SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRATERNAL ORDER OF POLICE METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, DC POLICE UNION, **Plaintiff,** **v.** **DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2020 CA 003492 B** **Judge William M. Jackson** **Next Event: Hearing on Temporary Restraining Order** **August 13, 2020, 2:00 p.m.** **Judge Hiram E. Puig-Lugo**

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiff, a union representing members of the Metropolitan Police Department (MPD), seeks a temporary restraining order preventing the District of Columbia (the District) and Mayor Muriel E. Bowser from complying with provisions of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 requiring the production of information, including names and body-worn camera footage, from incidents involving death or serious use of force by an MPD officer. But plaintiff has not met the heavy burden necessary to secure that extraordinary remedy. Plaintiff is unlikely to prevail on the merits of its claims because it has not shown that it has standing and has failed to state any violation of law. Plaintiff lacks organizational standing and third-party standing to bring an action on behalf of non-member persons, and its allegation that the public release of the information in question might injure one of its members is too speculative and

tenuous to constitute an injury. For the same reasons, and because the information sought to be enjoined has already been released and presently there are no additional names or body-worn camera recordings required to be released by the Act, plaintiff has not demonstrated a risk of irreparable harm. Finally, the balance of the equities and public interest do not support plaintiff's request because the District's and public interest in the proper enforcement of valid laws and transparency about the actions of the local police force are compelling public interests whereas plaintiff has shown not even a plausible risk of injury to its members. Because each factor weighs against the granting of a temporary restraining order, the Court should deny plaintiff's motion.

BACKGROUND

On July 6, 2020, the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the Act) was introduced in the Council of the District of Columbia (the Council). *See* https://lims.dccouncil.us/Legislation/B23-0825 (last accessed Aug. 11, 2020). Section 103 of Subtitle B of Title I of the Act amends D.C. Code § 5-116.33(c)(1)(B)(i) to require the mayor to "[b]y August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014," *id.* (c)(1)(B)(i)(II), and, thereafter "within 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force." *id.* (i)(I). The Act authorizes the victim or the victim's next of kin to exempt the mayor from releasing the video. *Id.* The Council

held a hearing on the bill, B23-0825, and adopted it unanimously on June 7, 2020. *Id.* Mayor Bowser signed it into law and enacted it with Act Number A23-0336 on July 22, 2020. *Id.* The Act was published in the D.C. Register on July 31, 2020. 67 D.C. Register 9148.

That same day, Deputy Mayor for Public Safety and Justice Kevin Donahue sent a letter to Councilmember Charles Allen, Chairman of the Committee on the Judiciary and Public Safety. Available at https://dmpsj.dc.gov/sites/default/files/dc/sites/dmpsj/release_content/attachments/Letter%20to%20Councilmember%20Charles%20Allen%20on%20Fatal%20Incidents%20with%20Body%20Worn%20Camera%20Footage.pdf (last accessed Aug. 11, 2020). DM Donahue explained that, since October 1, 2014, "there have been 10 fatal incidents involving a Metropolitan Police Department officer with video recording of the incident," including one on July 24, 2020, after enactment of the Act *Id.* The body-worn camera (BWC) video for three of these incidents were released in 2016 and 2017.[1] *Id.* The families of four other decedents "exercised their right to not have the BWC recordings released." *Id.*[2]

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[1] *See BWC Video: Police-Involved Shooting, 100 b/o Varnum St, NE, on 6/27/16 (CCN #16-105-892)*, OFFICIALDCPOLICE (July 7, 2016), available at https://www.youtube.com/watch?v=y8ERr-iKx2s; Terrence Sterling: *BWC Video: Police-Involved Shooting, 1300 b/o 3rd St, NW, on 9/11/16 (CCN #16-153-797)*, OFFICIALDCPOLICE (Sept. 27, 2016), available at https://www.youtube.com/watch?v=_IRh6LFPkhE; Gerald Hall: *BWC Video: 3200 b/o Walnut St, NE, on 12/25/16 (CCN #16-217-326)*, OFFICIALDCPOLICE (Jan. 4, 2017), available at https://www.youtube.com/watch?v=cTR43ranGGs (all last accessed Aug. 11, 2020).

[2] On August 12, 2020, after discussing the matter with MPD officials, the next of kin of one of the decedent's mentioned in the July 31, 2020 letter, who had previously preferred that the BWC recording not be released, changed her mind. MPD expects to release that footage Friday, August 14, 2020, after completing the proper

Also on July 31, 2020, the mayor "authorized the release of body-worn camera (BWC) videos related to [the remaining] three deaths involving [MPD] officers." *Id.*; *Community Briefing Videos of Officer-Involved Deaths*, available at https://mpdc.dc.gov/page/community-briefing-videos-officer-involved-deaths (last accessed Aug. 11, 2020). These videos were redacted to protect the privacy of civilians, for example, obscuring the face of a witness. The following day, DM Donahue sent a second letter to Chairman Allen, providing the requisite information for "six fatal incidents in that same time period where there is no video recording." Available at https://dmpsj.dc.gov/sites/default/files/dc/sites/dmpsj/release_content/attachments/Letter%20to%20Councilmember%20Charles%20Allen%20on%20Fatal%20Incidents%20without%20Body%20Worn%20Camera%20Footage.pdf (last accessed Aug. 11, 2020). The District is aware of no other incident responsive to the requirements of Subtitle B of the Act, meaning there are no additional "names [or] body-worn camera recordings" required to be released by the Act. Ex. A, MPD Declaration; Ex. B, Aug. 10, 2020 Email from Asst. Atty. Gen. Conrad Risher.

Plaintiff Fraternal Order of Police Metropolitan Police Department Labor Committee, DC Police Union (FOP) describes itself as "a labor union [that] is the exclusive representative of all police officers, sergeants, investigators, detectives, and detective sergeants of the D.C. Metropolitan Police Department and is comprised of approximately 3,600 members." Compl. at 3. On August 7, 2020, FOP filed the

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redactions. Ex. A, MPD Declaration, ¶¶ 7-8. Because the family originally requested that the BWC footage not be released, its release is discretionary and not required by the Act.

Complaint, seeking a declaratory judgment "that Subtitle B of the Act is invalid" and an injunction "[e]njoining the Mayor from publicly releasing the names and body-worn camera footage of officers involved in officer-involved death or serious use of force." Compl. at 14 (Prayer for Relief). On August 10, 2020, FOP filed an emergency motion for a temporary restraining order that requests the same relief. Proposed Order at 2.

STANDARD OF REVIEW

A temporary restraining order "is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976) (*cited* with approval in *District of Columbia v. Reid*, 104 A.3d 859, 866 (D.C. 2014); *see also District of Columbia v. Sierra Club*, 670 A.2d 354, 366 (D.C. 1996) (applying *Wieck* in the same way to motion for temporary restraining order as to motion for preliminary injunction). *See also In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980) (the "extraordinary remedy of preliminary injunction requires clear and convincing proof") (citation omitted). Plaintiffs that "seek to alter the status quo rather than to maintain it … must be held to a substantially higher standard than in the usual case." *Fountain v. Kelly*, 630 A.2d 684, 688 (D.C. 1993) (citing cases).

This Court employs a "four-factor test for whether a [temporary restraining order] should issue: (1) whether there is a substantial likelihood that the movants will prevail on the merits; (2) whether they are in danger of suffering irreparable harm during the pendency of the action if the injunction is not granted; (3) whether the balance of the equities is in their favor; and (4) whether the public interest would

be disserved by the issuance of an injunction." *Reid*, 104 A.3d at 865. The latter two factors merge when the District is opposing injunctive relief. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. Plaintiff Is Unlikely to Prevail on the Merits Because It Lacks Standing to Bring the Action and Has Not Adequately Alleged Irreparable Injury.

Plaintiff lacks standing to pursue its central claim and, even if it had standing, the Court should dismiss its claims as moot and for failure to state a cause of action. Thus, plaintiff cannot show a likelihood of prevailing on the merits, let alone the requisite "substantial likelihood." Further, a TRO is fundamentally about establishing the need for immediate relief. For that reason, "the most important inquiry is that concerning irreparable injury," *Zirkle v. District of Columbia*, 830 A.2d 1250, 1256 (D.C. 2003) (quoting *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976)), and "an injunction should not be issued unless the threat of injury is imminent and well-founded." *Id.* Plaintiff has not alleged that its members face an irreparable harm in the absence of injunctive relief. The primary reason is simple: the District already released "the names and body-worn camera recordings of all officers who have committed an officer-involved death [between] October 1, 2014," and July 31, 2018, as required by D.C. Code § 5-116.33(B)(i)(II), *see* Background, and there is no reasonable expectation that another release required by the Act is imminent or would harm anyone.

A. Plaintiff Has Not Alleged Any Injury to Itself to Establish Organizational Standing.

"To satisfy the requirements of constitutional standing, a plaintiff in our local courts must adequately allege that (1) she suffered an injury in fact, (2) the injury is fairly traceable to the defendant's action, and (3) the injury will likely be redressed by a favorable decision." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 42-43 (D.C. 2015) (quotations omitted). "The plaintiff bears the burden to establish standing." *Id.* at 43. "[A] challenge to a plaintiff's standing is properly raised as a challenge to the court's subject matter jurisdiction … ." *Id.* Here, FOP "sues on behalf of its members as well as on its own behalf." Compl. ¶ 1.

"An organization may file suit in its own right 'so long as it satisfies the constitutional requirements and prudential prerequisites of traditional standing analysis.'" *Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 603 (D.C. 2015) (quoting *D.C. Appleseed Ctr. for Law & Justice v. District of Columbia Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1205-06 (D.C. 2012) (footnote omitted)). "However, an organization's mere interest in a problem or its opposition to an unlawful practice is not sufficient to demonstrate injury in fact … ." *Id.* at 604. Rather, the organization must show "that the defendant's unlawful actions have caused a 'concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources.'" *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Plaintiff has made no allegation that the District, or Subtitle B, has injured its mission or drained its organizational resources. Indeed, the closest plaintiff comes to

mentioning its mission is in saying that it "is the exclusive representative of all police officers, sergeants, investigators, detectives, and detective sergeants." Compl. ¶ 1. Plaintiffs adds the bald allegations that "publicly releasing the names and body-worn camera footage of officers involved in officer-involved death or serious use of force" will cause FOP "and its members [to] suffer, immediate, substantial, and irreparable injury, including significant bodily harm and substantial reputational harm if this injunctive relief is not granted." Compl. ¶¶ 26, 35. This is insufficient to establish an injury to FOP, so plaintiff lacks organizational standing to maintain this action on its own behalf.

Separately, plaintiff appears to assert something like taxpayer standing to challenge an alleged violation of the separation of powers. Compl. ¶ 27; Mem. at 13-14. Plaintiff has no such right. Plaintiff mistakenly relies on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 497 (2010), for this proposition, based on the Court's conclusion that the executive cannot waive separation of powers concerns. But the Free Enterprise Fund alleged an actual injury to itself in the form of "the reporting requirements and auditing standards to which they [we]re subject," *id.* at 513, and, again, here plaintiff has alleged no injury to itself.

B. Plaintiff Has Not Established Third-Party Standing.

Generally, "a party must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Welsh v. McNeil*, 162 A.3d 135, 144 (D.C. 2017) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 (2004)). "[B]efore a litigant can bring an action on behalf of a third party: (1)

the litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; (2) the litigant must have a close relationship to the third party; and (3) the litigant must demonstrate some hindrance to the third party's ability to protect his or her own interests." *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1105 (D.C. 2008) (quoting *Powers v. Ohio,* 499 U.S. 400, 411 (1991)) (quotation marks omitted).

In support of its claims, FOP alleges the Act's infringement on the rights of civilians. *See*, *e.g.*, Comp. ¶ 23 ("civilian witnesses [could] become the potential targets of threats or violence"), ¶ 26 (release of footage impedes mayor's ability to "protect the privacy rights of citizens of the District"); Mem. at 14. Plaintiff, however, has met none of the requirements to establish standing to bring any claim on behalf of "civilian witnesses" or "citizens of the District" who are not its members. It has not suffered its own injury in fact. *See* Section I.A. It represents only those MPD personnel who are its members and does not allege a relationship with non-members. And it has alleged no "hindrance" to the ability of anyone "to protect his or her own interests."

C. Plaintiff's Associational Standing Is Insufficient to Obtain the Injunctive Relief Sought.

"A plaintiff must generally 'assert only its own legal rights.' An association, however, can establish standing without asserting injury to itself ... 'solely as the representative of its members.'" *D.C. Library Renaissance Project/West End Library Advisory Grp. v. D.C. Zoning Comm'n*, 73 A.3d 107, 114-15 (D.C. 2013) (quoting *Community Credit Union Servs. v. Federal Express Servs.*, 534 A.2d 331,

333 (D.C. 1987) and *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Here, plaintiff fails to allege sufficient injury to its members to establish standing, and for that reason, fails to allege the irreparable harm essential to secure a temporary restraining order.

1. Plaintiff's Prayer for an Injunction Against the Release of Information About Past Incidents is Moot and Unredressable, So It Is an Insufficient Basis for Standing.

"A plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future." *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 603 (D.C. 2015) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983)). "[I]t is well-settled that, while an [action] is pending, an event that renders relief impossible or unnecessary also renders that [action] moot." *Vaughn v. United States*, 579 A.2d 170, 175 n.7 (D.C. 1990).

To the extent plaintiff seeks to enjoin enforcement of Subparagraph B(1)(ii) of D.C. Code § 5-116.33, calling for the release of information from past instances of "officer-involved death or serious use of force," that claim was moot on August 7, 2020, when plaintiff filed the Complaint, because the information had been released on July 31, 2020. *See* Plaintiff, a union representing members of the Metropolitan Police Department (MPD), seeks a temporary restraining order preventing the District of Columbia (the District) and Mayor Muriel E. Bowser from complying with provisions of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 requiring the production of information, including names and body-worn camera footage, from incidents involving death or serious use of force by an MPD officer. But plaintiff has not met the heavy burden necessary to secure that

extraordinary remedy. Plaintiff is unlikely to prevail on the merits of its claims because it has not shown that it has standing and has failed to state any violation of law. Plaintiff lacks organizational standing and third-party standing to bring an action on behalf of non-member persons, and its allegation that the public release of the information in question might injure one of its members is too speculative and tenuous to constitute an injury. For the same reasons, and because the information sought to be enjoined has already been released and presently there are no additional names or body-worn camera recordings required to be released by the Act, plaintiff has not demonstrated a risk of irreparable harm. Finally, the balance of the equities and public interest do not support plaintiff's request because the District's and public interest in the proper enforcement of valid laws and transparency about the actions of the local police force are compelling public interests whereas plaintiff has shown not even a plausible risk of injury to its members. Because each factor weighs against the granting of a temporary restraining order, the Court should deny plaintiff's motion.

Background. Now that the District has fully complied with the requirements of this section, there is no ongoing threat of future release and no relief the Court can grant. *See Ramirez v. Salvattera*, No. 18-FM-490, 2020 WL 4211304, at *9 (D.C. July 23, 2020) ("If there is no appreciable risk that that conduct will occur, then there is no need to issue an injunction."). "Any prospective [injunctive] relief by this court would not redress what was wrought by" the release of the information, so the claims are moot. *Crawford v. First Wash. Ins. Co.*, 121 A.3d 37, 39-40 (D.C. 2015). Plaintiff

is likewise not entitled to declaratory relief on this question. "[A] 'desire for vindication'—that is, 'a declaration that a person was wronged'—is inadequate to create a live controversy. The same justiciability rules apply to requests for declaratory judgment." *FOP v. District of Columbia*, 113 A.3d 195, 199 (D.C. 2015) (quoting *Settlemire v. D.C. Office of Emple. Appeals*, 898 A.2d 902, 907 (D.C. 2006)).

2. Any Potential Injury from the Future Release of Information Is Too Speculative to Give Plaintiff Standing or Demonstrate Irreparable Harm.

A plaintiff has "not adequately alleged injury in fact [where] the alleged harms were speculative and asserted 'without explication.'" *D.C. Library Renaissance Project/West End Library Advisory Grp. v. D.C. Zoning Comm'n*, 73 A.3d 107, 114 (D.C. 2013) (quoting *York Apartments Tenants Ass'n v. District of Columbia Zoning Comm'n (YATA)*, 856 A.2d 1079 (D.C. 2004)).

To the extent plaintiff seeks to enjoin the future release of information about a yet-to-occur incident, it has not shown the likelihood of a future injury, relying purely on speculation and conclusory allegations. Plaintiff offers no evidence that "[t]he release of the body-camera footage and names of officers will result in unjust reputational harm and will unjustly malign and permanently tarnish the reputation and good name of any officer that may never be charged, but instead is later cleared of misconduct concerning the use of force." Mem. at 8. Indeed, every aspect of the sentence is speculative.

Even if the Court accepts plaintiff's assumption that there will be a future "officer-involved death or serious use of force," there is no evidence that one is imminent. And, in 40% of the incidents for which BWC footage is available, the

decedent's family "exercised their right to not have the BWC recordings released." *See* July 31, 2020 Donahue Letter at 3. The Donahue letters mention 16 incidents in the 2,130 days between October 1, 2014, and July 31, 2020. That works out to one incident every 133 days or fewer than 2.75 per year and, because the Act is emergency legislation, it "shall remain in effect for no longer than 90 days," that is until October 20, 2020. Act Sec. 304 (citing Section 412(a) of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. 93-198, 87 Stat. 801 (Dec. 24, 1973)).[3] It has been more than four years since the first BWC footage was released, *see* note 1 at 3 above, yet plaintiff offers not even a factual allegation to support its contention that the future release of such information would lead to reputational harm—or anyone becoming "a potential target of violence to obstruct the officer's testimony," Mem. at 8—let alone unjust harm. Even if plaintiff had, "it is well established that ... reputational injuries are generally not irreparable." *Zirkle*, 830 A.2d at 1256-57 ("embarrassment and inconvenience are not irreparable harm") (citing *District 50, United Mine Workers v. International Union, United Mine Workers*, 412 F.2d 165, 167 (D.C. Cir. 1969))[4]; *accord District of Columbia v. Grp. Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993) ("loss of income and damaged reputation fall far

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[3] These statistics are imperfect because D.C. Code § 5-116.33(c)(1)(B)(i)(II) and DM Donahue's letters are limited to fatal incidents, whereas future release under § 5-116.33(c)(1)(B)(i)(I) also includes incidents of the serious use of force.

[4] "Decisions of the D.C. Circuit prior to February 1, 1971, are binding on this court per *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)." *Parker v. United States*, 155 A.3d 835, 845 n.17 (D.C. 2017).

short of showing of irreparable injury required to justify temporary injunction") (citing *Sampson v. Murray*, 415 U.S. 61, 91-92 (1974)).

Even if events were to play out in accordance with all of plaintiff's speculations, it is not clear that the alleged injury would be an adequate injury in fact or one traceable to the District. *See* Section 3. There is no evidence that anyone who views an officer's "serious use of force" or BWC footage showing a death will conclude the officer was unjustified. And any negative conclusions that do result from the release of the information, even if there is any formal charge, would not necessarily be "unfair" or "unjust." If someone views the footage and concludes the officer was justified in his use of force, there would be no reputational harm at all. This chain of speculation and conclusory argument is too tenuous to support a motion for temporary restraining order.

3. Plaintiff Has Not Shown Any Potential Injury Traceable to the District or Redressable by the Order Plaintiff Seeks.

The connection between the District's potential, future public release of the relevant information and any conclusion about the officer involved is also too tenuous to be traceable to the District. "The 'causal connection between the injury and the conduct complained of' must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Arpaio v. Obama*, 418 U.S. App. D.C. 163, 171, 797 F.3d 11, 19 (2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

The only injuries plaintiff adequately alleges are based on speculation about reputational harm or potential targeting of its members, because of the public release

of information about an "officer-involved death or the serious use of force." Compl., *e.g.*, ¶¶ 14-15; Mem. at 16-17. But, even if such an injury should occur, plaintiff has not shown that it would be traceable to the District. If plaintiff correctly speculates that some members of the public, or even the majority of the public, would consider the "officer-involved death or the serious use of force" as indicating something repugnant about the involved officer, that would be the determination of the individual members of the public. The District is not responsible for the conclusions of any individual based merely on the release of factual information that an officer engaged in the serious use of force, and it would not be responsible for any actions taken by that individual. *See, e.g.*, *McKethean v. Wash. Metro. Area Transit Auth.*, 588 A.2d 708, 716 (D.C. 1991) ("An intervening negligent or criminal act breaks the chain of causation if it is not reasonably foreseeable."). *Accord Beattie v. United States*, 756 F.2d 91, 138 (D.C. Cir. 1984) ("As a general matter in tort law, the intervening intentional or criminal acts of third parties will break the chain of causation.") (citing Restatement (Second) of Torts § 442 B and *Romero v. National Rifle Ass'n of America*, 749 F.2d 77, 242 U.S. App. D.C. 55 (D.C. Cir. 1984) (Scalia, J.)). Thus, plaintiff has failed to show that even the alleged, potential injury would be adequately traceable to the District.

4. Plaintiff Has Not Shown an Adequate Privacy Interest for Its Members.

Plaintiff's arguments that "Subtitle B of the Act violates the fundamental right to privacy held by D.C Police Union members," Mem. at 14, is based on a misunderstanding of the law and facts. "[I]t is plain that certain forms of public

employment may diminish privacy expectations even with respect to such personal searches." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 671 (1989). Law enforcement is the most prominent of those forms. The issue in *Von Raab* was one of active searches—mandatory drug testing—which must overcome a much higher standard than here, where the material in question is primarily video footage taken in public of the public exercise of the officers' work. Even so, the Court concluded that the public interest in ensuring that public servants met a higher standard of conduct overcame any possible privacy question. *See also City of Ontario v. Quon*, 560 U.S. 746 (2010) (allowing review of public employees' private text messages sent on government pagers). "[W]hether an individual has a constitutionally protected right to privacy depends on both the conduct at issue and the place where that conduct occurs. One does not necessarily have a protectable privacy interest, for example, when committing a typically private act in a public place … ." *Lutz v. United States*, 434 A.2d 442, 445 (D.C. 1981) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("a right to privacy guaranteed by the Fourteenth Amendment include[s] only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.") (quotations omitted)). Plaintiff has not established that any of its members has a reasonable expectation of privacy in the BWC footage of his or her forceful interactions with the public.

Furthermore, even if they had such a privacy interest, it could be overcome by a "compelling state interest." *United States v. Edwards*, 430 A.2d 1321, 1341 (D.C. 1981). Irrespective of plaintiff's position on the policy decision, *see* Section II, the

Council concluded that Subtitle B was an appropriate part of the District's interest in "improving police accountability and transparency." The Act, Title I. The Supreme Court has repeatedly concluded that "the need to investigate whether there had been police misconduct constituted a justifiable government interest" for significant impingement on the rights of non-police officers. *Chavez v. Martinez*, 538 U.S. 760, 764, 775, 764 (2003) (this interest justified questioning man "while he was receiving treatment from medical personnel" immediately after being shot by a police officer and while he said, "I am dying," and "I am choking."); *accord Gilbert v. Homar*, 520 U.S. 924, 932 (1997) (discussing the significant government "interest in preserving public confidence in its police force"); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) ("Government has compelling interests in maintaining an honest police force and civil service"). The Court should decline plaintiff's request to determine whether the Council's decision is good policy. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) ("'The wisdom' of those decisions 'is none of our concern.'") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947)).

D. Plaintiff Fails To Allege a Violation of Separation of Powers.

The only significant legal arguments in plaintiff's motion focus on an alleged violation of the separation of powers, but these arguments are ill-founded and inadequately supported.

The correct reading of the issue is that the Act is the Council's decision on how to dispose of public property, in this case information including BWC footage. This is something the Council does regularly and pursuant to its authority under the Home Rule Act. *See, e.g.*, D.C. Code § 1-204.51 (Council is final arbiter of long-term

disposition of public lands). Furthermore, "[t]he District has a general policy favoring public access to and disclosure of its public records ... ." *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005) (discussing the District's Freedom of Information Act, *see* D.C. Code § 2-531). *See also FOP v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015) ("the core purpose of the [D.C.] FOIA, which is contributing significantly to public understanding of the operations or activities of the government.") (quotations omitted).

Plaintiff's conclusory allegation that the Council's disposition protocol here improperly interferes with mayoral authority is unsupported and insupportable. Every aspect of the Council's regulation of general employment practices, from unemployment insurance to the minimum wage, places a constraint on how the executive branch can operate. But such broad scale regulation has never been held to violate separation of powers. Even in those of the cases on which plaintiff relies, the inadequacies of which are discussed below, in which a court found improper legislative interference with executive authority, dealt with specific decisions about the employment of specific sets of individuals. The Act, in contrast, is not a "law[ ] conscripting state officers," *Printz v. United States*, 521 U.S. 898, 925 (1997), so it does not impinge on the separation of powers.

Plaintiff mistakenly relies on *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, 441 A,2d, 871, 881 (1980). First, this decision was supplanted by the *en banc* re-hearing in *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889 (D.C. 1981), which

does not mention a separation of powers issue. Regardless, the case dealt with the question of whether the Council, through an initiative, was improperly interfering with the mayoral exercise of *congressional* authority. There is no question here of Congress directing mayoral action, so the case is irrelevant. The same is true of *Hessey v. Burden*, 584 A2d 1 (D.C. 1990), which concluded the initiative in question attempted to appropriate funds, a power explicitly left to Congress and, thus, not one the Council ever had to delegate if it could.

The non-binding *In re Opinion of the Justices*, 162 N.H. 160 (2011), is even less relevant. The New Hampshire Supreme Court's purely advisory opinion, given in response to a set of questions from the state senate, turned on the inherently executive nature of prosecutorial discretion. *See Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."). This simply has no bearing on the case at hand, which is about how the District should dispose of some of its own property, in this case information and video footage of police actions. Finally, *Commc'ns Workers of Am. v. Florio*, 617 A.2d 223 (N.J. 1992) turned on the facts that the legislature attempted to attach "general legislation" to an appropriations bill and that "[s]taffing decisions are at the core of the Governor's day-to-day administration of government." *Id.* at 230, 234. Here, there is no dispute that the Council was engaged in general legislation, so the case is inapplicable.

II. The Balance of the Equities and Public Interest Weigh Against a Temporary Restraining Order.

The balance of the equities and public interest also counsel against granting plaintiff's motion because the harm to the District greatly outweighs any alleged potential harm to plaintiff's members. A plaintiff may commence a legal challenge when raising a "concrete legal issue rather than simply a disagreement over policy." *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 800 (D.C. 1975). The courts have developed the concept of ripeness, however, as "a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies ... an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Local 36 Int'l Ass'n of Firefighters v. Rubin*, 999 A.2d 891, 895-96 (D.C. 2010) (quoting *National Park Hospitality Ass'n v. Department of the Interior,* 538 U.S. 803, 807-08 (2003) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967))).

The most fundamental issue here is that plaintiff's Complaint challenges Subtitle B on policy grounds, not legal ones. This is best evidenced by the extent of plaintiff's reliance on the letter of Acting United States Attorney for the District of Columbia Michael R. Sherwin. Acting USA Sherwin shared with the Council his concerns about the Act when it was under consideration. The Council presumably considered these policy questions before deciding to pass the Act. Indeed, it made some modifications to the legislative language about which Mr. Sherwin expressed concerns. *See* Keith L. Alexander, *D.C. police union seeks court injunction to stop*

release of body-worn camera footage, officers' identity following fatal interactions, WASHINGTON POST (Aug. 8, 2020) ("At the time of Sherwin's letter, the city was considering mandating release within three days of an incident, a time frame the council later extended to five days. His office could not immediately say Monday whether that allayed any of his concerns."), available at https://www.washingtonpost.com/local/public-safety/dc-police-union-seeks-court-injunction-to-stop-release-of-body-worn-camera-footage-officers-identity-following-fatal-interactions/2020/08/10/deb8785a-db28-11ea-8051-d5f887d73381_story.html (last accessed Aug. 12, 2020). If plaintiff would ever have standing to bring such a challenge, it would be when it has evidence that the Act has actually caused some harm to one of its members, not now when it is merely expressing its disagreement with the Council's decision on how best to dispose of BWC footage.[5]

Plaintiff's reliance on *United States v. Kingsbury*, 325 F. Supp. 3d 158 (D.D.C. 2018), Mem. at 15, is yet more misguided. That case turned on "the generalized privacy concerns raised by the government" not, as here, by a private party. *Id.* at 160. More importantly, the *Kingsbury* Court discussed a previous holding "that the D.C. Code and the regulations promulgated thereunder by the Metropolitan Police Department ("MPD") embodied a 'policy judgment'" about how to handle releasing

[5] Additionally, the third form of relief plaintiff seeks, in both the TRO and the Complaint, enjoining *all* public release of BWC footage and "the names of officers involved in officer-involved death or serious use of force," extends far beyond the allegations in the Complaint and the declaratory relief plaintiff seeks "that Subtitle B of the Act is invalid." Compl. at 14; Proposed Order at 2. Plaintiff has not only failed to support a request for such relief, but its arguments and Acting USA Sherwin's letter both cut against such an injunction.

BWC footage, indicating both that the Council-enacted legislation can control the proper disposition of BWC footage and that MPD has adequate regulations in place to handle the public release of such information. Plaintiff is correct that "the Act does not contain any mechanism for police officers, the D.C. Police Union or its members, or general members of the public to challenge the release of the body-worn camera footage or the names of officers." Mem. at 17. But this is to be expected when the Council is deciding how to dispose of District property. *See* Section I.D.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Emergency Motion for a Temporary Restraining Order.

Dated: August 12, 2020.

Respectfully submitted,

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