

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

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**WP COMPANY LLC,**

**Plaintiff,**

**v.**

**DISTRICT OF COLUMBIA,**

**Defendant.**

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**Case No. 2021 CA 002114 B  
Judge José M. López**

**Next Event: Scheduling Conference,  
December 17, 2021,  
11:00 a.m.**

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANT’S OPPOSED MOTION TO DISMISS**

**INTRODUCTION**

Plaintiff WP Company LLC (the Post) submitted several requests under the D.C. Freedom of Information Act, D.C. Code § 2-531, *et seq.* (FOIA), pertaining to the riot at the United States Capitol on January 6, 2021. One of those requests sought WhatsApp and email messages sent by Mayor Muriel Bowser in the days surrounding the riot. The Executive Office of the Mayor (EOM) conducted a search for responsive records and determined that while there were no responsive WhatsApp messages, several dozen responsive emails existed, which EOM subsequently produced to the Post. EOM’s search was adequate and the few redactions it applied concern information that is exempt from disclosure under District law. The Post’s Count I, which seeks an order compelling the disclosure of those documents, is therefore moot and should be dismissed.

**BACKGROUND**

On January 6, 2021, a crowd of thousands of rioters seeking to disrupt the certification of electoral votes for the 2020 Presidential election besieged and breached the Capitol of the United States. *See* Compl. ¶ 13. The District’s Metropolitan Police Department (MPD), among other

agencies, responded to this attack by deploying to the Capitol in support of Capitol Police, and, after an extensive struggle, successfully forced the rioters out of the building, enabling Congress to reconvene. *See id.* ¶ 29. *See generally* Philip Rucker et al., *During: Bloodshed*, Wash. Post, Oct. 31, 2021, <https://www.washingtonpost.com/politics/interactive/2021/what-happened-trump-jan-6-insurrection> (providing narrative timeline of events that took place during the riot). During the siege and its aftermath, hundreds of rioters were arrested on a litany of charges related to the attack on the Capitol, and criminal investigations and prosecutions of Capitol rioters continue to this day. Compl. ¶ 13; *See generally Ten Months Since the Jan. 6 Attack on the Capitol*, U.S. Attorney’s Office, D.C., <https://www.justice.gov/usao-dc/ten-months-jan-6-attack-capitol> (last updated Nov. 9, 2021) (detailing investigation and prosecution efforts, including ongoing FBI efforts to identify over 350 individuals suspected of committing violence at the Capitol and arrests of approximately 675 individuals).

On January 7, 2021, Post FOIA Director Nate Jones submitted a FOIA request to EOM, seeking “[a]ll messages sent by Mayor Muriel Bowser on her WhatsApp account and email account between January 5 and January 8, 2021 ... ” (Request 1). Compl. ¶ 37; *see also* Compl. Ex. A. The Post subsequently filed suit on June 23, 2021, alleging that the District’s “failure to disclose the requested public records violates FOIA,” and seeking “an order compelling the Mayor to disclose the records that are the subject of Request 1.” Compl. ¶¶ 63–64.

On August 27, 2021, EOM produced to the Post all responsive records it had located in response to this request. *See* Ex. A ¶ 11 (Sacco Declaration). EOM noted that after a diligent search, no responsive WhatsApp messages were discovered. *Id.* ¶¶ 8–9. EOM, however, discovered 100 pages of responsive emails and attachments. *Id.* ¶ 11. EOM redacted four emails to protect the personal privacy of private citizens’ email addresses. *Id.* ¶¶ 12–13. An additional 34

emails were redacted to remove the web address links and call-in numbers of internal EOM WebEx conference rooms. *Id.* ¶ 14. EOM also redacted the text of one email that contained proposed language for a draft public statement. *Id.* ¶ 15.

## LEGAL STANDARD

Although D.C. courts were created under Article I rather than Article III, they generally “adhere to federal mootness principles.” *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia (FOP Intoxilyzer FOIA)*, 82 A.3d 803, 816 n.11 (D.C. 2014) (citing *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 447 n.11 (D.C. 2013)); *see also Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004) (“Although not bound strictly by the ‘case or controversy’ requirements of Article III of the U.S. Constitution, [District] court[s] [do] not normally decide moot cases.”). “Generally, a case is moot ‘when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.’” *FOP Intoxilyzer FOIA*, 82 A.3d at 813 (quoting *Settemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 904–05 (D.C. 2006)). “Mootness is a justiciability issue which implicates the power of the court to entertain the lawsuit.” *Id.* at 816; *see also Rotunda v. Marriott Int’l, Inc.*, 123 A.3d 980, 983 (D.C. 2015) (“Mootness is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)).

## ARGUMENT

### **I. Count I Is Moot Because EOM Produced All Responsive Records.**

In the FOIA context, a request for an order compelling an agency to produce records is moot when the agency produces the requested records. *See FOP Intoxilyzer FOIA*, 82 A.3d at 816; *see also Williams & Connolly v. SEC*, 662 F.3d 1240, 1243 (D.C. Cir. 2011) (“Once the documents

are released to the requesting party, there no longer is any case or controversy.’”).<sup>1</sup> Here, the District has fully satisfied the Post’s Request 1: no WhatsApp messages sent by Mayor Bowser between January 5, 2021 and January 8, 2021, were located, while every email message sent by Mayor Bowser between those dates has been produced to the Post. *See* Sacco Decl. ¶¶ 9, 11. The Court should find that Count I, which is wholly based on Request 1, is moot and dismiss it.

**II. The District’s Redactions Were Justified Because the Redacted Material Is Exempt From Disclosure.**

In producing responsive documents to the Post, EOM redacted three categories of information. First, private citizens’ email addresses were redacted to protect their privacy. Additionally, internal EOM WebEx conference room address links and the draft text of a proposed public statement were redacted under the deliberative process privilege. These redactions were proper because that information is exempt from disclosure under D.C. Code § 2-534(a).

**A. EOM Properly Redacted Private Citizens’ Email Addresses to Protect Their Privacy.**

First, EOM redacted email addresses of private citizens who had emailed District government officials. D.C. Code § 2-534(a)(2) exempts from disclosure “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In determining whether information qualifies for protection, the Court must “balance the public interest in disclosure against the privacy interest” the exemption is intended to protect. *FOP Lanier FOIA*, 75 A.3d at 265 (quoting *Padou v. District of Columbia*, 29 A.3d 973, 982 (D.C. 2011)). The privacy interest at stake “need only be ‘more than *de minimis*’ to

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<sup>1</sup> “The D.C. FOIA is modeled on the federal Freedom of Information Act, and therefore [D.C. courts] look to decisions interpreting like provisions in the federal act when ... interpret[ing] the meaning of the D.C. FOIA.” *District of Columbia v. Fraternal Order of Police, Metro. Police Dep’t Labor Comm. (FOP Lanier FOIA)*, 75 A.3d 259, 265 (D.C. 2013) (citations and internal quotation omitted).

trigger application of the balancing test.” *Id.* at 265 (quoting *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008)). “The bar is low.” *Id.* at 266 (quoting *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 191 (2d Cir. 2012)).

Determining whether a privacy interest qualifies as more than *de minimis* requires a context-specific inquiry. *Long*, 692 F.3d at 191. A person’s privacy interest “encompasses the individual’s control of information concerning his or her person, including names, addresses, and other identifying information.” *FOP Lanier FOIA*, 75 A.3d at 265 (citation and internal quotation omitted). The information need not be embarrassing or intimate to warrant protection. *Id.* at 266 (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 598 (1982)). On the other hand, “[t]he public interest in the balancing analysis is only ‘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.’” *FOP Lanier FOIA*, 75 A.3d at 266 (quoting *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)).

Here, EOM redacted four emails to shield the email addresses of citizens who had sent correspondence to Mayor Bowser. Sacco Decl. ¶ 12. Citizens “obviously have a powerful privacy interest” in their personal email addresses. *Competitive Enter. Inst. V. U.S. EPA*, 12 F. Supp. 100, 122 (D.D.C. 2014) (denying request to disclose personal email addresses of agency personnel in FOIA suit alleging those persons used personal email accounts for official business); *see also Cause of Action Inst. v. Export-Import Bank of U.S.*, 521 F. Supp. 3d 64, 93–94 (D.D.C. 2021) (noting privacy interest in email address in avoiding being subject to unsolicited emails and harassment, particularly given requestor’s indication that it intended to publicize the records obtained through the request); *Trotter v. Ctr. for Medicare & Medicaid Servs.*, 517 F. Supp. 3d 1,

7 (D.D.C. 2021) (noting privacy interest in email address because knowledge of a specific individual’s email address can render the individual vulnerable to cyberattacks).

The public interest in disclosure of the email addresses does not outweigh this privacy interest. Here, EOM has left unredacted the content of messages that contain redacted email addresses, including the identity of the individuals sending such correspondence. Therefore, to the extent there is a public interest in knowing what communications are being shared with government officials, that interest is satisfied by EOM’s disclosure of the content of the messages. “In the context of addressing whether disclosure of redacted ... identifying information is warranted where the documents themselves adequately serve the public interest, the Supreme Court has explained that the requestor must show how the addition of the redacted identifying information would shed any *additional* light on the Government’s conduct.” *FOP Lanier FOIA*, 75 A.3d at 268 n.8 (citing *Ray*, 502 U.S. at 178) (internal quotation omitted). Identifying these email addresses would not shed any additional light on the government’s own conduct, because the content of the messages, including the identity of the sender, was left unredacted. *See id.* at 268; *see also Cause of Action Inst.*, 521 F. Supp. 3d at 95 (rejecting request to compel disclosure of email addresses when the names of individuals involved were released). Because the public interest at stake in the email addresses is minimal—if one exists at all—a non-*de minimis* privacy interest is sufficient to justify their redaction. *See U.S. Dep’t of Def.*, 510 U.S. at 500.

**B. EOM Properly Redacted Internal Web Conference Access Information and Draft Statements Because That Information Is Protected By the Deliberative Process Privilege.**

EOM redacted two categories of information under the deliberate process privilege, which is incorporated in FOIA under D.C. Code §§ 2-534(a)(4), (e). The deliberate process privilege protects “documents reflecting advisory opinions, recommendations and deliberations comprising

part of a process by which governmental decisions and policies are formulated.” *Fraternal Order of Police v. District of Columbia (FOP Peaceholics FOIA)*, 79 A.3d 347, 354–55 (D.C. 2013) (quoting *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992)). For information to qualify under this doctrine, it must be “predecisional and deliberative;” “[a] document is ‘predecisional’ if it was prepared in order to assist an agency decision maker in arriving at [her] decision rather than to support a decision already made, and material is ‘deliberative’ if it reflects the give-and-take of the consultative process.” *Id.* at 355. More generally, “[i]n ascertaining whether the documents are deliberative, the ‘key question is whether disclosure of the information would discourage candid discussion within the agency.’” *Id.* (quoting *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991)); *see also Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 7 (D.D.C. 2014) (“The deliberative process privilege protects agencies from being ‘forced to operate in a fishbowl’ ... [a]nd it applies when ‘production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects.’”) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

Here, EOM redacted 34 emails to protect internal EOM WebEx meeting room addresses and dial-in numbers. Sacco Decl. ¶ 14. These addresses and numbers are used to access EOM meetings “that are deliberative and closed to the public.” *Id.* For that reason, disclosure of the access information would plainly inhibit candid internal governmental decision making, because it would destroy the private nature of these online conferences, “as various offices often re-use virtual meeting site web addresses and codes.” *See id.*; *FOP Peaceholics FOIA*, 79 A.3d at 355. Finally, the access information does not itself describe or reflect any final agency decision that may have been decided upon during any given meeting. *See Elec. Frontier Found.*, 739 F.3d at 7 (“The privilege ‘calls for disclosure of all opinions and interpretations which embody the agency’s

effective law and policy ... .”) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). For these reasons, EOM WebEx connection information was properly withheld.

EOM also redacted the text of an email that contained draft language for a proposed public statement. Sacco Decl. ¶ 15. “[T]he overwhelming consensus among judges in this District is that the privilege protects agency deliberations about public statements ... .” *Am. Ctr. for Law & Justice v. U.S Dep’t of Justice*, 325 F. Supp. 3d 162, 171–72 (D.D.C. 2018). This protection is warranted because “internal deliberations about public relations efforts are not simply routine operational decisions: they are deliberations about policy ... .” *Comm. on Oversight & Gov’t Reform, U.S. House of Reps. v. Lynch*, 156 F. Supp. 3d 101, 111 (D.D.C. 2016). In addition, “if agency deliberations about public statements were FOIA-able, then agencies would be hamstrung in their dealings with the press, defeating the very transparency FOIA aims to foster.” *Am. Ctr.*, 325 F. Supp. 3d at 172. The information redacted here is predecisional and deliberative because “the offices involved had not yet decided” whether to use the proposed language in a potential statement, and “the email[] evinced the process through which the employees consulted about whether the [draft statement] should be approved.” *FOP Peaceoholics FOIA*, 79 A.3d at 356. This draft text is therefore exempt from disclosure under FOIA.

## CONCLUSION

For the foregoing reasons, the Court should grant the District’s motion and dismiss Count I of plaintiff’s Complaint.

Dated: November 29, 2021.

Respectfully submitted,

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Attorney General for the District of Columbia

CHAD COPELAND  
Deputy Attorney General  
Civil Litigation Division



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*Counsel for Defendants*

# Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
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## DECLARATION OF CRISTINA SACCO

I, Cristina Sacco, declare as follows:

1. I am an adult over the age of 18 years.
2. I am an Associate General Counsel for the Executive Office of the Mayor (EOM), Office of General Counsel (OGC) and I report to Betsy Cavendish, the General Counsel for EOM.
3. I have held this position since October 19, 2020. In this capacity, I process FOIA requests for OGC, which involves evaluating requests, submitting searches, applying exemptions to withhold or redact documents, and delivering final productions to requesters.
4. I would testify to the information in this declaration if called to do so. I make this declaration upon personal knowledge, information, and belief, including information provided to me by other District of Columbia employees in the course of my official duties and records maintained by EOM.
5. This declaration is offered to summarize the efforts EOM has made to ensure that the District's response to plaintiff's FOIA requests to EOM satisfy the District's FOIA obligations.

6. On January 7, 2021, Nate Jones, FOIA Director for the Washington Post, submitted a FOIA request to EOM seeking, "[a]ll messages sent by Mayor Muriel Bowser on her WhatsApp account and email account between January 5 and January 8, 2021."

7. The request was entered into the DC Government FOIAXpress Portal and assigned tracking number 2021-FOIA-02036.

8. In response to the first category of the FOIA request, the General Counsel requested the Mayor to conduct a search of all messages sent by the Mayor on her WhatsApp account between January 5 and January 8, 2021.

9. In response to this request, the Mayor notified the General Counsel that a search of her WhatsApp account yielded no responsive records, and that information was relayed to me by the General Counsel.

10. In response to the second category of the FOIA request, I submitted an email search request with the Office of the Chief Technology Officer (OCTO) for all emails sent by Mayor Muriel Bowser between January 5 and January 8, 2021.

11. This search yielded 100 pages of responsive emails and attachments which were delivered to the Plaintiff on August 27, 2021, with certain redactions under D.C. Official Code § 2-534(a)(2) for privacy and § 2-534(e) for deliberative process privilege. *See* Ex. A [copy of response].

12. Four (4) total records contained redactions for privacy under D.C. Official Code § 2-534(a)(2). Redactions under this exemption were applied to email addresses of private citizens within letter attachments that were sent to Mayor Bowser.

13. Private citizen email addresses were redacted because individuals have a privacy interest in their personally identifying information, including their email addresses. There is not a

counterbalancing public interest in knowledge of the email addresses because email addresses of private citizens who contact the government do not reveal anything about the government's own conduct.

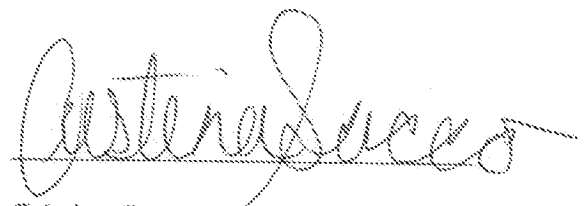
14. Thirty-four (34) emails contained internal EOM WebEx meeting room address links and dial-in numbers which were redacted for deliberative process privilege under D.C. Official Code § 2-534(e). This information was redacted to protect hyperlinks and dial-in numbers to meetings that are deliberative and closed to the public, as various offices often re-use virtual meeting site web addresses and codes.

15. One (1) email was redacted for deliberative process privilege under D.C. Official Code § 2-534(e). This email was redacted because the email discusses draft language for a proposed public statement. This information is predecisional and deliberative because it was generated by the Mayor as part of the drafting and consultative course of formulating potential governmental action.

I declare under penalty of perjury pursuant to D.C. Superior Court Rule of Civil Procedure 9-1(e)(1)(A) that the foregoing is true and correct.

11/24/21

Date



Cristina Sacco  
Associate General Counsel  
Executive Office of the Mayor  
Office of the General Counsel

From Email : Sacco, Cristina<crisrina.sacco@dc.gov>
To Email : nate.jones@washpost.com
Cc Email :
Bcc Email :
Subject : Re: 2021-FOIA-02036
Date Sent : 8/27/2021 4:16:22 PM
Email Body : VIA ELECTRONIC MAIL August 27, 2021 Nate Jones The Washington Post Nate Jones The Washington Post 1301 K St NW WASHINGTON, DC 20071 Re: 2021-FOIA-02036 Dear Mr. Jones, This is the final response to your Freedom of Information Act ("FOIA") request to the Executive Office of the Mayor ("EOM") received January 7, 2021. Documents responsive to your request have been sent via the FOIA Portal. I have determined that documents and portions of documents should be withheld pursuant to: 2-534(a)(2), "Personal Privacy" - Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; and 2-534(e), Deliberative process privilege, attorney work-product privilege, and/or attorney-client privilege A portion of our FOIA request asked for, "All messages sent by Mayor Muriel Bowser on her WhatsApp account between January 5 and January 8, 2021," there are no messages sent by the Mayor on her WhatsApp account between January 5 and January 8, 2021. Please know that, under D.C. Official Code § 2-537 and 1 DCMR 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to: The Mayor's Office of Legal Counsel, FOIA Appeal, 1350 Pennsylvania Avenue, NW, Suite 407, Washington, DC 20004. Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to the Freedom of Information Officer of the involved agency or to the agency head of that agency if there is no designated Freedom of Information Officer there. Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor. Sincerely, Cristina Sacco FOIA Officer, Executive Office of the Mayor

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**ORDER**

Upon consideration of Defendant's Opposed Motion to Dismiss (Motion), plaintiff's opposition, and the entire record, it is:

**ORDERED** that the Motion is **GRANTED**; and it is further

**ORDERED** that Count I of plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

**SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE JOSÉ M. LÓPEZ  
Judge, Superior Court of the District of Columbia

Copies by CaseFileXpress to:

All counsel of record