

No. 21-CV-543



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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DISTRICT OF COLUMBIA,
APPELLANT,

v.

TERRIS, PRAVLIK & MILLIAN, LLC,
APPELLEE.

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

SUPPLEMENTAL BRIEF FOR THE DISTRICT OF COLUMBIA

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On July 13, 2022, the Agency Budget Request Freedom of Information Clarification Emergency Amendment Act of 2022 (“Act”) became law.¹ On July 25, this Court granted appellee’s consent motion for supplemental briefing addressing the impact of the Act on this appeal. Appellee filed a supplemental brief on August 2. The District files this supplemental brief in response.

The Act amended two sections of the District of Columbia Freedom of Information Act, D.C. Code § 2-531 *et seq.* (“DC FOIA”). First, it added the following language to D.C. Code § 2-534, which lists exemptions from DC FOIA’s disclosure requirement:

(c)(1) Notwithstanding any other provision of law, no document or information described in section 206(a)(6A) that was created on or after December 7, 2004, shall be exempt from disclosure pursuant to subsection (a)(4) and (e) of this section [the deliberative process privilege].

Act § 1042(c-1). Section 206(a)(6A) is part of DC FOIA’s budget information publication provision, D.C. Code § 2-536.

Second, the following two new subsections were added to D.C. Code § 2-536:

(d)(1) Notwithstanding any other provision of law, no document or information described in subsection (a)(6A) of this section that was created on or after December 7, 2004, shall be exempt from disclosure pursuant to section 204(a)(4) and (e).

(2) In addition to making such document or information public information pursuant to subsection (a) of this section, a public body

¹ A copy of the Act is included in the statutory and regulatory addendum to appellee’s supplemental brief.

shall provide any document or information described in subsection (a)(6A) of this section that was created on or after December 7, 2004, to a person who has requested to inspect or copy it pursuant to section 202 [D.C. Code § 2-532, DC FOIA's right of access provision], regardless of the date on which such request may have been made.

Act § 1042(d)(1) & (2).

In short, the Act amends DC FOIA to provide that the budget information described in D.C. Code § 2-536(a)(6A) is no longer exempt from DC FOIA's disclosure requirement under the deliberative process privilege. For that reason, the District no longer presses the argument, set forth in Section I of its opening brief, that the text of DC FOIA requires neither production nor publication of the agency preliminary budget documents at issue in this case.

The District, however, continues to press the argument set forth in Section II of its opening brief (and Section II of its reply brief) that the agency preliminary budget documents requested here are protected by the executive communications privilege inherent in the constitutional separation of powers, which applies in the District of Columbia. Thus, separation of powers principles preclude the Council from requiring, through legislation, the disclosure of internal budget policy documents between the Mayor and her subordinates related to the Mayor's exclusive duty under the District Charter to prepare and submit an annual budget.

The District also continues to press its argument set forth in Section III of its opening brief (and Sections III and IV of its reply brief) that DC FOIA does not

create a cause of action to enforce its publication provision, and that the Superior Court lacked authority to order prospective publication of documents that the appellee did not request.

Respectfully submitted,

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August 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual's social-security number
 - Taxpayer-identification number
 - Driver's license or non-driver's' license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym "SS#" where the individual's social-security number would have been included;
 - (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
 - (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
 - (4) the year of the individual's birth;
 - (5) the minor's initials; and
 - (6) the last four digits of the financial-account number.
2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the 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

21-CV-543
Case Number

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CERTIFICATE OF SERVICE

I certify that on August 12, 2022, this supplemental brief was served through
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