IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

INVISIBLE INSTITUTE, et al., **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA,** **Defendant.**	**2023 CAB 006295** **Judge Yvonne Williams**

SUMMARY JUDGMENT ORDER

Before the Court is Defendant District of Columbia's (the "District") Motion for Summary Judgment ("Motion"), filed March 1, 2024. Plaintiffs Invisible Institute and Washington City Paper (collectively, "Plaintiffs") filed an Opposition to the District's Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment ("Cross-Motion") on March 29, 2024. The District filed a Reply in Support of its Motion and Opposition to Plaintiffs' Cross-Motion ("District's Reply") on April 12, 2024, and Plaintiffs filed a Reply to the District's Opposition to Plaintiffs' Cross-Motion ("Plaintiffs' Reply") on April 26, 2024. For the reasons set forth below, the District's Motion shall be **GRANTED IN PART AND DENIED IN PART**, and Plaintiffs' Cross-Motion shall be **GRANTED**.

I. BACKGROUND

This case concerns two Freedom of Information Act ("FOIA") requests Plaintiffs made to the Metropolitan Police Department ("MPD"). Plaintiff Invisible Institute is a nonprofit journalism production company based in Chicago, IL, that conducts investigative reporting on government accountability and transparency and collects data on police activity. Am. Compl. ¶ 8. Plaintiff Washington City Paper is an online newspaper published in Washington, DC, that reports

investigative and breaking news stories of interest to the District of Columbia community. *Id.* at ¶ 9. The facts at issue in this matter are largely undisputed.

On March 28, 2023, Plaintiff Invisible Institute submitted a FOIA request seeking "[d]ata or spreadsheets showing all MPD officers who are lateral hires from other law enforcement agencies[,]" including each officer's (1) name, (2) employee ID, (3) badge/star number, (4) date of hire at MPD, and (5) all previous employing agencies ("Invisible Institute's First FOIA Request"). Def.'s Statement of Undisputed Material Facts ("DSUMF") ¶ 1; *see* Am. Compl., Ex. 1. Invisible Institute submitted this request "to determine whether any MPD officer had a history of misconduct or misbehavior in their past places of employment[,]" to inform the public "about the government's hiring decisions and to determine whether MPD is adequately assessing officers' qualifications when evaluating lateral applicants[,]" which Plaintiffs assert are "decisions of particular importance as calls for police reform and increased transparency permeate the public policy debate." Am. Compl. ¶ 21. Moreover, Plaintiffs claim that "[t]he presence of lateral hires with or without prior disciplinary or misconduct issues further sheds light on the soundness of MPD's hiring practices." *Id.*

MPD denied Invisible Institute's First FOIA Request in its entirety on May 17, 1014. DSUMF ¶ 2. In the written denial letter, MPD asserted that (1) releasing the information Invisible Institute requested would "constitute as a clearly unwarranted invasion of personal privacy and is exempt from disclosure pursuant to D.C. Official Code § 2-534(a)(2)" and (2) "MPD does not capture the previous employing agencies of lateral hires in its electronic databases." *Id.*; *see* Am. Compl. Ex. 2 at 2.

Plaintiff Washington City Paper submitted a FOIA request ("Washington City Paper's First FOIA Request") on August 15, 2023, that was nearly identical to Invisible Institute's First FOIA

Request.[1] DSUMF ¶ 3; *see* Am. Compl., Ex. 2 at 1-2. On August 18, 2023, MPD denied Washington City Paper's First FOIA Request for the same two reasons it denied Invisible Institute's First FOIA Request. DSUMF ¶ 4; *see* Am. Compl., Ex. 2 at 2. In the August 18, 2023 email denying Washington City Paper's First FOIA Request, MPD also provided that "under D.C. Official Code § 2-537 and 1 DCMR § 412, [Washington City Paper] h[ad] the right to appeal t[he] [denial] to the Mayor or to the Superior Court of the District of Columbia" and provided specific instructions Washington City Paper was required to follow "if" it elected to appeal to the Mayor of the District of Columbia (the "Mayor"). Am. Compl. Ex. 2 at 2.

Plaintiffs filed the original Complaint in this matter on October 11, 2023. Six days after this case was initiated, on October 17, 2023, both Plaintiffs filed second FOIA requests ("Second FOIA Requests") for the (1) names, (2) employee IDs, (3) badge/star numbers, (4) date of hire at MPD, and (5) all previous employing agencies of "all MPD officers who ha[d] been hired as lateral hires from other law enforcement agencies and/or who were previously employed with another law enforcement agency since Jan. 1, 2018." DSUMF ¶ 6; *see* Am. Compl., Exs. 3, 4.

On October 18 and 19, 2023, MPD denied the Second FOIA Requests declaring that MPD does not capture "all previous employing agencies" of its lateral employees "in a readily searchable electronic database" and it "would require an inordinate amount of manual research to locate and collect the requested information among thousands of files and records, and would either require the creation of new records to compile and assemble such information, or the review and redaction of a large volume of otherwise nonresponsive material." DSUMF ¶ 7; Am. Compl., Ex. 3 at 3, Ex. 4 at 1. MPD also reasoned that, the Second FOIA Requests "ask[ed] for an unreasonable volume of research, and associated processing that is not required under the FOIA[,]" thus, it was

[1] The only difference between Invisible Institute's First FOIA Request and Washington City Paper's First FOIA Request is that Washington City Paper omitted reference to "star number."

"not able to further process" the requests or "perform a reasonable and adequate search for specific records" because the requests were "perfected." *Id.* Just as it asserted in its denials of the Plaintiffs' first FOIA requests, MPD claimed that the requested records were "subject to withholding pursuant to D.C. Official Code § 2-534 (a)(2), which covers information of a personal nature, the release of which would constitute a clearly unwarranted invasion of personal privacy" including the "names/personal identifiers and other personal privacy information…which may lead to the identity of individuals, in combination with 'previous employing agencies.'" DSUMF ¶ 7; Am. Compl., Ex. 3 at 3, Ex. 4 at 2. Again, MPD informed Plaintiffs that they had the right to appeal the denials to the Mayor or the Superior Court of the District of Columbia. *Id.*

The District entered its appearance in this matter on November 1, 2023. On November 6, 2023, Plaintiffs filed the Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), the operative pleading. Through the Amended Complaint, Plaintiffs allege that MPD violated FOIA by unlawfully invoking the privacy exemption under D.C. Code § 2-534(a)(2) and by failing to make reasonable efforts to search for the requested records in an electronic format pursuant to D.C. Code § 2-532(a)(2). Am. Compl. ¶¶ 22-42. For these purported violations, Plaintiffs seek a Court order (1) declaring that MPD's denial of the FOIA requests was a violation of D.C. Code § 2-534(a)(2) and D.C. Code § 2-532(a)(2); (2) requiring MPD to immediately search for, process, and release records responsive to Plaintiffs' FOIA requests; (3) requiring MPD to grant Plaintiffs' petitions for a fee waiver for their FOIA requests; and (4) awarding Plaintiffs' attorney's fees and costs under D.C. Code § 2-537(c). *Id.* at 9-10. The District filed an Answer to the Amended Complaint on behalf of MPD on December 18, 2023.

On November 1, 2023, before Plaintiffs filed the Amended Complaint, MPD renewed its search for documents responsive to the Second FOIA Requests. DSUMF ¶ 11. During this

renewed search, MPD made inquiries to its Risk Management Division, Human Resources Management Division, Applications Investigation Division, Office of General Counsel, Analytical Services Unit, Joint Strategic & Tactical Analysis Command Center, and Chief of Staff. *Id.* at ¶ 12. On December 18, 2023, the same date the District filed its Answer, MPD produced to Plaintiffs: (1) a list of lateral officers that was generated around April 2023; (2) a list of eleven lateral officers that was generated in November 2023; (3) a list of lateral/experienced officers that was created in 2008; (4) a list of lateral officers that was created in 2019; and (5) a list of lateral officers created by its former Director of the Application Investigation Division. *Id.* at ¶ 13. In each of the produced lists, MPD redacted the names, Social Security Numbers, computer-assisted dispatch numbers, badge numbers, rank, and other identifying information of the officers, purportedly to protect the officers' privacy interests under D.C. Code § 2-534(a)(2). *Id.*

On January 11, 2024, Stacey Small – the Program Manager of MPD's Application Investigation Division – clarified that paper job applications and investigation materials, including resumes, were scanned and uploaded into applicants' profiles in eSOPH – MPD's electronic employment application database. DSUMF ¶ 144. Ms. Small also represented that the job application and investigation materials uploaded to eSOPH and documents completed within eSOPH (i.e., Electronic Signature Authorization, Police Officer Ability Test Waiver, MPDC Applicant Polygraph Release From, and questionnaires about the applicants' relative's, neighbors, references, education, military service, residents, employment, finances, etc.) could only be retrieved by searching by officer, downloading the documents from that officer's profile, and searching for reference to the requested information. *Id.* According to Ms. Small, the only information Plaintiffs requested that was available in eSOPH were the applicants' names and

previous employing law enforcement agencies, as they are not assigned an employee ID, badge number, or start date until they are officially hired and processed in a different database. *Id.*

Eventually, Ms. Small used eSOPH to generate a list of all MPD's lateral hires since January 1, 2018 and downloaded the profile materials for each of the thirteen laterally hired officers. DSUMF ¶ 15. The District then examined the thirteen profiles, each of which had between 425 and 1,455 pages of documents, to assess whether any documents were responsive to Plaintiffs' FOIA requests and, if so, whether any reasonable portion of those documents could be produced. *Id.* at ¶ 16. After its review, the District determined that the following documents contained responsive material that could not be reasonably segregated: (1) for all thirteen applicants – the Background Investigation Documents, Activity Logs, Agency Tasks for Lateral Law Enforcement Officer Positions, Agency User Notes, List of Questionnaires with Flagged Answers, Employment Questionnaires, Financial Questionnaires, Essay Questions and Virtual Interviews, Polygraph answers concerning general background information, employment, and current or prior law enforcement experience (excluding Applicant 4), Supervisor Questionnaires, Personal Reference Questionnaires, Employer Questionnaires, Coworker Questionnaires, Requests for Information from Background Investigators, Confidential Reports of Background Investigations, and Reference Requests; (2) for Applicants 6-10 – the Polygraph Examination Reports; (3) for Applicant 2 – the Memorandum re: Marginal Suitability Review Conference; and (4) for Applicant 4 – the Standard 3 – Employment History, May 2, 2023 Request for Records, and the May 4, 2024 Memorandum for the D.C. Metropolitan Police Department. DSUMF ¶ 18.

On February 29 and March 1, 2024, MPD produced to Plaintiffs the list of the thirteen lateral hires since January 1, 2018, and the following documents: (1) the Lateral Eligibility Self-Certification and Initial Determination Forms, MPD Prospect Day Board Sheets, National Testing

Network Exam Results Notifications, Conditional Offers of Employment, Investigator Welcome Letters, and Applicant Task List for all thirteen applicants, except the MPD Prospect Day Board Sheet for Applicant 11; (2) the September 5, 2023, Request for Records for Applicant 3; (3) the updated Appointment Latter for Applicant 5; and (4) the March 13, 2023, Letter Discontinuing Application Process for Applicant 6. DSUMF at ¶17. However, MPD redacted

> the names, ages, gender, races, states of residence, email addresses, and telephone numbers of applicants; the law enforcement agencies with which they were previously employed, hire dates at the prior law enforcement agencies, law enforcement agencies that issued their current basic law enforcement qualifications certifications, and law enforcement agencies where they completed their Police Academy training; whether they have been subject to any adverse actions and the nature and dates of any such adverse actions; and the names, telephone numbers, fax numbers, and email addresses of the MPD background investigators, as well as any other personally identifying information,

to protect the applications "substantial privacy interests" and because "[t]here is no cognizable countervailing public interest." PSUMF ¶ 9; Districts' Mot., Ex. 3 at 3.

In part, the District asserts that it was entitled to redact the released documents given the confidentiality pledge in the "Notice to Applicant" within each of the applicants' eSOPH files. DSUMF ¶ 20. The Notice to Applicant provided that all the information supplied "for the application & background investigation process [would] be treated as confidential, to the extent permitted by law." *Id.*, District's Mot., Ex. 4 ("Notice to Applicant") at 1. Furthermore, that "[i]nformation voluntarily submitted by background sources in response to a request for information [would] be treated as confidential if so requested by the provider, or when required or permitted by law" given the "strong public interest in obtaining complete and accurate background information on an applicant." *Id.* MPD also asserted that "[d]isclosure of confidential background information can harm public interest in making providers of background information reluctant to share relevant information, and thus may allow the hiring of personnel who may have significant

background issues that would have precluded employment had the information been known by the Metropolitan Police Department." *Id.*

The Parties appeared before the Court for a Remote Initial Scheduling Conference on January 12, 2024 (the "Hearing"). At the Hearing, the Parties represented that they had agreed to a summary judgment briefing schedule. Order (Jan. 12, 2024) at 1. Accordingly, the Court ordered the District to file its motion for summary judgment on or before March 1, 2024, Plaintiffs to file their opposition to the District's Motion and a cross-motion for summary judgment on or before March 22, 2024, the District to file a reply in support of its motion and Opposition to Plaintiff's Cross-Motion on or before April 5, 2024, and Plaintiffs to file a Reply in support of their Cross-Motion on or before April 19, 2024. *Id.*

The District timely filed the instant Motion for Summary Judgment on March 1, 2024. In its Motion, the District claims that (1) Plaintiff failed to exhaust their administrative remedies because they did not petition the Mayor before filing this civil case; (2) MPD conducted an adequate search for responsive documents because it went "through months of outreach, follow-ups, and clarifications," "discerned that MPD's only record of lateral hires [wa]s in eSOPH[,]" determined "that no existing records combine their names with employee ID, badge number, and hire date; [] that previous employing agency information only exists in job application investigation files" and, after identifying segregable records, released these files; and (3) all unreleased requested information is exempt from disclosure under FOIA's personal privacy exemptions – D.C. Code §§ 2-534(a)(2) and (a)(3)(C) – given the lateral hires' substantial privacy interests in their identifying information, the risk of unwarranted intrusions, and MPD's confidentiality pledge. Mot. 1, 4-12. MPD also asserts that there is no public interest in disclosing information identifying its lateral hires and their previous law enforcement employers, the public

interest asserted by Plaintiffs is purely speculative, and that the laterally hired officer's privacy interests would outweigh any public interest that does exist. *Id.* at 12-15; District's Reply 6-8.

Plaintiffs late filed their Opposition to the District's Motion and Cross-Motion for Summary Judgment on March 29, 2024, without leave of the Court. *See* Order (Jan. 12, 2024) at 1 (ordering Plaintiffs to file their Opposition and Cross-Motion on or before March 22, 2024).[2] According to Plaintiffs, the District has withheld all information sought through their FOIA requests. Cross-Motion 1. Plaintiffs submit that (1) they did not fail to exhaust the administrative remedies because they were not required to petition the Mayor before filing this action, and (2) FOIA demands disclosure of the requested information because (a) there is no substantial privacy interest implicated with officers' public employment or their qualifications for public service, (b) there is a public interest in the disclosure of the withheld information because it helps the public understand the operations of the government and MPD's hiring practices, and (c) the public interest in this information outweighs the officers' diminished privacy interests. Cross-Motion 3-15. "Because this lawsuit prompted the District to perform an adequate search of MPD records, Plaintiffs no longer challenge the adequacy of the District's search in Count 2 of the Complaint." Plaintiffs' Reply 1 n. 1. As articulated below, the District's Moton shall be granted on Count 2 but denied on Count 1, and Plaintiff's Cross-Motion shall be granted.

II. LEGAL STANDARD

Rule 56(a) provides in relevant part, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." D.C. Super. Ct. Civ. R. 56(a). "Summary judgment may have once

[2] Although Plaintiff did not seek the Court's leave for their late filing, the Court considers the Cross-Motion on its merits because the District did not object as to timeliness in its Reply, and so that the Court may fully consider Plaintiffs' claims on the merits.

been considered an extreme remedy, but that is no longer the case," and indeed, District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted). Today, summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The facts supporting a motion for summary judgment must be in a form that would be admissible at trial. D.C. Super. Ct. Civ. R. 56(c)(2).

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K Street Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and

citation omitted). In addition, a party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Id.* (quotation and citation omitted). Likewise, the non-moving party's "mere speculations are insufficient to create a genuine issue of fact and thus withstand summary judgment." *Hunt v. District of Columbia,* 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC,* 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted). Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial.

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt,* 66 A.3d at 990 (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Ave., LLC,* 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP,* 979 A.2d 1239, 1244 (D.C. 2009). The Court also cannot make credibility determinations favoring any witnesses' testimony or discrediting internal inconsistencies in a single witness's testimony. *Fry v. Diamond Constr.,* 659 A.2d 241, 245-46 (D.C. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

III. DISCUSSION

Plaintiff concedes that the District conducted an adequate search for the records sought through their Freedom of Information Act ("FOIA") requests. Thus, the Court shall grant the

District's Motion with respect to Count 2 of the Amended Complaint and enter summary judgment in favor of the District on the claim for violation of D.C. Code § 2-532(a)(2)'s reasonable search requirement. The remainder of this Order concerns Count 1 for the District's allegedly unlawful invocation of the privacy exception under D.C. Code § 2-534(a)(2).

FOIA establishes that "[t]he public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Code § 2-531. All FOIA provisions must "be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Code § 2-531. The District of Columbia Court of Appeals has correspondingly held that FOIA "is designed to promote the disclosure of information, not to inhibit it." *Riley v. Fenty*, 7 A.3d 1014, 1018 (D.C. 2010) (quoting *Washington Post v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989)) (internal quotation marks omitted). Accordingly, "'the provisions of the Act giving citizens the right of access are to be generously construed,' while the statutory 'exemptions [from disclosure] are to be narrowly construed, with ambiguities resolved in favor of disclosure.'" *Id.*

Under FOIA, the burden is on the government agency to defend "a decision to withhold production of requested records." *Id.* (citing D.C. Code § 2-537(b)). When an agency withholds information by asserting an exemption, the "agency must provide 'sufficient information in the form of affidavits, so-called Vaughn indexes, oral testimony, or an in camera review of responsive documents to enable the court — not the agency — to be the final arbiter of the propriety of the agency's decision to withhold information.'" *Tax Analysts v. District of Columbia*, 298 A.3d 334, 338 (D.C. 2023) (quoting *Riley v. Fenty*, 7 A.3d 1014, 1018 (D.C. 2010)). "Summary judgment is appropriate where the agency 'describes the documents and the justifications for nondisclosure

with reasonably specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Id.* (quoting *Fraternal Ord. of Police v. District of* Columbia, 79 A.3d 347, 355-56 (D.C. 2013)). Although the federal FOIA is different than the District of Columbia FOIA, the Court is "'guided by federal FOIA law which we treat as instructive authority with respect to our own FOIA pertaining to similar provisions.'" *District of Columbia v. FOP*, 75 A.3d 259, 264 n. 2 (D.C. 2013) ("*FOP 2013*") (quoting *Padou v. District of Columbia*, 29 A.3d 973, 982 (D.C. 2011)).

The primary issue in this case is whether MPD has a sufficient justification for withholding the names, employee IDs, badge numbers, date of hire at MPD, and all previous employing agencies of its lateral hires since January 1, 2018. The District does not argue that the names of the laterally hired officers are protected from disclosure themselves but that "narrowing a public roster to those officers who are lateral hires implicates a privacy interest." District's Motion 4. The Court shall enter summary judgment in favor of Plaintiffs.

A. Plaintiffs Did Not Have to Exhaust Any Administrative Remedies Before Filing a Civil Action in This Court.

FOIA does not establish any mandatory administrative remedies to appeal a denial. Under the statute, "any person denied the right to inspect a public record of a public body *may* petition the Mayor to review the public record to determine whether it may be withheld from public inspection." D.C. Code § 2-537(a) (emphasis added). If the Mayor denies a petition, or if a person is deemed to have exhausted their administrative remedies because the responding agency did not respond within fifteen days, "the person seeking disclosure may institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia." D.C. Code § 2-537(a)(1). The District of Columbia Municipal Regulations also provides that upon a denial of

a FOIA request, "the requester may appeal the denial to the Mayor *or may seek immediate judicial review of the denial in the D.C. Superior Court*." 1 D.C.M.R. § 412.1 (emphasis added).

No FOIA provisions required Plaintiffs to petition the Mayor before seeking relief in this Court. Petitioning the Mayor is a choice offered under the Statute, not a prerequisite. *See* D.C. Code § 2-532(e) (stating that a "person *chooses* to petition the Mayor pursuant to § 2-537 to review the deemed denial of the request") (emphasis added). The District of Columbia Court of Appeals has similarly interpreted D.C. Code § 2-537(a) as providing an "optional appeal procedure." *Kane v. District of Columbia*, 180 A.3d 1073, 1079 n. 12 (D.C. 2018). Even MPD's emails denying Plaintiffs' FOIA requests stated that Plaintiffs had "the right to appeal [the] [denials] to the Mayor *or* to the Superior Court of the District of Columbia." Am. Compl., Ex. 2 at 2, Ex. 3 at 2, Ex. 4 at 2 (emphasis added). Without any binding authority otherwise, the Court cannot find that FOIA required Plaintiff to do anything other than wait fifteen days for a response before initiating this action, which they did. Therefore, the Court declines to enter summary judgment for failure to exhaust administrative remedies because there were no other administrative remedies for Plaintiffs to exhaust.

B. MPD Did Not Have Sufficient Justification to Assert an Exemption to Disclosure Under D.C. Code § 2-534(a)(2) or (a)(3)(C).

The information MPD redacted in its document production to Plaintiffs is not exempt under FOIA and must be released. FOIA provides that "[t]he names, salaries, title, and dates of employment of all employees and officers of a public body" must be made public information and does not require a written request to obtain. D.C. Code § 2-536(a)(1). However, there are certain exemptions to disclosure of information requested under FOIA. In relevant part, government agencies are not required to disclose "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" or

"[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, 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)(2), (a)(3)(C).[3] "The term 'unwarranted' requires [the Court] to 'balance the public interest in disclosure against the privacy interest Congress [and the Council of the District of Columbia] intended the exemption to protect.'" *FOP 2013*, 75 A.3d at 265 (quoting *Padou v. District of Columbia*, 29 A.3d 973, 982 (D.C. 2011)) (brackets in original).

The personal privacy exemption balancing test requires the Court to "first consider whether disclosure would create an invasion of privacy at all and, if so, how serious an invasion." *FOP 2013*, 75 A.3d at 266. "The privacy interest in the FOIA balancing analysis 'encompasses the individual's control of information concerning his or her person,' including names, addresses, and other identifying information…even if it is not of an embarrassing or intimate nature." *Id.* (quoting *Padou*, 29 A.3d at 982; and then citing *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982)). If there is "a greater than *de minimis* privacy interest threatened by disclosure, [the Court] then evaluate[s] the public interest in disclosure." *Id.* "The 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.'" *Id.* (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 210 U.S. 487, 497 (1994)). "Lastly, [the Court] balance[s] the competing interests to determine whether the invasion of privacy is clearly unwarranted." *Id.* Here, MPD officers have a greater than *de minimis* privacy interest in being specifically identified as lateral hires and the release of their employment

[3] Federal Courts consider "the privacy inquiry of [D.C. Code § 2-534(a)(2)] and [D.C. Code § 2-534(a)(3)(C)] to be essentially the same." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1125 (D.C. Cir. 2004).

histories; however, this privacy interest does not outweigh the strong public interest in having access to this information.

i. MPD Officers Have a Greater Than *De Minimis* Privacy Interest in Being Identified as Lateral Hires and Information Concerning their Employment Histories.

Releasing records identifying the laterally hired MPD officers and indicating at which law enforcement agencies they were previously employed implicates a significant privacy interest. While laterally hired officers do not have a substantial privacy interest in their employment histories alone, the fact that their employment applications contained a confidentiality pledge and the risk of intrusion raises the officer's privacy interests just above *de minimis*.

Officers do not innately have a privacy interest in the employment history submitted as part of their successful applications to MPD. The Supreme Court of the United States established that employment history "is not normally regarded as highly personal[.]" *United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). Similarly, the United States Court of Appeals for the District of Columbia Circuit ("Circuit Court") acknowledged that "[i]t is generally well-accepted that federal employees do not have a reasonable expectation of privacy in their titles or aspects of a successful job application." *Am. Oversight v. U.S. Postal Serv.*, 2021 U.S. Dist. LEXIS 182014, *35 (D.D.C. 2021) (citing *Core v. U.S. Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) (balancing the "slight infringement" of a successful job applicant's privacy against the public's "interest in the competence of people [USPS] employs and in its adherence to regulations governing hiring" to conclude that [the privacy interest] exemption [] did not apply)). There is no indication that MPD's lateral hires submitted their employment history solely for background investigation purposes rather than as a basic requirement of the employment application for MPD so that the agency could evaluate their qualifications to serve as a police officer in this jurisdiction. Thus, the officers' employment histories do not by themselves establish a privacy interest.

Moreover, the officers' employment histories would not directly link them "with the specter of misconduct." Mot. 9. Although the District of Columbia Court of Appeals has held "that police officers subject to departmental disciplinary proceedings have far more than a *de minimis* privacy interest in not being publicly identified [,]" this finding is not appliable to the facts at issue in this matter. *FOP v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015) ("*FOP 2015*"). In *FOP 2015*, the plaintiffs specifically requested files of internal disciplinary proceedings against senior officers of MPD. *Id.* at 71. Here, Plaintiffs did not ask MPD to release disciplinary records or investigations. Plaintiffs requested the names, employee IDs, badge numbers, date of hire at MPD, and all previous employing agencies of officers that were laterally hired so they can conduct their own investigation into "whether any MPD officer has a history of misconduct or misbehavior in their past places of employment." Am. Compl. ¶¶ 14, 21. MPD is required to release information concerning internal police disciplinary hearings in the District that result in a recommendation of termination and must release disciplinary records when requested, thus, it would be contrary to that policy for MPD to create barriers for the public to find similar information about MPD officers' misconduct in other jurisdictions. *See* D.C. Code § 5-1031(c)(1) (establishing that "MPD shall publish, on a publicly accessible website, a schedule of adverse action hearings for cases in which the proposed discipline is termination"); *see also* Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Act 24-781, 70 D.C. Reg. 7904 (April 21, 2023) (a FOIA request "for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy for officers within the Metropolitan Police Department").

The confidentiality pledge in each employee's application profile creates a minimal privacy interest in the officers' employment history. While the "'release of [personal] information

provided under a pledge of confidentiality involves a greater invasion of privacy than release of information provided without such a pledge…to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *FOP 2013*, 75 A.3d at 267 (quoting *Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982)). As such, a confidentiality pledge alone does not establish a substantial personal interest but "should be given weight on the privacy side of the scale." *Id.*

There is also a limited risk of intrusion from identifying MPD's lateral hires and releasing their employment history. Plaintiffs assert that they will use the requested information to research the officers' misconduct history for journalistic purposes. This could mean that Plaintiffs and other members of the public could try to contact the officers and their former law enforcement agencies about their prior employment. As such, the laterally hired officers have privacy interests in preventing people from investigating their professional history. However, this privacy interest is minor because police officers are public employees with government roles, not private citizens. MPD officers patrol streets and direct interactions with members of the public, during which their names and badge numbers must be on display pursuant to D.C. Code § 5-337.01.[4] Furthermore, MPD posts all officers names, email addresses, and phone numbers on their website. If the public were provided a list of the lateral hires at MPD, the risk of individuals or the press contacting the officers would not be much higher than it already is; they would just have information that will allow them to direct their efforts more efficiently. Even if Plaintiffs write articles naming the laterally hired officers who had engaged in police misconduct in other jurisdictions, this would be

[4] D.C. Code § 5-337.01 requires that "[e]very member of the Metropolitan Police Department ("MPD"), while in uniform, shall wear or display the nameplate and badge issued by the MPD, or the equivalent identification issued by the MPD, and shall not alter or cover the identifying information or otherwise prevent or hinder a member of the public from reading the information." D.C. Code § 5-337.01.

no different than the public's ability to contact officers who have engaged in substantiated misconduct claims in the District because MPD disciplinary records are already subject to disclosure. Finally, any member of the public can use databases like LinkedIn to search for officers' employment histories, just as Plaintiffs did. *See* Cross-Motion 7 n.2.

The Court finds that the laterally hired officers have greater than *de minimis* privacy interest implicated by Plaintiffs' FOIA requests. By themselves, the MPD confidentiality pledge and the risk of intrusions are not substantial, but together, they create a privacy interest that raises just above the bar required under D.C. Code Sections 2-534(a)(2) and (a)(3)(C).

ii. <u>There is a Strong Public Interest in Knowing the Identities of the MPD Officers Who Were Laterally Hired and Their Employment Histories.</u>

The general public of the District of Columbia has an interest in learning how MPD chooses its lateral hires and where those lateral hires were previously employed. "'[M]atters of substantive law enforcement policy. . . are properly the subject of public concern,' [if] disclosure of the requested records would likely reveal a great deal about law enforcement policy[.]" *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 746 F.3d 1082, 1093 (D.C. Cir. 2014) (quoting *United States DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 766 n.18 (1989)). The District of Columbia Circuit Court of Appeals has also "recognized that a relevant public interest could exist where 'the names of current workers might provide leads for an investigative reporter seeking to ferret out what "government is up to."'" *Painting & Drywall Work Preservation Fund v. Department of Housing & Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (quoting *Fed. Labor Relations Auth. v. United States Dep't of* Treasury, 884 F.2d 1446, 1452 (D.C. Cir. 1989)). While the public has an interest in knowing "what their government is up to [,]" the "speculative nature of [an] asserted hypothetical public interest is simply insufficient for [the District of Columbia Court of Appeals] to give it weight as a public interest." *FOP 2013*, 75

A.3d at 266 (finding a threat of clearly unwarranted invasion of privacy where FOP should the names and identifying information of MPD officers who wrote emails expressing their personal concerns that the Chief of Police may have responded to certain concerns depending on the rank of the employee because FOP did not point to any record evidence to support its suspicion of disparate treatment.)

Plaintiffs are not required to show evidence that MPD's lateral hires had a history of misconduct or that MPD improperly hired officers with a history of misconduct because Plaintiffs did not submit their FOIA request to prove or disprove misconduct. Rather, Plaintiffs intend to conduct further investigation into MPD's employment selection criteria and report facts for the public to better understand the inner workings of MPD's hiring practices and how MPD implements District law making certain applicants ineligible for employment. *See* D.C. Code § 5-107.01.[5] For example, the names of the thirteen employees laterally hired since January 1, 2018 would allow Plaintiffs to determine whether any of the officers were hired despite prior misconduct in other jurisdictions, thus providing inside knowledge on what MPD considers "serious misconduct" and what misconduct is not "serious" enough to warrant ineligibility. Plaintiffs will also be able to investigate whether MPD enforces D.C. Code § 5-107.01 in a consistent manner.

This case differs from *FOP 2013* because Plaintiffs do not seek private statements made by officers in a sensitive work context; they seek to know the identities of the officers employed to protect the citizens of the District of Columbia and from which jurisdictions they were hired. Information about MPD's lateral hiring practices is especially relevant to the public because MPD

[5] Under D.C. Code § 5-107.01, "[a]n applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant: (1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order; (2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned, recruit, or probationary position with a law enforcement agency; or (3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination." D.C. Code § 5-107.01(f).

officers are entrusted to serve the public's interests and protect the public's safety. Police officers are public employees, regardless of the jurisdiction in which they serve, and directly interact with community members. The fact that a MPD officer was a lateral hire does not reveal anything intrinsically private about those officers but will allow the public to better understand who is policing their communities. As such, there is a public interest in the identity of MPD's laterally hired officers.

iii. The Public Interest in the Identity of MPD's Lateral Hires and Their Employment Histories Outweighs Those Officers' Privacy Interests.

The Court finds that MPD must disclose the identities of its lateral hires and the law enforcement agencies they were previously employed because the public interest in this information outweighs those officers' privacy interests. As explained above, the laterally hired officers have a slightly greater than *de minimis* privacy interest in their identities and their employment histories, given the confidentiality pledge included in their employment applications and the risk of intrusions into their professional lives. Despite these privacy interests, the public has a greater interest in knowing the identities of laterally hired officers who patrol their communities and where they worked as officers before working for the District. *See Riley*, 7 A.3d 1014, 1018 (requiring that the FOIA exemptions must be narrowly construed in favor of disclosure). As the facts in this matter are largely undisputed, summary judgment is proper.

Therefore, the Court shall deny the District's Motion with respect to Count 1 of the Amended Complaint, grant Plaintiffs' Cross-Motion, and enter judgment in Plaintiffs' favor on Count 1 – unlawful invocation of exemption under D.C. Code § 2-534(a)(2). The Court hereby declares that MPD's denial of Plaintiffs' FOIA requests was unlawful because it improperly invoked exemption under D.C. Code § 2-534(a)(2). MPD shall release unredacted records identifying the names, employee IDs, badge numbers, date of hire at MPD, and all previous

employing law enforcement agencies of its lateral hires since January 1, 2018. Because the Parties did not make any representations with respect to Plaintiffs' request for a fee waiver for their FOIA request or attorneys' fees, the Court declines to address these issues.

Accordingly, it is on this 18th day of July, 2024, hereby,

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that Plaintiffs' Cross-Motion for Summary Judgment is **GRANTED**; and it is further

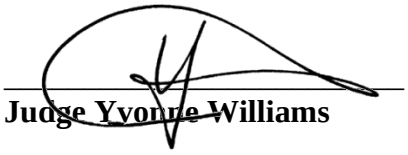
ORDERED that **JUDGMENT** is entered in favor of Defendant District of Columbia and against Plaintiffs Invisible Institute and Washington City Paper on Count 2 of the Amended Complaint concerning the adequacy of the Metropolitan Police Department's search for records responsive to Plaintiffs' Freedom of Information Act requests under D.C. Code § 2-532(a)(2); and it is further

ORDERED that **JUDGMENT** is entered in favor of Plaintiffs Invisible Institute and Washington City Paper and against Defendant District of Columbia on Count 1 of the Amended Complaint concerning MPD's unlawful invocation the private interest exemption under D.C. Code § 2-534(a)(2); and it is further

ORDERED that the Remote Status Hearing on July 19, 2024 at 9:30 a.m. is **VACATED**; and it is further

ORDERED that this case is **CLOSED**.

IT IS SO ORDERED.



Judge Yvonne Williams

Date: July18, 2024

Copies to:

Jeffrey S. Gutman
Counsel for Plaintiffs

Steven Nathan Rubenstein
David Jastrab
Jarod C. Wilson
Counsel for Defendant