No. 21-CV-543

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

V.

TERRIS, PRAVLIK & MILLIAN, LLC,
APPELLEE.

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

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

Terris, Pravlik & Millian, LLP ("TPM") brought this action under the District of Columbia Freedom of Information Act, D.C. Code § 2-531 *et seq.* ("DC FOIA"), to compel the production and publication of preliminary budget documents that two District agencies provided to the Mayor. The trial court granted summary judgment to TPM. The issues in this appeal are:

1. Whether preliminary budget documents that the Mayor solicits and reviews to prepare and submit an annual budget to the Council of the District of Columbia ("Council") are exempt from disclosure under DC FOIA's deliberative process privilege.

2. If not, whether these preliminary budget documents are protected by the executive communications privilege inherent in the separation of powers.

3. If not, whether the court was authorized to require the District to publish all documents enumerated in D.C. Code § 2-536 even though the only injunctive remedy available to a requester under DC FOIA is to obtain copies of the requested documents, DC FOIA's publication requirement includes no provision for private enforcement, and TMP lacks standing to seek a publication remedy.

STATEMENT OF THE CASE

On July 13, 2020, TPM, a law firm, filed a complaint challenging the District of Columbia's denial of its request under DC FOIA for preliminary budget

submissions to the Mayor from the District of Columbia Public Schools ("DCPS") and the Office of the State Superintendent for Education ("OSSE"), which contain these agencies' initial budget advice and recommendations for fiscal year 2019. Joint Appendix ("JA") 21-49. TPM also challenged the District's decision not to publish the requested documents online. JA 29. On July 23, 2021, the Superior Court granted summary judgment to TPM and ordered the District to produce to TPM and publish online the requested documents by August 5. JA 178-93. On August 5, the same day that the District filed this appeal, this Court granted an administrative stay and held in abeyance the District's motion to stay the trial court's order pending appeal. On August 20, the Superior Court stayed the execution of its order pending appeal and clarified that its July 23 order required the District to publish all the documents enumerated in D.C. Code § 2-536, not just the documents requested by TPM. JA 194-98.

STATEMENT OF FACTS

1. Legal Framework.

DC FOIA provides "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them." D.C. Code § 2-531. Thus, the Court "construe[s] the statutory disclosure provisions liberally and the statutory exemptions from disclosure narrowly." *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011). DC FOIA

"provides for full disclosure unless the information requested is exempt under a specific statutory provision." *Barry v. Wash. Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

DC FOIA identifies several categories of documents that may be exempt from disclosure. D.C. Code § 2-534. Among them are "[i]nter-agency or intra-agency memorandums or letters" that "would not be available by law to a party other than a public body in litigation with the public body." *Id*. § 2-534(a)(4). This provision specifically incorporates the deliberative process, attorney-client, and attorney work-product privileges, "among other privileges that may be found by the court." *Id*. § 2-534(e). DC FOIA makes clear, however, that the exemptions from disclosure in Section 534 "shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law." *Id.* § 2-534(c).

Finally, "[w]ithout limiting the meaning of other sections of the subchapter," which include the exemption provisions, DC FOIA requires that certain categories of information be published without the need for any written request; these include "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process." *Id.* § 2-536(a), (a)(6A). "[R]eports on budget implementation and execution prepared by the Office of the Chief Financial Officer ("OCFO"), including baseline budget submissions and appeals, financial status

reports, and strategic plans and performance-based budget submissions" are also made public information. *Id.* § 2-536(a)(6A). This information must be made "available on the Internet" or by other electronic means. *Id.* § 2-536(b).

2. The Executive Budget Proposal Process.

Under the Home Rule Act, D.C. Code § 1-201.01 *et seq.*, the District Charter establishes "the means of governance of the District" of Columbia. *Id.* § 1-203.01. The District Charter vests the executive power of the District "in the Mayor who shall be the chief executive officer of the District government." *Id.* § 1-204.22. It also directs the Mayor to "prepare and submit to the Council each year, and make available to the public, an annual budget for the District of Columbia . . . in such detail as the Mayor determines necessary to reflect the actual financial condition of the District government." *Id.* § 1-204.42(a).

Early in the annual budget development process, the Mayor solicits budget advice and recommendations from each subordinate agency based on her policy and program priorities for the coming year. JA 172 ¶ 6, 177 ¶ 10. In addition to seeking factual information about agency budget needs based on past performance, the Mayor asks agencies to respond to the specific policy and financial priorities she sets and to provide their recommendations for spending any additional funds that may be available. JA 172 ¶ 6. Each agency director then prepares their submission, which includes financial requests and the supporting policy recommendations and

rationale, JA 172-73 ¶ 7, 177 ¶ 10, and submits a draft preliminary response to the Mayor through the OCFO. JA 172-73. This begins a deliberative process that includes several rounds of discussion and changes to the agencies' proposed submissions. JA 172-73 ¶ 7. The Mayor then uses this information to formulate her budget policy and draft the budget proposal that she eventually submits to the Council. JA 173 ¶ 8. The OCFO works closely with the Mayor and her team to provide support during the budget process, but the final budget submission is the responsibility of the Mayor. D.C. Code § 1-204.24d(26); JA 177 ¶ ¶ 8-9.

3. TPM's FOIA Request And Superior Court Complaint.

In October 2019, TPM submitted a FOIA request to the Mayor's Office seeking "(1) actual copies—not summaries—of [DCPS's and OSSE's] budget requests for fiscal year 2019, including Form B; (2) any similar documentation describing in detail the agencies' budget needs or requests for fiscal year 2019; and (3) information identifying corresponding totals from the final approved budget." JA 11. TPM noted that it was specifically interested in "funding for special education oversight, policy development and compliance issues impacting 3-5-year-olds," and it did "not object to the production being narrowed accordingly." JA 12. TPM also noted that the information it requested "should be accessible to the public" under D.C. Code § 2-536(a)(6A), although it did not make any request for publication. JA 11 n.1. In December, TPM was provided a copy of the Mayor's

fiscal year 2019 proposed budget for OSSE but was informed that OSSE's preliminary submission to the Mayor would not be produced because it was "deliberative" and thus "privileged." JA 18-19; *see* JA 24 ¶¶ 10-11.

In January 2020, TPM filed a FOIA appeal with the Mayor's Office. In July, TPM filed the underlying Superior Court complaint seeking a declaratory judgment and order to produce and publish online the requested documents. JA 28. The District moved to dismiss TPM's complaint, which the court denied in February 2021. JA 58-77. In April, TPM filed a motion for summary judgment, which the Council supported with a statement as amicus curiae. JA 7.

The District filed a cross-motion for summary judgment. JA 8. In it, the District argued that the preliminary budget documents that TPM requested were protected by the deliberative process privilege, which was expressly recognized as an exemption to disclosure under D.C. Code § 2-534(a)(4), and it argued that the privilege was not limited by the publication requirements in D.C. Code § 2-536(a)(6A). Defs.' Opp'n and Cross-Mot. for Summ. J. at 6-13. Furthermore, even if the requested documents were not exempt as deliberative, they were protected from disclosure under the executive communications privilege, and requiring their release would violate the separation of powers because under the District's Charter, the Mayor has the exclusive obligation and discretion to submit to the Council the annual budget of her choosing. Defs.' Opp'n and Cross-Mot. for

Summ. J. at 13-25 (citing D.C. Code § 1-204.42(a)). In addition, the District argued that DC FOIA does not provide a private right of action to enforce its publication requirement, that the plaintiff lacked standing, and that prospective publication was not an available remedy. Defs.' Opp'n and Cross-Mot. for Summ. J. at 25-30.

3. The Superior Court's Orders.

On July 23, the Superior Court granted TPM's motion for summary judgment, denied the District's motion, and ordered the District to "respond to TPM's FOIA request" and "publish the required documents pursuant to D.C. Code § 2-536 on or before August 5." JA 193.

The court rejected the District's argument that DC FOIA did not provide a cause of action to enforce the requirement to publish documents online. JA 184-86. The court concluded that "D.C. Code § 2-537 gives any person denied the *right to inspect a public record* standing to bring it before the Superior Court." JA 184; *see* JA 185-86. The court also disagreed with the District's contention that TPM's injury was a generalized grievance insufficient to confer standing. Instead, it found that TPM had requested the preliminary budget documents, which "were not online as required by statute," and that it "had standing to bring its claims before the Court" because its request "was denied." JA 186.

The court also rejected the District's argument that the requested documents were exempt from disclosure under the deliberative process privilege. The court

observed that the "documents that the District states are pre-decisional and deliberative are listed in [D.C. Code § 2-536(a)](6A) as documents that need to be produced and published," and it was "hesitant to accept that the Council would draft conflicting statutes." JA 188. But the court did not address the prefatory clause in Section 2-536(a), which states that the publication mandate does not "limit[] the meaning of other sections of this subchapter." *Id.* § 2-536(a). The court also did not accept that D.C. Code § 2-534(c), which provides that the exemptions in Section 534(a) "shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by *other law*," *id.* § 2-534(c) (emphasis added), referred only to laws outside of DC FOIA. It found that the District's interpretation "would narrow the meaning of other law where DC FOIA urges construction of the law toward expansion of public access." JA 188.

Finally, the court was not persuaded that requiring disclosure of the agencies' initial budget requests to the Mayor would undermine her exclusive responsibility under the District Charter to prepare an initial budget for submission to the Council and unduly interfere with the Mayor's Charter-authorized discretion to determine what to include therein, in violation of separation of powers and the executive communications privilege. JA 190-92. The court found that "the power of the budget is a shared power between *both* the legislative and executive branches." JA 190. And it found that a DC FOIA request for budget documents "made after

budget deliberations occurred, and not *during* the Mayor's discussions with agency leaders and the CFO [Chief Financial Officer], and subsequent submission to the Council," would not "interfere with the Mayor's access [or] ability to obtain candid and informed opinions from [her] advisors." JA 191. The court also found that the executive communications privilege, which it did not recognize, was in any event inapplicable because the budget "is a shared power between the Mayor and the Council," and because the "Mayor does not formulate the budget on her own, but with the advice of the CFO." JA 192.

On August 5, the District timely filed its appeal of the Superior Court's order, which this Court administratively stayed the same day. On August 20, the trial court stayed its July 23 order pending resolution of this appeal. JA 197. It also clarified that its July 23 order required the District to "publish the documents pursuant to [D.C. Code] § 2-536 which necessarily encompasses the documents requested by" TPM, observing that "D.C. Code § 2-536 specifically enumerates certain documents that the D.C. Council required the government to publish[,] not just the 2019 documents that" TPM requested. JA 196-97.[1]

[1] On August 25, this Court vacated its administrative stay and denied as moot the District's motion to stay pending appeal in light of the Superior Court's order.

STANDARD OF REVIEW

This Court reviews de novo the trial court's entry of summary judgment. *Fraternal Ord. of Police v. District of Columbia* ("*FOP*"), 79 A.3d 347, 353 (D.C. 2013). Summary judgment is proper "when there are no genuine issues as to any material facts" and the record shows that "the moving party is entitled to judgment as a matter of law." *Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C. 2014).

SUMMARY OF ARGUMENT

1. The requested documents are protected from disclosure by DC FOIA's deliberative process privilege. Those agency-submitted preliminary budget documents are indisputably pre-decisional and deliberative because they are part of the consultative process through which the Mayor develops the budget proposal that she submits to the Council. Requiring their production would discourage candid discussion between agencies and the Mayor and undermine the Mayor's ability to make budgetary decisions. Nonetheless, the trial court found that DC FOIA's publication provision in D.C. Code § 2-536(a)(6A) was an "other law" under D.C. Code § 2-534(c) that superseded the deliberative process privilege and mandated disclosure. But the Superior Court ignored this Court's prior, binding precedent holding that DC FOIA's exemption provisions prevent the disclosure of documents otherwise required to be made public by its publication provision. That precedent explains that the publication requirement must be construed "[w]ithout limiting the

meaning of other sections of the subchapter," D.C. Code § 2-536(a), which include the exemption provisions. Further, the trial court's construction of "other law" does not accord with the ordinary meaning of "other" as *different from or not the same as* DC FOIA. Finally, even if there was some ambiguity in DC FOIA's exemption and publication provisions, interpreting them as the trial court did raises serious separation-of-powers questions that this Court can and should avoid.

2. If DC FOIA does not prevent disclosure, the requested documents are protected by the executive communications privilege inherent in the separation of powers. This Court has affirmed that separation-of-powers principles are a recognized part of the District government's structure and that its Charter, like the federal Constitution and state constitutions, vests executive power in the Mayor. Inherent in the separation of powers is an executive communications privilege. At the federal level, that privilege traditionally protects the President's ability to confidentially obtain candid and informed opinions from his advisors so that he can faithfully carry out his constitutionally assigned duties and effectively make decisions. State courts that have considered the issue, often in addressing disputes over documents requested under public records acts similar to DC FOIA, have found that the rationale to protect presidential communications applies with equal force to communications made to foster and inform sound gubernatorial deliberations and

policymaking. For those same reasons, the Mayor must also enjoy the protections of the executive communications privilege.

Preliminary budget requests from District agencies to the Mayor are executive communications that are protected from disclosure by the Mayor's assertion of the executive communications privilege. Application of the privilege is necessary to ensure that the Mayor receives the full, candid, and objective advice necessary for the Mayor to faithfully and effectively carry out her exclusive duty under the District Charter to propose an annual budget. The Superior Court disagreed, believing that the Mayor's ability to develop her budget would not be chilled by after-the-fact production of preliminary budget documents. But it is the knowledge that their assessments and recommendations will be disclosed, not the timing of that disclosure, that would chill agencies from providing candid assessments and recommendations to the Mayor. Nor is the executive communications privilege inapplicable because passing the budget is a shared power between the Mayor and Council. While it is true that each branch has a role in the budget development process, the Mayor's duty under the Charter to prepare and submit an annual budget to the Council is explicit and exclusive. And while the CFO and Office of Budget and Planning assist in that duty, the preliminary budget information transmitted by OSSE and DCPS to the Mayor belongs to and is used by the Mayor in formulating her budget policy.

3. The trial court also erred in ordering publication of the documents enumerated in D.C. Code § 2-536 because DC FOIA's statutory scheme does not permit a private party to force, let alone authorize the court to order, such publication, and TMP has no standing to seek it. The trial court failed to account for the statute's text, which authorized the court to order production when a person was denied the right to *inspect* a public record but had no similar provision regarding the publication of documents. Nor did it address case law holding that the analogous federal FOIA does not authorize district courts to order an agency to make available for public inspection documents subject to its publication provision.

The trial court also erred in ordering prospective publication. TPM is not entitled to prospective relief for documents not yet in existence. And even if it is, prospective publication is only appropriate in rare circumstances that do not apply here. Finally, the court lacked authority to order publication of documents that TPM had not even requested.

ARGUMENT

I. DC FOIA Requires Neither Production Nor Publication Of Agency Preliminary Budget Documents.

A. The agency's preliminary budget documents are protected from disclosure under the deliberative process privilege.

Although DC FOIA promotes government transparency and access to public documents, its open government objectives are not absolute; the statutory scheme builds in numerous exemptions that shield documents from disclosure. Among the

documents exempted are "[i]nter-agency or intra-agency memorandums or letters" that "would not be available by law to a party . . . in litigation with the public body." D.C. Code § 2-534(a)(4). This exemption expressly shields documents protected by the deliberative process privilege. *Id*. § 2-534(e).

It is undisputed that that the requested documents here fall within the deliberative process privilege. "The deliberative process privilege shelters documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *FOP*, 79 A.3d at 354-55 (internal quotation marks omitted). The privilege "protects agencies from being forced to operate in a fishbowl" and "applies when production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects." *Elec. Frontier Found. v. U.S. Dep't of Just.*, 739 F.3d 1, 7 (D.C. Cir. 2014) (internal quotation marks omitted).[2] To qualify, the documents must be pre-decisional—prepared to assist the decision maker "in arriving at [her] decision"—and deliberative—"reflect[ing] the give and take of the consultative process." *FOP*, 79 A.3d at 354 (internal quotation marks omitted). The "key question" in determining if the

[2] Because DC FOIA "is modeled on the corresponding federal statute," the Court treats the federal FOIA "as instructive authority with respect" to similar provisions of DC FOIA. *Padou*, 29 A.3d at 982 (internal quotation marks omitted).

communication is deliberative "is whether disclosure of the information would discourage candid discussion within the agency." *Id*. (internal quotation marks omitted).

The documents requested here were undisputedly both pre-decisional and deliberative. They were drafted to assist the Mayor in "mak[ing] the final decision concerning what budget requests should be submitted." *Bureau of Nat'l Affs., Inc. v. U.S. Dep't of Just.*, 742 F.2d 1484, 1497 (D.C. Cir. 1984); *see* JA 173 ¶ 8, 177 ¶ 11. And they are developed in response to the Mayor's specific annual policy priorities and begin a consultative process between the Mayor, the agency, and the OCFO, through which the Mayor develops her final budget proposal. JA 172-73 ¶¶ 7-8. Furthermore, disclosure of this information would discourage open and candid discussion between agencies and the Mayor and undermine the Mayor's ability to shape her "ultimate budgetary choices." *Bureau of Nat'l Affs., Inc.*, 742 F.2d at 1497; *see* JA 174 ¶ 11. Notably, the trial court (and TPM) did not dispute that the deliberative process privilege applies to the requested documents. JA 188; *see* TPM Reply Br. at 10.

B. DC FOIA's publication provision does not limit the statute's enumerated exemptions, including the deliberative process privilege.

Although the deliberative process privilege would shield the requested documents, the court below held that the documents must nonetheless be produced

under DC FOIA's publication provision. Specifically, D.C. Code § 2-536(a)(6A) requires the publication of "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process." In essence, the court below held that this provision overrides the statute's enumerated exceptions—including the deliberative process privilege. That holding conflicts with the statute's text and contravenes this Court's precedents.

This Court has already expressly held that DC FOIA's exemption provisions prevent the disclosure of documents otherwise mandated to be made available to the public under its publication provision—like those sought here. In *Office of the People's Counsel v. Public Service Commission of the District of Columbia*, 955 A.2d 169, 176 (D.C. 2008), the Court affirmed the Public Service Commission's refusal to make local-revenue data that the Commission collects from public utilities available under DC FOIA's mandatory publication requirements because the documents were deemed to be exempt from disclosure under D.C. Code § 2-534(a)(1), another of DC FOIA's exemptions. The Court held that Section 2-536(a), DC FOIA's publication provision, "does not mandate disclosure of data that satisfy the requirements of D.C. Code [§] 2-534(a)," DC FOIA's exemptions provision. *Id*.

The Court based this finding on the "introductory language of Section 2-536(a), which declares broad categories of information to be public '[w]ithout limiting the meaning of other sections of this subchapter.'" *Id.* (quoting D.C. Code § 2-536(a)). "[T]his subchapter" includes the privileges recognized in D.C. Code § 2-534, like the deliberative process privilege. The Court construed "that qualifying language to denote that information that is determined to be exempt from disclosure under Section 2-534(a) need not be treated as public information and made available pursuant to Section 2-536." *Id*.; *see also Kane v. District of Columbia*, 180 A.3d 1073, 1083-84 (D.C. 2018) (holding that the mandatory disclosure provision in the Advisory Neighborhood Commissions Reform Amendment of 2000, D.C. Code § 1-309.01 *et seq*., did not preclude the ANC "from asserting the deliberative process privilege to withhold information in response to [appellant's] FOIA request"). The court below failed to even address this binding authority or cite to any other authority that found that disclosure was required when documents satisfied DC FOIA's criteria for exemption.

In addition to the language in Section 2-536(a), DC FOIA also explicitly states that its enumerated exemptions are inoperable only where "disclosure is authorized or mandated by *other* law." D.C. Code § 2-534(c) (emphasis added). "Other" means "distinct from that or those first mentioned or implied," "not the same," or

"different." *Other*, Merriam-Webster Dictionary.[3] The "ordinary sense" and "meaning commonly attributed to" those words, then, is a law that is not the same as or is different than DC FOIA. *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). The production requirements in Section 2-536 are not "other law[s]"; they are part of the *same* law—that is, DC FOIA.

This interpretation is bolstered by other DC FOIA provisions that refer to "provisions of this subchapter," *see* D.C. Code §§ 2-531, 2-534(a), (d), 2-537(d), (e), 2-538(d), or "sections of this subchapter," *see id*. § 2-536(a). If the Council intended to refer to the provisions of DC FOIA itself, it would have done so in the same manner it repeatedly did elsewhere in the statute. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). Notably, the trial court's construction of "other law"—to reach both FOIA and non-FOIA alike—would render the Section 534 exemptions meaningless. After all, Section 534 enumerates exemptions from otherwise mandatory disclosures *under DC FOIA*. If DC FOIA is an "other law" that can render its exemptions

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[3] *Available at* https://bit.ly/3sf3uDJ (last visited Dec. 17, 2021).

inoperable, then the exemptions will never protect against disclosure. This result is illogical.

Further, while the court believed its interpretation was necessary to avoid a conflict between Sections 534 and 536, the asserted conflict is illusory. The text of the two provisions work in harmony: the publication provision makes clear that it does not override the exemptions, and the exemptions provision makes clear that it can only be overridden by non-FOIA law. Moreover, not everything referenced in Section 536(a)(6A) is protected by the deliberative process privilege. For example, in agencies' preliminary budget submissions, several documents would *not* be protected by the privilege, including: a list of its vacancies, the agency's employees and their titles and salaries, previous budget reprogramming, budget history, year-end surplus information, and the agency's organizational chart. In addition, reports on budget implementation and execution include factual information that is generally not considered deliberative, and the District publishes final baseline budgets and agency performance plans. For all those reasons, the text of the statutory scheme cannot support the Superior Court's reading.

The court also failed to identify anything in the legislative history that indicated that the Council, in enacting the publication requirements of D.C. Code § 2-536(a), meant to limit the availability of the deliberative process privilege or otherwise require the public disclosure of information that was not already available

under DC FOIA. Rather, the statutory text suggests that the purpose of this provision was simply to increase access to certain information already available via FOIA requests by proactively making that information public, without the need to submit an individual request. *See* D.C. Code § 2-536(a) (specifying categories of information that "do not require a written request"). Nowhere did the Council indicate that it intended to limit the reach of the well-established DC FOIA exemptions in Section 2-534. And although the court below referenced the current Council's amicus brief in concluding that withholding documents designated to be public was contrary to the Council's intent, courts have repeatedly been "warn[ed] that the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotation marks omitted). At the very least, the Council needed to speak more clearly to abrogate a critical, longstanding, and settled legal privilege. *See, e.g.*, *Newell-Brinkley v. Walton*, 84 A.3d 53, 58 (D.C. 2014) (explaining that it was "highly unlikely that the Council would have altered preexisting law in so fundamental a way implicitly rather than explicitly").

In short, plain language, this Court's binding precedent, and the provision's purpose support an interpretation that shields the requested documents under DC FOIA's deliberative process privilege.

C. DC FOIA should be interpreted in a manner that avoids any constitutional or separation-of-powers question.

Even if there were any ambiguity in the provisions of DC FOIA relevant here, interpreting them as the trial court did raises serious constitutional and separation-of-powers concerns. "The deeply rooted doctrine that a constitutional issue is to be avoided if possible informs" this Court's "principles of statutory construction." *Gay Rts. Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ.*, 536 A.2d 1, 16 (D.C. 1987); *see Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 389-90 (2004) ("[O]ccasion[s] for constitutional confrontation between the two branches should be avoided whenever possible.") (internal quotation marks omitted). Accordingly, "[i]nsofar as its language permits," DC FOIA "must be construed in a manner that protects its constitutionality" and "avoid[s] difficult and sensitive constitutional questions." *Gay Rts. Coal.*, 536 A.2d at 16; *see District of Columbia v. Sierra Club*, 670 A.2d 354, 366 (D.C. 1996) (explaining that separation of powers, which "restrains courts from 'inappropriate interference in the business of the other branches of Government'" is "at its apogee when the court is asked to dictate the Mayor's spending priorities" (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990))).

As explained more fully below, the District government's structure incorporates the constitutional separation-of-powers principles that divide power between the branches of the federal government. *See Wilson v. Kelly*, 615 A.2d 229,

231 (D.C. 1992). Further, disclosing the internal, executive policy deliberations and other information contained in the agency's preliminary budget documents implicates the executive communications privilege, a privilege that the Mayor has asserted here, and which is "inextricably rooted in the separation of powers." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Abrogation of the executive communications privilege by DC FOIA's publication provision or otherwise would violate the separation of powers because the District Charter vests in the Mayor the exclusive responsibility to create and submit an annual budget to the Council. D.C. Code § 1-204.42(a). The Court can and should avoid these serious separation-of-powers questions by interpreting DC FOIA to shield the requested documents.

II. The Requested Documents Are Protected Executive Communications, And Requiring Their Production And Publication Would Violate Separation-Of-Powers Principles.

If DC FOIA requires the production of the requested documents, producing them would violate the executive communications privilege inherent in the constitutional separation of powers.[4]

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[4] Notably, the D.C. Circuit has explained that exemption 5 of the federal FOIA, which like D.C. Code § 2-534(4) exempts from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation," "incorporates two executive privileges," one of which is the presidential communications privilege. *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008); *see Jud. Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (same). Thus, in addition to being inherent in the constitutional separation of powers, the executive communications privilege is also an inherent part of D.C. Code § 2-534(4)'s exemption.

A. Separation-of-powers principles establish an executive privilege safeguarding the Mayor's communications with close advisors.

Per District law, "the Council recognizes the principle of separation of powers in the structure of the District of Columbia government." D.C. Code § 1-301.44(b). This "familiar tripartite structure of the government," including the principle of separation of powers, was adopted by Congress when it established District home rule. *Wilson*, 615 A.2d at 231. Thus, for instance, Congress vested enumerated legislative authority in the Council, D.C. Code § 1-204.04, but gave the Mayor the "executive power of the District," *id.* § 1-204.22. This Court has explained that, given the structure of the District government, "it is reasonable to infer from this tripartite structure and the vesting of the respective 'power' in each branch that the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level." *Wilson*, 615 A.2d at 231; *see Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 n.3 (D.C. 2011) (noting the Mayor's "discretionary authority to establish spending priorities and manage the city's budget" and "that separation of powers concerns, especially where spending is concerned, may require courts . . . to avoid interference in the business of the executive branch").

The executive privilege is "fundamental to the operation of Government," "inextricably rooted in the separation of powers," and derived "from the supremacy of each branch within its own assigned area of constitutional duties." *Nixon*, 418

U.S. at 708. On the federal level, executive privilege includes a presidential communications privilege, which "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Loving*, 550 F.3d at 37. Confidentiality is needed "to protect the effectiveness of the executive decision-making process" and "ensure that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge." *Jud. Watch*, 365 F.3d at 1115, 1116 (internal quotation marks omitted). Without confidentiality, presidential advisors "may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705. Confidentiality ensures that a "President and those who assist him" are "free to explore alternatives in the process of shaping policies and making decisions" and can "do so in a way many would be unwilling to express except privately." *Id*. at 708. The privilege protects direct communications and documents viewed or "solicited and received by the President or his immediate White House advisers." *Loving*, 550 F.3d at 37. Whether pre-decisional or not, the privilege covers in their entirety documents that reflect such "decisionmaking and deliberations." *Id*. at 37-38.

The rationale for the presidential communications privilege applies with equal force to state chief executives and has repeatedly been recognized in the context of requests for documents under state open records laws. For example, in *Killington,*

Ltd. v. Lash, 572 A.2d 1368 (Vt. 1990), the Vermont Supreme Court recognized an executive privilege in addressing a dispute over documents requested under the state's public records act, observing that "[f]ederal and state courts have accorded to the chief executive of the nation or of a state a privilege which is 'fundamental to the operation of Government and inextricably rooted in the separation of powers.'" *Id*. at 1373 (quoting *Nixon*, 418 U.S. at 798). The court found it "hard to imagine a government functioning with no opportunity for private exchange among its ministers" and explained that "no less than the national government does Vermont government need to preserve the confidentiality of intragovernmental documents reflecting advisory opinions, recommendations[,] and deliberations comprising parts of the process by which governmental decisions and policies are formulated." *Id.* at 1374 (internal quotation marks omitted); *see Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 783 (Del. Super. Ct. 1995) ("State courts that have dealt with the issue have been nearly unanimous in holding that a governor, in the discharge of official duties, is entitled to an executive privilege to protect the governor's deliberative and mental processes."). Indeed, "[i]t is generally acknowledged that some form of executive privilege is a necessary concomitant to executive power." *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 481 (Ohio 2006) (quoting *Annotation, Construction and Application, Under State Law, of Doctrine of Executive Privilege*, 10 A.L.R. 4th 355, 357 (1981)).

Also addressing a dispute over documents requested under the state's public records law, the Ohio Supreme Court in *Dann* recognized that *Nixon* was the "seminal federal case recognizing and interpreting the presidential-communications privilege," a privilege "inextricably rooted in the separation of powers," and "necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." *Id.* at 480-81 (internal quotation marks omitted). It found the *Nixon* Court's rationale for executive privilege to be "precise and persuasive" and that the "rationale applies with equal force to the chief executive official of a state." *Id*. at 481. Specifically, the privilege fostered the public's "interest in ensuring that their governor can operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the governor without concern that unwanted consequences will follow from public dissemination." *Id*. at 484; *see Doe v. Alaska Superior Ct., Third Jud. Dist.*, 721 P.2d 617, 623 (Alaska 1986) ("[T]he public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government."); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978) (determining that the gubernatorial executive privilege "is analogous to the qualified constitutionally-based privilege of the President, which is fundamental to the operation of government and inextricably rooted in the separation of powers" (internal quotation marks omitted)).

In line with these decisions, state after state has concluded that the executive privilege applies to state executives. *See, e.g.*, *Protect Fayetteville v. City of Fayetteville*, 566 S.W.3d 105, 110 (Ark. 2019) ("Considering the separation-of-powers doctrine, we hold that the executive privilege also exists in Arkansas."); *Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't*, 283 P.3d 853, 868 (N.M. 2012) (recognizing a privilege "similar in origin, purpose, and scope to the presidential communications privilege recognized by the federal courts and the executive communications privilege recognized by some other state high courts"); *Taylor v. Worrell Enters., Inc.*, 409 S.E.2d 136, 140 (Va. 1991) (finding that mandating disclosure, under Virginia's freedom of information act, of the Governor's office's itemized list of long distance phone calls would violate the separation of powers by "unconstitutionally interfer[ing] with the ability of the Governor to execute the duties of his office"); *Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. Ct. App. 1980) (recognizing a similar privilege).

Finally, with regard to state FOIAs specifically, "[e]very court that has examined the executive communications privilege in light of open government laws has recognized both the privilege and its applicability to open government laws." *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1259 (Wash. 2013) (citing cases); *see, e.g.*, *Vandelay Ent., LLC v. Fallin*, 343 P.3d 1273, 1278 (Okla. 2014) (reasoning that "a privilege to protect confidential advice provided by senior executive branch

officials is essential to the existence, dignity and functions of the Governor as chief executive" and the "principle of separation of powers expressed" in Oklahoma's Constitution "protects this privilege from encroachment by Legislative acts, such as the Open Records Act").

Like the President and state governors, the District's Mayor too requires the protection of executive privilege. The District Charter vests executive power in the Mayor. D.C. Code § 1-204.22; *see District of Columbia v. Wash. Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (en banc) (concurring opinion) (referencing the Home Rule Act as "the constitutional analog"); *Zuckerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1072 (D.C. 2014) (explaining that the District Charter is "[c]omparable to a state constitution"). And as the head of the executive branch in the District, the Mayor—like the President and state governors—relies on her close advisors, including agency directors, to provide sound and candid advice and recommendations in all areas, including budget policy.

B. The executive communications privilege covers the requested documents.

Preliminary budget requests from District agencies to the Mayor are executive communications the disclosure of which is precluded by the executive communications privilege that the Mayor has asserted here. Such documents lie at the heart of the privilege. They are "communications in performance of [a Mayor's] responsibilities of [her] office and made in the process of shaping policies and

making decisions," and "reflect [Mayoral] decision-making and deliberations" that the Mayor "believes should remain confidential." *Jud. Watch*, 365 F.3d at 1113 (internal quotation marks omitted); JA 173 ¶ 10. The Mayor has both a right and a need to receive confidential information and advice from her subordinates to assist her in deliberations regarding policy decisions and to fully discharge her responsibilities as the "chief executive officer of the District government," including her exclusive duty to "prepare and submit" an annual budget proposal to the Council. D.C. Code §§ 1-204.22, 204.42(a). Here, the Mayor herself solicits the agency budget recommendations and advice; they come from her agency directors; and she reviews them in formulating her budget policy. JA 172-73 ¶¶ 6,8, 176 ¶ 6. The Mayor's final budget submission to the Council represents her budget policy, and the details of how she arrived at that policy are entitled to protection from disclosure under DC FOIA, including the deliberations she undertook with her agencies. Without the protection of an executive communications privilege, the Mayor's subordinates could not confidently provide her candid advice or sensitive information regarding the agencies' strengths, vulnerabilities, and budget requirements for fear that their advice or discussions would become subject to public scrutiny. JA 174 ¶ 11.

In holding otherwise, the court below reasoned that "[a] budget request made after budget deliberations occurred, and not *during* the Mayor's discussions with

agency leaders and the CFO, and subsequent [to] submission to the Council, does not interfere with the Mayor's access [or] ability to obtain candid and informed opinions from her advisors." JA 191 (internal quotation marks omitted). That reasoning completely misunderstands the privilege. It is the *knowledge* that subordinates' assessments and recommendations could be disclosed in the future, not the timing of that disclosure, that chills an executive's ability to obtain candid assessments and recommendations.[5] As the Supreme Court has explained, "[u]nless [s]he can give h[er] advisers some assurance of confidentiality, [the executive] could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of h[er] duties depends." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448-49 (1977). Indeed, "[h]uman experience teaches that those who *expect* public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705 (emphasis added). The trial court's view would effectively nullify the privilege any time a dispute over disclosure takes place after an executive branch decision has been made—contrary to not just the principles underlying the privilege, but also a host of case law applying it in precisely that

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[5] The trial court undermines its own rationale to the extent its August 20, 2021 order requires contemporaneous production and publication of preliminary budget documents going forward. JA 197.

circumstance. *See, e.g.*, *Loving*, 550 F.3d at 36, 40 (holding that the privilege applies to documents concerning the President's prior involvement in capital sentence); *Jud. Watch*, 365 F.3d at 185 (holding that the privilege reaches communications viewed by the President involving prior pardon decisions).

The court also found that the District did not demonstrate that the documents TPM requested fell within the scope of the executive communications privilege for three reasons: (1) the privilege was inapplicable to the requested documents because the "power of the budget is a shared power between the Mayor and the Council"; (2) the Mayor "does not formulate the budget on her own, but with the advice of the CFO"; and (3) DC FOIA entitles all persons to complete information regarding government affairs. JA 192; *see* JA 190-91. None is persuasive.

First, although both the Mayor and the Council have a role in the budget-preparation process, the court failed to recognize that the Mayor's duty under the Charter to prepare and submit an annual budget to the Council is explicit and exclusive. "[T]he Mayor shall prepare and submit to the Council each year, and make available to the public, an annual budget for the District of Columbia government." D.C. Code § 1-204.42(a). Requiring disclosure of agencies' initial budget requests to the Mayor, which include policy recommendations and advice, would undermine the Mayor's Charter-authorized discretion to determine what information to include in her proposed budget. JA 172-73 ¶¶ 6-7, 177 ¶ 11. The

court below believed that the Mayor's duty to prepare a budget is subordinate to the Council's authority because the Charter requires the Mayor to submit her annual budget submission "[a]t such time as the Council may direct." JA 190 (quoting D.C. Code § 1-204.42(a). But the Charter exclusively gives the Mayor—not the Council—discretion over what information to include in her annual budget submission, and that exclusive authority is untouched by the Council's authority to direct the timing of the submission. D.C. Code § 1-204.42(a)(1). Other than its authority over the timing of the Mayor's submission, the Charter grants the Council the power to adopt an annual budget, *id.* § 1-204.46, to request a supplemental or deficiency budget recommendation, *id.* § 1-204.42(d), and to identify, in its final budget, issues that the Mayor needs to address in the following year's budget, *id.* § 1-204.42(a)(6). But none of those provisions limit the Mayor's exclusive authority to decide what budget to submit to the Council in the first place. "The separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *In re Sealed Case*, 121 F.3d 729, 751 (D.C. Cir. 1997) (internal quotation marks omitted).[6]

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[6] In the federal system, the responsibility for submitting and approving a budget is similarly divided between the President and Congress. *See* 31 U.S.C. § 1105(a) (requiring the President to "submit a budget" proposal to Congress each year). And the executive communications privilege unquestionably protects documents the President solicits or views during the process of preparing the budget. *Cf. N.Y. Times*

Second, the fact that the Mayor obtains the assistance of the CFO in crafting her budget makes no difference. While the CFO assists, "under the direction of the Mayor," in the preparation of the budget "for submission by the Mayor to the Council," it is the Mayor "who has the specific responsibility for formulating budget policy." D.C. Code § 1-204.24d(26). Furthermore, the CFO has always considered "this information (agency budget requests to the Mayor's office) [to] belong[ ] to the Mayor, whose budget authority is granted by the District Charter." JA 176 ¶ 6. Thus, even though agency directors submit their budget requests and recommendations to the Office of Budget and Planning, the information is transmitted and belongs to the Mayor and is used in formulating her budget policy. JA 177 ¶¶ 9, 11. A document does not lose "its privileged status simply because it traveled up the chain of command before the [Mayor] received it." *Loving*, 550 F.3d at 40. Rather, the privilege protects not just communications directly involving the Mayor, but also "documents *solicited and received*" by her or her "immediate [] advisers." *Id.* at 37 (emphasis added).[7]

Co. v. Off. of Mgmt. & Budget, 531 F. Supp. 3d 118, 126, 129 (D.D.C. 2021) (holding that privilege applies to budget- and spending-related communications involving the President).

[7] The trial court disregarded this principle—as well as the reality of how the budgeting process works—in deeming the communications too attenuated from the Mayor's office. *See* JA 191-92. The privilege protects communications the executive solicits and receives from his advisers, including executive branch

Finally, although it is true that DC FOIA's general policy is to expand public access to the affairs of government, D.C. Code § 2-531,[8] its mandate must give way to the constitutional and Charter-related privilege that the Mayor has raised here, *see Bishop v. District of Columbia*, 411 A.2d 997, 998 (D.C. 1980) (finding the Council's imposition of a tax on nonresident professionals and personal service businesses exceeded its authority under the Home Rule Act and thus was invalid); *Wash. Home Ownership Council,* 415 A.2d at 1359 (enjoining the Council's practice of enacting successive, substantially identical emergency acts, which exceeded its authority under the Home Rule Act). The separation of powers precludes the Council from requiring, through DC FOIA's publication requirement or otherwise, disclosure of internal policy documents between the Mayor and her subordinates related to the Mayor's exclusive duty under the Charter to prepare and submit an annual budget.

For all those reasons, if this Court reaches the separation-of-powers question raised by this appeal, it should hold that the executive communications privilege prevents disclosure of the requested documents.

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agencies like those at issue here. *See, e.g.*, *Loving*, 550 F.3d at 40 (holding that document drafted within the Department of the Army and sent to the President was privileged).

[8] D.C. FOIA's policy is tempered by its provision identifying several types of matters exempted from disclosure. D.C. Code § 2-534.

III. DC FOIA Did Not Create A Cause Of Action To Enforce Its Publication Provision, And The Court Lacked Authority To Order Prospective Publication Of Documents That TPM Did Not Request.

A. DC FOIA did not create a private right of action to enforce its publication provision.

In ordering the District to "publish the documents pursuant to [D.C. Code] § 2-536," JA 197, the trial court exceeded its authority and gave effect to a provision of DC FOIA that cannot be enforced by a private litigant. Although agency decisions are presumptively reviewable by a court, that presumption falls away where the legislature has either committed the challenged action to executive discretion, or "where a statute precludes review, implicitly or explicitly." *Tucci v. District of Columbia*, 956 A.2d 684, 690 (D.C. 2008); *see Coleman v. District of Columbia*, 80 A.3d 1028, 1031 n.3 (D.C. 2013) (rebutting the presumption of reviewability "whenever the congressional intent to preclude judicial review is fairly discernable in the statutory scheme" (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984))). A statutory scheme that specifically authorizes judicial review of a certain type of government action, while not authorizing review of another, indicates an intent to preclude judicial review of the second type of action. *See, e.g.*, *United States v. Fausto*, 484 U.S. 439, 449 (1988) (finding that respondent's service category's exclusion from the provisions of the Civil Service Reform Act "establishing administrative and judicial review" "prevents respondent from seeking review"); *see generally Howard Univ. Hosp. v. D.C. Dep't of Emp. Servs.*, 952 A.2d

168, 174 (D.C. 2008) ("Where a statute, with reference to one subject, contains a given provision, the omission of such [a] provision from a similar statute concerning a related subject . . . is significant to show [that] a different intention existed." (quoting *Smith v. D.C. Dep't of Emp. Servs.*, 548 A.2d 95, 100 n.13 (D.C. 1988))).

The statutory scheme here provides a remedy if the District fails to provide documents to an individual requester; it does not authorize a private party to sue to force, let alone authorize the court to order, the publication of documents online pursuant to D.C. Code § 2-536. Under DC FOIA, upon receipt of a "request reasonably describing any public record" the District is required either to "make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor." D.C. Code § 2-532(c)(1). "Request means a single demand for any number of documents made at one time to an individual public body." *Id.* § 2-532(f)(1A). Failing to produce documents reasonably described and requested in an appropriate time is a "denial" of that "request." *Id.* § 2-532(e). A requester who, after exhausting administrative remedies, is "denied the right to *inspect* a public record" "may institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia." *Id.* § 2-537(a)(1), (2) (emphasis added). In any such lawsuit, the court may "enjoin the public body from withholding records and order the production of any records improperly withheld

from the person seeking disclosure." *Id.* § 2-537(b) (emphasis added). Thus, while the court may order production of improperly withheld documents to an individual requester, there is no similar provision that authorizes it to require documents to be published on the internet.

This interpretation accords with federal case law. In analyzing the federal FOIA's analogous reading room provision, which requires agencies to "make [certain records] available for public inspection in an electronic format[,]" 5 U.S.C. § 552(a)(2), the D.C. Circuit found that "a district court lacks authority to order an agency to make available for public inspection documents subject to the reading-room provision." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just. (CREW),* 846 F.3d 1235, 1243 (D.C. Cir. 2017). Although "it might seem strange for Congress to command agencies to currently publish or promptly publish documents, without in the same statute providing courts with power to order publication," "that is exactly what Congress intended." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996). The publication provision "is aimed at relieving the injury suffered by the individual complainant, not by the general public[,] as [i]t allows district courts to order the production of any agency records improperly withheld from the complainant, not agency records withheld from the public." *CREW*, 846 F.3d at 1243 (internal quotation marks omitted). Said another way, "[a]uthorizing a court to order an agency to make

documents available for public inspection would reach beyond section 552(a)(4)(B)'s focus on relieving the injury suffered by the individual complainant to remedy an injury suffered by the general public." *Id.*

In short, per the provision's text and analogous federal precedent, DC FOIA's publication provision is not enforceable by a private litigant, and the trial court erred in requiring, in addition to their production, publication of the documents TPM requested.

B. In any event, the court lacked authority to order prospective publication and publication of documents that TPM did not request.

Even if a private litigant could sue to enforce and the court was authorized to require the publication of documents under D.C. Code § 2-537, the trial court erred in ordering prospective publication. TPM is not entitled to prospective relief for "documents not yet in existence." *Humane Soc'y of the U.S. v. U.S. Fish & Wildlife Serv.*, 838 F. App'x 721, 731-32 (4th Cir. 2020). DC FOIA provides that the court may "order the production of any records improperly withheld," D.C. Code § 2-537(b); its disclosure requirements only "refer[] to information that already exists, not information that will be created in the future," *Humane Soc'y*, 838 F. App'x at 731. And, as explained above, even if a prospective injunction was justified, such an injunction could only impose an affirmative duty to disclose the

requested documents to TPM, not a requirement that they be prospectively published on the internet. *CREW*, 846 F.3d at 1243.

Furthermore, even if TPM was entitled to prospective relief, the court erred in ordering publication of documents that TPM did not request and has no concrete interest in receiving. In its August 20, 2021 clarifying order, the court observed that "D.C. Code § 2-536 specifically enumerates certain documents that the D.C. Council required the government to publish[,] not just the 2019 documents that [TPM] requested." JA 196. Thus, it clarified its June 23, 2021 order "that the District was required to publish the documents pursuant to § 2-536 which necessarily encompasses the documents [TPM] requested." JA 196-97. TPM, however, only requested copies of DCPS's and OSSE's preliminary budget requests for fiscal year 2019, documents that fall within the scope of only one of Section 2-536's subsections—subsection (a)(6A).

It is axiomatic that a plaintiff must demonstrate standing for "each form of relief that is sought." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). And TPM's standing to obtain directly the OSSE and DCPS budget documents it specifically requested does not confer standing to obtain prospective publication of all documents listed in D.C. Code § 2-536. TPM did not originally request prospective publication, and it has articulated no concrete injury from the absence of such publication. Moreover, the statute alone, even assuming it were

directly enforceable, cannot make up for that failure: "a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Little v. SunTrust*, 204 A.3d 1272, 1274 (D.C. 2019) (quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016)). An "abstract" and "generally available grievance"—which is all TPM could claim here—does not suffice. *Vining v. Exec. Bd. of D.C. Health Benefit Exch. Auth.*, 174 A.3d 272, 278 & n. 26 (D.C. 2017).

As such, TPM lacked standing to seek, and the court lacked authority to order, publication of all prospective documents identified in D.C. Code § 2-536. *See Prisology v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117-18 (D.C. Cir. 2017) (plaintiff lacked standing to challenge BOP's failure to post documents online because it made no request for the documents and thus suffered no particularized injury).

CONCLUSION

This Court should reverse the orders of the Superior Court.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

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

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

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected

party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

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

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

/s/ Richard S. Love
Signature

No. 21-CV-543
Case Number

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December 17, 2021
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CERTIFICATE OF SERVICE

I certify that on December 17, 2021, this brief was served through this Court's electronic filing system to:

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/s/ Richard S. Love
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