding de novo "whether disclosure of the videos would've somehow interfered with the OPC's ongoing investigation." But the issue for the Superior Court was not whether MPD *correctly* invoked the ongoing-investigation exemption—it was whether MPD *reasonably* did so. *See FOP 2012*, 52 A.3d at 830. The Superior Court held that it did, and that finding warrants "a double dose of deference" on appeal. *Morley*, 894 F.3d at 393 ("The question for us is whether the District Court *reasonably* (even if incorrectly) concluded that the agency *reasonably* (even if incorrectly) withheld documents.").

If nothing else, MPD's initial reliance on the ongoing-investigation exemption hardly suggests "government recalcitrance" (Br. 41-42). MPD responded to Zinman within 25 business days, D.C. Code § 2-532(c)(2)(A); its letter stated the "specific reasons for the denial," *id.* § 2-533(a); and it disclosed nonexempt footage within a few months of OPC's investigation ending, App. 62-66. While Zinman quibbles with MPD's "reasoning" (Br. 41-42), the denial letter provided everything the law requires in explaining that disclosure "could interfere with" OPC's investigation by revealing its "direction and pace," by leading "to attempts to destroy or alter evidence," or by revealing "information about potential witnesses who could then be subjected to intimidation." App. 62-63. That is an adequate explanation by any measure, *see Swan v. SEC*, 96 F.3d 498, 499 (D.C. Cir. 1996), and Zinman's own cited cases (Br. 42) belie his effort to disparage MPD's response as "patently unreasonable" government "obduracy," *see Wheeler v. IRS*, 37 F. Supp. 2d 407, 414-16 (W.D. Pa. 1998) (finding "no recalcitrant or obdurate behavior" where agency exercised "diligence and care in responding to the plaintiff's requests").[4]

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[4] *Horsehead Indus., Inc. v. EPA*, 999 F. Supp. 59, 65-68 (D.D.C. 1998) (denying fees because, while "EPA lacked a reasonable basis for withholding" certain records, its behavior "simply was not mulish enough"); *see Seegull Mfg. Co. v. NLRB*, 741 F.2d 882, 885-87 (6th Cir. 1984) (awarding fees where agency was not "forthright and honest" with FOIA requesters); *Read v. FAA*, 252 F. Supp. 2d 1108, 1112 (W.D. Wash. 2003) (finding that "FAA's failure to respond to" a FOIA request "for two years" demonstrated "recalcitrance and obduracy").

c. Zinman has not shown that his costs are reasonable.

Zinman's brief does not mention the reasonableness of his requested costs, and he addressed it below only on reply. That failure is dispositive. While the $621.90 he seeks may pale in comparison to the cost of litigating other claims, it is still Zinman's burden to show that his costs are reasonable. *Vining*, 198 A.3d at 745. By ignoring that issue, he has forfeited the point and this Court need not consider it.

CONCLUSION

The Superior Court's judgment should be affirmed.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

GRAHAM E. PHILLIPS
Deputy Solicitor General

/s/ Bryan J. Leitch
BRYAN J. LEITCH
Assistant Attorney General
Bar Number 1016484
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6524 (office)
(202) 741-0649 (fax)
bryan.leitch@dc.gov

September 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;

     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;

     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;

     (4) the year of the individual's birth;

     (5) the minor's initials; and

     (6) the last four digits of the financial-account number.

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

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

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the party protected under such order," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal

orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

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

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

/s/ Bryan J. Leitch
Signature

21-CV-894
Case Number

Bryan J. Leitch
Name

September 12, 2022
Date

Bryan.leitch@dc.gov
Email Address

CERTIFICATE OF SERVICE

I certify that on September 12, 2022, this brief was served through this Court's electronic filing system to:

Corey J. Zinman

/s/ Bryan J. Leitch
BRYAN J. LEITCH