No. 21-CV-0543

In the District of Columbia Court of Appeals

DISTRICT OF COLUMBIA,
Appellant,

v.

TERRIS, PRAVLIK & MILLIAN, LLP,
Appellee.

On Appeal from a Judgment of the
Superior Court of the District of Columbia

BRIEF FOR APPELLEE

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January 28, 2022

DISCLOSURES PURSUANT TO RULES 28(a)(2) AND 26.1

Plaintiff-Appellee Terris, Pravlik & Millian, LLP (TPM) is a nongovernmental party. Accordingly, TPM provides the following information regarding the parties, *amici*, and their counsel.

Plaintiff-Appellee TPM. TPM is a partnership and has been and continues to be represented by its partners Kathleen L. Millian, Todd A. Gluckman, and Nicholas Soares. TPM's full list of partners also includes Carolyn Smith Pravlik, Zenia Sanchez Fuentes, Patrick A. Sheldon, Alicia C. Alcorn, Michael L. Huang, and Stephanie Ann Madison.

***Amicus Curiae* Council of the District of Columbia.** The Council of the District of Columbia filed two *amicus curiae* briefs in support of TPM's filings in the Superior Court and is expected to do the same in support of TPM's appellee brief here. The Council was represented by Daniel P. Golden and Wei Guo in the Superior Court and is expected to be represented by them here as well.

***Amici Curiae* Open Government Organizations.** The DC Open Government Coalition, Public Citizen, and potentially other organizations, plan to seek consent or to move for leave to file an *amicus curiae* brief in support of TPM's appellee brief. The DC Open Government Coalition and Public Citizen are represented by Adina Rosenbaum.

Defendant-Appellant District of Columbia. The Defendant-Appellant is the District of Columbia, which was represented by Andrew Saindon, Honey Morton, and Fernando Amarillas in the Superior Court, and is represented by Richard S. Love in this appeal.

Respectfully submitted,

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INTRODUCTION

Consistent with the "public policy of the District of Columbia [] that all persons are entitled to full and complete information regarding the affairs of government" (D.C. Code § 2-531), the District amended its Freedom of Information Act ("DC FOIA") in 2004 to make certain budget-related documents "public information" and require them to be accessible to the public online. *See* D.C. Code § 2-536(a)(6A) and (b). Despite this unambiguous statutory command, Defendant-Appellant, the District of Columbia ("the District" or "the Mayor"),[1] refused to produce such documents or put them online when Plaintiff-Appellee Terris, Pravlik & Millian, LLP (TPM) requested them.

TPM appealed that refusal to the Mayor, who made no response. Then TPM filed suit in the Superior Court, which rejected the Mayor's defenses and ordered the District to produce the requested documents to TPM and to put the required documents online. Joint Appendix (JA) 178-198. The Superior Court granted the District's request to stay pending the outcome of this appeal. JA 194-195, 197.

The Mayor now asks this Court to either read the relevant terms of the Code out of existence or to conclude that the Mayor and the Council violated separation

[1] TPM often refers to the Appellant as the Mayor rather than the District in this brief because the Mayor has opposed disclosure of the requested materials while the Council of the District of Columbia filed two *amicus* briefs supporting TPM below, explaining that the materials should be available to the public.

of powers principles when they passed the law. Those arguments, as well as the Mayor's other arguments regarding standing and remedy, lack merit. The judgment of the Superior Court should be affirmed.

STATEMENT OF JURISDICTION

This appeal is from final orders of the Superior Court (JA 178-198) that disposed of all claims.

STATEMENT OF ISSUES FOR REVIEW

The Mayor's statement of issues assumes several legal conclusions with which TPM disagrees. Below is a revised list.

1. Whether the Superior Court correctly held that TPM has standing to seek the relief identified in the Complaint.

2. Whether the Superior Court correctly held that the documents at issue are public information based on D.C. Code § 2-534 and D.C. Code § 2-536(a)(6A) and (b).

3. Whether the Superior Court correctly held that the Mayor and the D.C. Council did not violate the separation of powers—or any executive communications privilege rooted therein—when they passed D.C. Code § 2-536(a)(6A).

4. Whether the Superior Court had the authority to order the District to place the required documents online.

STATEMENT OF FACTS

TPM is counsel for the plaintiff class of preschool-aged children with disabilities in *DL v. D.C.*, No. 05-1437 (D.D.C.). JA 52, para. 2. The District is subject to an injunction in that special education case. *Ibid*.; JA 80-91.

On October 18, 2019, as part of its work monitoring the District's compliance with the *DL* injunction (JA 78, para. 2), TPM served a DC FOIA request (JA 11-12) on the Executive Office of the Mayor, seeking budget-related documents. JA 52, para. 3; JA 78, para. 3. That request states, in relevant part, the following (JA 11):

> We are writing to request, pursuant to the District of Columbia Freedom of Information Act, DC Code 2-531, *et seq*., the following documents related to (a) the Office of the State Superintendent of Education ("OSSE") and (b) District of Columbia Public Schools ("DCPS") (together, the "agencies"): (1) actual copies—not summaries—of the agencies' budget requests for fiscal year 2019, including "Form B"[2]; (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.

The District asserted the deliberative process privilege and did not produce the documents to TPM or post them online. JA 54, para. 12; JA 78, para. 3. TPM appealed that decision to the Mayor, who did not issue a decision. JA 79, para. 4.

[2] Form B is a form which agencies have used to present their budget requests to the Mayor. *See* D.C. Code § 47-318.05a (requiring the Mayor to transfer to the Council "simultaneously with the proposed budget submission: (1) Actual copies, not summaries, of all agency budget enhancement requests, including the 'Form B' for all District agencies; and (2) Any similar documentation describing in detail agencies' budget needs or requests").

TPM next filed its Complaint (JA 21-49) asking the Superior Court to find that, contrary to its obligations, the District failed to produce the requested documents (Claim 1) or post them online (Claim 2). JA 28, paras. 26-27. TPM asked that Court to issue a declaratory judgment and order the District to produce the requested documents and post all required documents online. JA 28, para. 28.

The Mayor moved to dismiss and the Superior Court denied that motion. JA 58-77. On cross-motions for summary judgment, the Superior Court granted judgment for TPM, denied judgment for the District, and ordered the District to produce the requested documents and post all required documents online. JA 178-193. To address a dispute as to the meaning of that order, it then issued an order clarifying its relief and staying it pending the outcome of this appeal. JA 194-198.

STANDARD OF REVIEW

There were no material factual disputes below. All the Mayor's arguments relate to legal questions. Accordingly, TPM agrees with the Mayor that the standard of review applicable here is *de novo*.

SUMMARY OF ARGUMENTS

The findings of the Superior Court were correct. First, TPM had a right to inspect the documents at issue, it requested them, the documents were not produced or posted online, and TPM petitioned the Mayor, who did not respond. TPM more than satisfied the requirements for suit and had the right to "institute proceedings for

injunctive or declaratory relief." D.C. Code § 2-537(a)(1). The Superior Court correctly found that TPM has standing and a cause of action to litigate its claims, including its claim related to the failure to post documents online.

Second, DC FOIA explicitly makes certain budget-related documents "public information" and requires them to be posted online. D.C. Code § 2-536(a)(6A) and (b). The Mayor refused to produce or post those documents, claiming that they are protected by the deliberative process privilege. The Superior Court correctly rejected that argument, consistent with the plain language of the D.C. Code.

Third, the Superior Court correctly rejected the Mayor's contention that D.C. Code § 2-536(a)(6A) ("paragraph 6A") violates the separation of powers or any executive privilege inherent therein. The separation of powers does not require this Court to establish, for the first time, an executive communications privilege in the District and doing so as the Mayor proposes would impermissibly interfere with the Council's own authority. Paragraph 6A is a valid exercise of the Council's legislative authority and abrogated any privilege that the Mayor could have claimed. Further, the information sought is not of the type protected by such a privilege.

Fourth, in addition to broad equitable powers, the Superior Court has the power under DC FOIA to "enjoin the public body from withholding records." D.C. Code § 2-537(b). That provision is ample authority for the Superior Court to order the District to comply with its own law by posting documents online.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT TPM HAS STANDING TO BRING ALL OF ITS CLAIMS

A. There is No Dispute that TPM Has Standing to Litigate its Claim for Failure to Produce the Requested Documents

Whenever a FOIA request is denied, the requestor has standing to sue. *See*, *e.g.*, *Grayson v. AT & T Corp.*, 15 A.3d 219, 231 n.24 (D.C. 2011). Accordingly, it is undisputed that TPM has standing with regard to its first claim, which relates to the failure to produce the requested documents. *See* JA 183.

B. The Superior Court Correctly Concluded that TPM has Standing to Litigate its Claim for the Failure to Post the Requested Documents Online

1. <u>The District Can Be Sued for Failing to Post Required Documents Online</u>

D.C. Code § 2-536(a)(6A) and (b) require the District to post certain budget-related documents online. Despite that, the Mayor argues that no plaintiff has the right to sue to enforce that obligation. *See* Brief for the District of Columbia ("Def. Br."), pp. 35-38. Her argument disregards the statutory text conveying that right:

- "Any person has a right to inspect, and at his or her discretion, to copy any [non-exempt] public record . . . ." D.C. Code § 2-532(a).
- "[A]ny person denied the right to inspect a public record of a public body may petition the Mayor . . . ." D.C. Code § 2-537(a).
- "If the Mayor denies the petition or does not make a [timely] determination . . . the person seeking disclosure may institute proceedings for injunctive or declaratory relief" in the Superior Court. D.C. Code § 2-537(a)(1).

- The Superior Court "may enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure." D.C. Code § 2-537(b).

TPM had a right to inspect the documents, was deprived of that right when it could not locate the documents online, and it petitioned the Mayor, who did not respond. *See* p. 3 above. TPM therefore had a right to sue.

The Mayor disagrees, contending that because DC FOIA obligates the District to produce documents in response to "requests," and no "request" needs to be made for documents that are required to be posted online, no plaintiff may sue when the District fails to post required documents online. Def. Br. 36-37. However, DC FOIA does not condition suit on a "request" or prohibit a challenge to the failure to post documents online. As the Superior Court explained (JA 185-186):

> D.C. Code § 2-537 explicitly mentions the denial of the *right* to inspect a public record, not the denial of the request. If a person is denied the *right* to inspect a public record, that person has the right to petition the Mayor, D.C. Code § 2-537(a), and if the Mayor denies or fails to respond within ten (10) business days, the "person seeking disclosure may institute proceedings for injunctive or declaratory relief." D.C. Code § 2-537(a)(1). [emphases in original]

In light of the plain provisions of D.C. Code § 2-537 permitting suit, TPM had the right to sue and the Mayor's contrary argument must be rejected. *See Coleman v.*

D.C., 80 A.3d 1028, 1031 & n.3 (D.C. 2013) (describing "strong presumption" of reviewability and the high burden necessary to rebut it).[3]

The Mayor contends (Def. Br. 37) that her argument is bolstered by *Citizens for Responsibility and Ethics in Washington v. U.S. DOJ*, 846 F.3d 1235, 1240 (D.C. Cir. 2017) ("*CREW I*"). However, that decision explicitly states the contrary (*ibid.*): "Equally certain under our case law [related to federal FOIA], a plaintiff may bring an action under FOIA to enforce the reading-room provision [the requirement to post online], and may do so without first making a request for specific records . . . ."[4]

Regardless, after TPM could not locate the documents online, it submitted a request for them and informed the District that the documents were required to be publicly available without a request. JA 11 n.1 (quoting paragraph 6A); *see also* JA 196. Therefore, even if a request was required, TPM made one.

2. TPM Has Standing to Sue the District for Failing to Post the Required Documents Online

Plaintiffs have standing because "[t]heir inability to inspect documents in virtual reading rooms harmed them in real-world ways; their injuries are different

[3] The Mayor italicizes the word "inspect" in DC FOIA provisions, seemingly to suggest that a person could only "inspect" a document produced in response to a FOIA request, rather than a document that was placed online. Def. Br. 13, 36. However, a person is equally "denied the right to inspect a public record" (D.C. Code § 2-537(a)) if the District fails to place it online as required. *See also* § 2-537(c) (distinguishing "inspect[ing]" from "receiv[ing]" records).

[4] The analysis in *CREW I* of the remedy for such suits is addressed in Section IV.

from the injuries sustained by other Americans who never regularly visited these online reading rooms." *Animal Legal Def. Fund v. USDA*, 935 F.3d 858, 869 (9th Cir. 2019) ("*ALDF*"); *see also New York Legal Assistance Group v. Bd. of Immigration Appeals*, 987 F.3d 207, 216 n.18 (2d Cir. 2021) ("*NYLAG*") (standing where "the agency's failure to make unpublished [] decisions publicly available impairs [the plaintiff's] ability to represent clients in immigration proceedings" (cleaned up)); *Campaign for Accountability v. U.S. DOJ*, 278 F. Supp. 3d 303, 318 (D.D.C. 2017) (standing to challenge failure to post documents online where plaintiff requested that the agency do so). By contrast, a plaintiff cannot sue if the plaintiff does not identify any injury to itself. *Prisology v. Federal Bureau of Prisons*, 852 F.3d 1114, 1116-1118 (D.C. Cir. 2017) (no standing to challenge failure to post documents online because plaintiff made no request for the documents and did not allege any injury that would differentiate it from the public at large).

TPM searched for, failed to find, and requested the budget-related documents as part of its monitoring role for *DL* and informed the District that they must be publicly available online. JA 78, para. 2; JA 11-12; JA 23-24, paras. 7, 10; JA 53-54, paras. 7, 10; JA 32-33. TPM also called the relevant FOIA office (JA 23, para. 9), was told to expect a call back but received none (*ibid.*), and appealed the ultimate refusal to the Mayor (JA 30-36) but never received a decision (JA 79, para. 4).

Contrary to the Mayor's arguments (Def. Br. 39-40), TPM did more than enough to establish standing as to its claim related to the failure to post the documents online.

The Mayor contends that TPM only has an abstract, generalized grievance and lacks a concrete injury. Def. Br. 39-40. To the contrary, it is undisputed that TPM searched for the documents online and that "TPM's interest in updated versions of such documents has repeated and will repeat on an annual basis because the *DL* injunction is ongoing." JA 78, para. 2. Thus, the Superior Court correctly concluded that TPM has standing to litigate its second claim related to the failure to post documents online in violation of DC FOIA. JA 184-186.

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE DISTRICT VIOLATED DC FOIA BY FAILING TO PRODUCE THE REQUESTED DOCUMENTS AND POST THEM ONLINE

A. The D.C. Code Makes the Requested Information Public

The Mayor agrees that it is the public policy of the District "that all persons are entitled to full and complete information" about their government and that all of DC FOIA's provisions are to 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; *see* Def. Br. 2-3.

This Court has explained that this is a "strong policy of disclosure" where "the provisions . . . 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." *Fraternal Order of Police v. D.C.*, 79 A.3d 347, 354 (D.C. 2013) (quotation omitted).

D.C. Code § 2-532(a) states that "[a]ny person has a right to inspect, and . . . copy any public record of a public body, except as otherwise expressly provided by § 2-534 . . . ." Section 2-534 states that the following matters "may be exempt from disclosure" and includes in that list documents covered by the deliberative process privilege. *See* D.C. Code § 2-534(a)(4) & (e). Section 2-534(c) states: "This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law." Taking account of the double negative, D.C. Code § 2-534(c) means that the exemptions to mandatory disclosure spelled out in D.C. Code § 2-534 shall not be used to prevent disclosure if "disclosure is authorized or mandated by other law."

D.C. Code § 2-536 ("Information which must be made public") lists information that must be made public and placed online. Subsection (a) begins:

> Without limiting the meaning of other sections of this subchapter, the following categories of information are specifically made public information, and do not require a written request for information . . . .

Following that is a list of twelve "categories of information [that] are specifically made public information." That list includes the budget-related documents at issue, which are found in paragraph 6A (Section 2-536(a)(6A)):

> Budget 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, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions[.]

D.C. Code § 2-536(b) underscores the fact that making these materials public is a mandatory obligation. It states that "each public body shall make records available on the Internet" and that it "is intended to apply only to information that must be made public pursuant to this subsection" (emphases added).

Paragraph 6A was added to the Code in 2004. The rationale for it was described in the amendment to Bill 15-768 through which it became law (JA 92-95):

> Members of the public and advocacy groups have stated that it is very difficult to participate in the budget process because of the lack of sufficient information. They have further stated that their requests for documents and reports that are a key part of budget analysis and deliberations – baseline budget submissions and appeals, regular financial status reports, and the like – are often not fulfilled on a timely basis. This amendment would expand public access to key budget documents so that residents can participate more fully in the budget dialogue, and would promote accountability by making the financial operations of the District government more transparent.

Thus, paragraph 6A was added to DC FOIA to allow public access to the exact type of budget documents that TPM requested (JA 11).

In 2014, the District underscored its commitment to open government and described steps that it would take to increase transparency. The Office of the Mayor issued Mayor's Order 2014-170 (JA 96-103), which states the following (JA 96, 98):

> The District . . . is committed to creating an unprecedented level of openness in government. . . .
>
> The District has been a leader in government transparency and open data policy in the United States. In 2001, the Freedom of Information Act was amended to require that certain public records be published online. Since 2006, the District has been making data publicly available on the Internet. . . .
>
> . . . Each agency shall be responsible for ensuring that the information required to be published online is accessible from the agency's . . . webpage. The required information shall include, but is not limited to, where applicable: . . . The information required to be made public under this Directive and D.C. Official Code § 2-536 [that is where paragraph 6A appears], including links to: . . . G. Budget Information . . . . [emphases added]

To summarize: (1) D.C. Code § 2-531 (and subsequent statements by the Office of the Mayor) explain that DC FOIA is to be "construed with the view toward expansion of public access"; (2) D.C. Code § 2-534 states that the District may invoke several privileges, including the deliberative process privilege, but in no case may the District hold back materials otherwise authorized or mandated for release by "other law"; and (3) Paragraph 6A of D.C. Code § 2-536 explicitly mandates and authorizes that, "[w]ithout limiting the meaning of other sections of this subchapter," a variety of materials, including the requested materials, are "public information."

"Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language, structure, and subject matter." *Padou v. D.C.*, 29 A.3d 973, 980 (D.C. 2011) (cleaned up). The Superior Court held (JA 188-189) that a fair and holistic reading of these provisions, consistent with the broad

disclosure mandate in the law (*see* pp. 10-11 above), is that paragraph 6A is an "other law" and that the documents explicitly made public in paragraph 6A cannot be withheld on a deliberative process claim.

The Mayor contends (1) that this interpretation makes the deliberative process and other Section 2-534 exemptions "meaningless," and (2) that the proper way to interpret DC FOIA is to read the deliberative process privilege under Section 2-534 as preventing the disclosure of the vast majority of documents explicitly made public under paragraph 6A. Def. Br. 18-19. Neither point has merit. Another provision of Section 2-536(a) provides a simple demonstration of this fact.

Paragraph 2 (Section 2-536(a)(2) and (b)) states that "Administrative staff manuals" are public information that must be available online without the need for a written request. If an individual requested a draft staff manual under DC FOIA, the District would likely argue that it is protected by the deliberative process privilege under Section 2-534 and that the requirement to place "staff manuals" online under Section 2-536 does not change that fact. The provisions work together. Section 2-536(a)(2) requires disclosure of staff manuals. Section 2-534(a)(4) would protect drafts if they fall within the deliberative process privilege.

Likewise, draft versions of the documents made public by paragraph 6A may be protected by the deliberative process privilege. But the Mayor's claim that the deliberative process privilege allows it to withhold the very budget documents made

public in paragraph 6A would render paragraph 6A a nullity. Statutes must be construed to give effect to their terms and cannot be read to render any provision a nullity. *See Atiba v. Washington Hosp. Ctr.*, 43 A.3d 940, 941-942 (D.C. 2012) (rejecting an interpretation of the D.C. Code that would have made another provision "inoperable upon promulgation"). This does not mean that the deliberative process privilege is meaningless. It just means that it cannot restrict access to the very documents specifically made public by paragraph 6A. *Cf. Brennan Ctr. for Justice v. U.S. DOJ*, 697 F.3d 184, 195 (2d Cir. 2012) ("[T]he document claimed to be exempt will be found outside [of the deliberative process exemption] if it closely resembles that which FOIA affirmatively requires to be disclosed.").[5]

The Mayor argues that if the Council intended "other law" (D.C. Code 2-534(c)) to include reference to a part of DC FOIA itself (here, paragraph 6A), it would have used language such as "provisions" or "sections" "of this subchapter." Def. Br. 18. However, the language that the Mayor suggests would not encompass both (1) parts of DC FOIA and (2) statutes outside of DC FOIA. The term "other law" does, as the Superior Court explained. JA 188.

Even assuming, *arguendo,* that "other law" was intended to refer only to a law

[5] Even if this Court found a conflict between Section 2-534 and paragraph 6A, the more specific provision (paragraph 6A), which addresses the specific documents at issue, controls. *See In re G.K.*, 993 A.2d 558, 567 (D.C. 2010).

outside of DC FOIA as the Mayor contends (Def. Br. 17-19), that would not end the inquiry. This Court must still give effect to paragraph 6A since it should not interpret a statute in a manner that would render it, or substantial portions of it, a nullity. However, that would be the result if this Court accepted the Mayor's argument.

The Mayor argues that paragraph 6A has effect even under her interpretation because several pieces of information that may be incorporated in the budget-related documents listed in paragraph 6A are not protected by the deliberative process privilege (Def. Br. 19), such as "a list of [the agency's] 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." This cramped view of the public information required under paragraph 6A is erroneous. Paragraph 6A makes the entire agency budget submissions and related documents public—it does not state that just some facts and information from the budget submission are public.[6]

The Superior Court explained (JA 188-189):

> [T]he Court is hesitant to accept that the Council would draft conflicting statutes, and withholding such documents, that are expressly

[6] In addition, some of the items the Mayor contends are made public by the addition of paragraph 6A in 2004 were already made public by other provisions. D.C. Code § 2-536(a)(1) already made public (as of 1977) "[t]he names, salaries, title, and dates of employment of all" public employees and D.C. Code § 1-204.42 already made public (as of 1973) the Mayor's final proposed budget. This Court should not read paragraph 6A as superfluous.

> enumerated to be public, would be contrary to the intent of the Council. Amicus [Statement of the Council, April 23, 2021] at 3. The documents that the District states are pre-decisional and deliberative are listed in 6(A) as documents that need to be produced and published. *See* D.C. Code § 2-536(a)(6A). *See also*, Amicus at 3 (Council added paragraph (6A) to D.C. Code § 2-536(a) specifically to ensure that members of the public have access to 'documents and reports that are key part[s] of budget analysis and deliberations…to ensure that 'residents can participate more fully in the budget dialogue' and to 'promote accountability by making the financial operations of the District government more transparent.'").

The Superior Court referred in the passage above to an *amicus* brief submitted by the Council. The Mayor argues that it was "hazardous" for the Court to rely upon the current Council for the opinions of the former Council. Def. Br. 20. However, the statements upon which the Superior Court relied were based on the legislative history of the Council that passed paragraph 6A into law. JA 92-95. Moreover, where, as here, the Council's position has remained consistent and comports with the plain language of the statute and the legislative history from its passage, it is entitled to "considerable weight." *Cf. Hargrove v. D.C.*, 5 A.3d 632, 637-638 (D.C. 2010) (Council's view entitled to "considerable weight" where it has been consistent, there is no inconsistent legislative history, it comports with the views of other government agencies, and it comports with the plain meaning of the statute).

B. This Court's Analyses of Similar Issues in Other Cases Further Support Disclosure

In *Kane v. D.C.*, 180 A.3d 1073, 1082-1084 (D.C. 2018), upon which the Mayor relies (Def. Br. 17), this Court addressed a similar dispute. It concerned

whether the Council abrogated the deliberative process privilege as to Advisory Neighborhood Commission (ANC) documents under an analogous section of the D.C. Code, which states (*id*. at 1082 (quoting D.C. Code § 1-309.11(g)):

> Without limiting the scope of that section [i.e., the Sunshine Act § 1-207.42(a)], the following categories of information are specifically made available to the public: . . . *All documents not related to personnel and legal matters*. [emphasis and bracketed material in original]

This Court explained that, when the D.C. Code explicitly made "all [ANC] documents not related to personnel and legal matters" public, some of those documents could still be withheld if they are protected by the deliberative process privilege. *Kane*, 180 A.3d at 1082-1083. The deliberative process privilege was integrated into that ANC statute by reference—the excluded documents "related to personnel and legal matters" were intended to encompass documents subject to the deliberative process privilege. *Ibid*.

The statute at issue in *Kane* could be construed together with the deliberative process privilege to give both effect as to the documents at issue. Accordingly, in *Kane*, although many documents were protected, "several thousand pages" of documents were produced. *Id*. at 1076-1077. Here, in contrast, the Mayor withheld everything despite all of it being deemed "public information."

In *Kane*, this Court explained that "nothing in the legislative history . . . suggests that the Council meant . . . to limit" the deliberative process privilege. *Kane*, 180 A.3d at 1083. The Mayor argues the same here. Def. Br. 19-20.

However, the legislative history (see p. 12 above) shows that the precise documents that TPM requested were made public in a specifically-worded statute to "expand public access to key budget documents" and "promote accountability by making the financial operations of the District government more transparent." JA 95.

Moreover, in *Kane*, 180 A.3d at 1083, the Court noted that the "Council confirmed [the Court's] understanding" of the statute when it modified the law to make explicit that the deliberative process privilege protects the relevant documents. Here, in contrast, the Council filed two *amicus* briefs below directing the Court to the legislative history that underscores that the documents are public.

In *Office of People's Counsel v. Pub. Serv. Comm'n*, 955 A.2d 169 (D.C. 2008) (Def. Br. 16-17), this Court concluded that, although D.C. Code § 2-536(a)(5) & (6) made "public" categories of information related to the actions of public bodies and their contracts, the revenue figures of utility companies could be redacted from those documents if they would reveal confidential business information. 955 A.2d at 175-177. In that context, the Court explained (*id.* at 176):

> We have some doubt about . . . whether public-utility jurisdictional revenue data fall within the scope of information described in D.C. Code 2–536 §§ (a)(5) or (a)(6). [footnote omitted] However, even if the revenue data do fall within the scope of one or both of these provisions, we agree with the Commission's reasoning that section 2–536(a) does not mandate disclosure of data that satisfy the requirements of D.C. Code 2–534(a). We base this conclusion 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." We construe 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.

Contrary to the Mayor's contention (Def. Br. 16), the Superior Court's decision here does not contravene this or other precedent.

As a preliminary matter, the information sought in *Office of People's Counsel* was qualitatively different than the information sought here. There, the government sought only to withhold confidential business information that belonged to third parties. 955 A.2d at 175. Here, the Mayor contends that she can withhold the very budget-related information created by District agencies and made public by paragraph 6A.

Moreover, as in *Kane*, the disclosure provisions at issue in *Office of People's Counsel* were phrased generally—"[c]orrespondence and materials . . . relating to any" decision, or request for decision, regarding "regulatory, supervisory, or enforcement responsibilities" of a public body and "[i]nformation . . . taken from any account voucher or contract dealing with the receipt or expenditure" of funds by a public body. *Office of People's Counsel*, 955 A.2d at 176 (quoting D.C. Code §§ 2-536(a)(5) and (6)). There, the statutory directive making public the general categories of documents could be construed in harmony with the exemption for confidential business information to give effect to both statutory provisions. Here, by contrast, the Mayor's reading would read paragraph 6A out of the statute by

permitting her to withhold the specific documents the provision makes public.[7]

As explained above (p. 14), draft versions of the documents made public by paragraph 6A may be protected by the deliberative process privilege, just as confidential business information could be protected in *Office of People's Counsel*. But the Mayor's claim that the deliberative process privilege, read together with the introductory phrase to Section 2-536(a), allows her to withhold the very budget documents made public in paragraph 6A would render paragraph 6A a nullity. This Court's decision in *Office of People's Counsel* does not support such a reading of the statutory provisions. There is no way to turn documents explicitly made "public information" into protected information. The Superior Court agreed. There was no legal error.

III. THE SUPERIOR COURT CORRECTLY REJECTED THE MAYOR'S SEPARATION OF POWERS DEFENSE

The Mayor urges this Court to invalidate paragraph 6A on the grounds that this provision—passed by the Council and signed by the then-Mayor—violates the separation of powers by intruding on an executive communications privilege that, as the Superior Court correctly noted (JA 70, 191), has never been recognized in the

[7] In *Office of People's Counsel*, a regulation specifically made the information exempt from disclosure absent a contrary decision by the Public Service Commission. *See* 955 A.2d at 176-177; *id.* at 177-178 (deferring to the "regulation deeming the information confidential" "at least where . . . it is not manifest that the information . . . is 'public information'"). That is the inverse of this case, where paragraph 6A specifically makes the information public.

District. *See* Def. Br. 22-34. This Court need not grapple with the weighty question of whether to establish such a privilege because, even if an executive communications privilege existed in the District, the Mayor could not invoke it here because the Council, in a proper exercise of its legislative authority, made "public" the information the Mayor seeks to withhold. Moreover, the information sought here would not be protected under any such privilege. The Superior Court correctly rejected the Mayor's arguments.

A. There has Never Been an Executive Communications Privilege in the District and the Mayor Fails to Justify its Creation

No executive communications privilege has ever been recognized in the District. JA 70, 191. Indeed, prior to this case, the Superior Court has explicitly refused to recognize such a privilege when it was asserted by the Mayor. *Nichols v. Fenty*, No. 2009 CA 006292 2 (JA 143-159), at 11 (JA 153) (D.C. Super. Ct. Oct. 30, 2009), *appeal voluntarily withdrawn* No. 09-cv-1247 (D.C.) (rejecting the argument that "inherent in the creation of the three branches of the D.C. government lay an executive privilege akin to that in the federal courts"). The Superior Court correctly reached the same conclusion in this case. JA 70, 191.

As in *Nichols*, the Mayor here contends that an executive communication

privilege is "inherent in the constitutional separation of powers." *E.g.*, Def. Br. 22.[8] As support, she cites cases demonstrating that the federal courts and courts of other states have recognized such a privilege arising out of their respective constitutions.[9] However, the Mayor provides no reasoning or analysis that explains why this Court should formulate and establish such a privilege in the District. Given the District's unique constitutional structure and position, this is a notable lapse. In *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections and Ethics*, 441 A.2d 889, 897 n.15 (D.C. 1981), this Court, sitting en banc, explained the need for "careful focus" in light of the District's "constitutionally unique" governmental structure, and the need to "be cautious, in drawing on precedent from other jurisdictions, to test it against our own special context" (citations omitted).

[8] The Mayor claims that the "executive communications privilege is also an inherent part of D.C. Code § 2-534(4)'s exemption" because federal caselaw examining federal FOIA exemption 5 has so held. Def. Br. 22 n.4. It is undisputed that there exists an executive communications privilege at the federal level and so it may be incorporated by federal law. However, no such privilege has ever been established in the District, so it could not be an inherent part of the District's exemptions.

[9] Although the Mayor states that "[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" (Def. Br. 27 (quoting *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1259 (Wash. 2013)), that is not the case. Like the Superior Court here, Massachusetts' highest court rejected the conclusion "that executive privilege inheres in or is a necessary ramification of the doctrine of separation of powers . . . ." *Babets v. Sec'y of Exec. Off. of Hum. Services*, 526 N.E.2d 1261, 1263 (Mass. 1988).

The Mayor fails to demonstrate why the District specifically requires an executive communications privilege, providing only her bare assertion that it must be so. *See* Def. Br. 28 ("Like the President and state governors, the District's Mayor too requires the protection of executive privilege."). This Court should be wary about too lightly creating such a privilege, particularly when the privilege is being pressed to invalidate a duly enacted statutory provision. *Cf. U.S. v. Nixon*, 418 U.S. 683, 710 (1974) (privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth") (footnote omitted).

However, because the Mayor could not here successfully invoke any executive communications privilege to justify her noncompliance with DC FOIA, even if such a privilege existed in the District, this Court need not decide that issue.

B. Even if this Court Recognized an Executive Communication Privilege, the Mayor May Not Invoke It Here Because the Council Made the Information Public through a Valid Exercise of Its Authority

1. Paragraph 6A, Which Made the Information Public, Was a Valid Exercise of the Council's Legislative Authority

As the legislative body for the District, the Council may create, restrict, or abolish any common law or statutory privileges. *See, e.g.*, *Johnson v. U.S.*, 616 A.2d 1216, 1222-1223 (D.C. 1992) (discussing how legislatures have altered the common law marital privilege). This is true even where the Council's action involves the Mayor. *See Francis v. Recycling Sol., Inc.*, 695 A.2d 63, 73 (D.C. 1997), *on reh'g in part* (June 9, 1997) ("[J]ust as the executive power is vested in the Mayor, the

legislative power . . . is vested in the Council. The Council accordingly may enact legislation that restricts the actions of the Mayor.") (citations omitted).

Thus, so long as paragraph 6A represents a valid exercise of the Council's legislative authority, the Mayor cannot refuse to comply with it. Perhaps recognizing this, the Mayor urges this Court to find that paragraph 6A violates the separation of powers in the District Charter. *See, e.g.*, Def. Br. 34. This attempt to nullify a duly enacted statute intended to shine sunlight on the operations of the District government lacks merit.[10]

Separation of powers "is concerned with the allocation of official power among the three branches of government, and is designed to preclude encroachment or aggrandizement of one branch of government at the expense of the other." *D.C. v. Fitzgerald*, 953 A.2d 288, 298 (D.C. 2008), *amended on denial of reh'g*, 964 A.2d 1281 (D.C. 2009) (cleaned up). The doctrine does not require "three airtight

[10] While not dispositive, it is worthwhile to note that Congress did not disapprove of paragraph 6A (or of D.C. Code § 47-318.05a, which requires the Mayor to transfer the same documents to the Council) when presented after enactment. *Cf. Am. Bus. Ass'n v. D.C.*, 2 A.3d 203, 213 n.19 (D.C. 2010) (where Congress can authorize a state burden on interstate commerce, "it may fairly be asked whether, as a matter of law . . . —Council-passed legislation that Congress did not disapprove—could actually violate the dormant Commerce Clause"). *See Council of D.C. v. DeWitt*, No. 2014 CA 2371 B (JA 104-142), at 22 (JA 125) (D.C. Super. Ct. March 18, 2016) (in upholding the District's "Budget Autonomy Act, it is of profound significance that Congress *did not exercise its ultimate authority of veto*") (emphasis in original; citation omitted).

departments of government." *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 443 (1977) (citation omitted). Rather, "our constitutional system imposes upon the Branches [of Government] a degree of overlapping responsibility, a duty of interdependence as well as independence." *Brawner v. U.S.*, 745 A.2d 354, 357-358 (D.C. 2000) (quotation omitted).

This Court has stated that separation of powers is only violated where one branch of government "impermissibly burden[s] or unduly interfere[s] with" another branch's "authority to exercise its core functions." *See Bergman v. D.C.*, 986 A.2d 1208, 1230 (D.C. 2010); *Fitzgerald*, 953 A.2d at 298 (separation of powers violated "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department" or where a branch undermines "the authority and independence of" another) (emphases in original; quotation omitted).

The Mayor fails to show that paragraph 6A impermissibly burdens or unduly interferes with her authority to exercise her "core functions" or that it allows her "whole power" to be exercised by another branch. The only duty the Mayor identifies as being at issue here is the Mayor's duty to submit a proposed budget to the Council.[11] However, even if the obligation to submit a proposed budget may be

[11] Although the Mayor cites several cases to suggest that she has broad authority over the budget process, those cases dealt with the Mayor's control over spending funds already appropriated, not with the process of determining what funds to appropriate in the first instance. *See, e.g.*, Def. Br. 21 (citing *D.C. v. Sierra Club*,

considered a "core function" of the Mayor, the Mayor does not and cannot show that the disclosure required by paragraph 6A impermissibly burdens or unduly interferes with her ability to submit the proposed budget of her choosing nor that it allows the Council to exercise that ability.[12] The Mayor remains free to submit the budget proposal of her choosing.

The Mayor bases her separation of powers argument—and hence her executive communications privilege argument—on the purported chilling effect of disclosure. *See, e.g.*, Def. Br. 24, 29-30. Couching her argument in generalities, the Mayor provides no analysis of why the disclosure of the particular information at issue would have any chilling effect, nor of the expected degree or impact of the alleged chill. Although courts recognize the potential for a chilling effect, this Court should reject "the proposition that some unspecified chilling effect alone would constitute sufficient undue interference to create a separation of powers violation," particularly where the alternative is invalidating a statutory provision. *See Texas Comm'n on Envtl. Quality v. Abbot*, 311 S.W.3d 663, 675 (Tex. App. 2010)).

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670 A.2d 354 (D.C. 1996)); Def. Br. 23 (citing *Potomac Development Corp. v. D.C.*, 28 A.3d 531 (D.C. 2011)).

[12] Indeed, even the cases the Mayor cites recognize that the Council may legislate in the area of the Mayor's Charter-assigned (D.C. Code § 1-204.48(a)) power over "the administration of the financial affairs of the District." *See Sierra Club*, 670 A.2d at 365 (with regard to "'core' executive functions," the Court "should 'accede to a request for judicial intrusion' only if it is 'plain' that the Council intended to restrict the Mayor's authority in this regard.") (quotation omitted).

The Mayor relies upon the declaration of Budget Director Jennifer Reed as factual support for her argument. *See* Def. Br. 29 (citing JA 174, para. 11). Ms. Reed's statement, which is unsupported by any evidence or reasoning (*see* JA 174, para. 11), undoubtedly represents her opinion, as an executive branch employee, of what constitutes good policy. However, the policy of the District, as embodied in its statutes, is that the public interest is best served by the release of these materials, and Ms. Reed's policy preferences do not and cannot alter that. The Mayor does not provide any detail as to how revealing an agency's views on its budgetary needs would chill candid advice. There is no reason to think that it would do so here. *See* JA 191 (rejecting the Mayor's chilling argument). *Cf. Sanchez v. Johnson*, No. 00-1593, 2001 WL 1870308, at *7 (N.D. Cal. Nov. 19, 2001) (noting in the context of a discovery request for budget documents that "[a]though Defendants assert that any disclosure whatsoever of these documents would lead to a 'chilling effect' on the behind-the-scenes discussion concerning the Governor's annual budget, they fail to explain why 32 states make agency budget requests part of the public record, apparently without any 'chilling effect.'").

In any event, even were Ms. Reed correct regarding the wisdom of paragraph 6A, the policy question was decided when the Council passed and the Mayor signed

the provision into law.[13] If the current Mayor is unhappy with the transparency imposed by the law, the proper course of action is for her to propose legislation to remove that transparency; the Mayor may not simply disregard the law as she has done so far. A dispute between the political branches about which is the wisest policy for the District is not a basis for this Court to invalidate or vitiate a duly enacted statute. *See Hornstein v. Barry*, 560 A.2d 530, 533 (D.C. 1989) (en banc) ("'[J]udicial intervention is generally unwarranted no matter how unwisely we may think that a political branch has acted.'") (citations omitted).

2. The Mayor's Theory Improperly Impinges on the Council's Charter-Assigned Authority

As the Superior Court recognized, the District's budget is developed through collaboration between the Mayor and the Council. JA 190. The Mayor's separation of powers theory improperly interferes with the Council's authority and responsibility to enact an appropriate budget for the District and further interferes with other facets of the Council's Charter-assigned authority.

The Charter directs that at "such time as the Council may direct, the Mayor shall prepare and submit to the Council each year, and make available to the public,

[13] In fact, the District's Mayor has at least twice signed without objection legislation that explicitly makes this material public, first in 2004 when paragraph 6A was enacted and again in 2008 when D.C. Code § 47-318.05a—which obligates the Mayor to produce the same materials to the Council and which does not provide for any exemptions—was enacted.

an annual budget . . . ." D.C. Code § 1-204.42(a). After receiving the Mayor's proposed budget, the Council—after conducting its own investigation and analysis of the financial needs of the District—adopts a final budget. D.C. Code § 1-204.46(a). The Council is free to accept, modify, or reject in its entirety the proposal made by the Mayor. *See ibid*. It is the Council, as the legislative body for the District (D.C. Code § 1-204.04(a)), that has ultimate authority within the District to establish the budget. As this Court has explained, "the allocation of the District's financial resources is a 'core legislative function.'" *Washington, D.C. Ass'n of Realtors v. D.C.*, 44 A.3d 299, 305 (D.C. 2012)); *see* JA 190 (quoting same).

To formulate a budget that is adequate and proper for the District, the Council requires full and complete information about the District's finances and needs. The Charter explicitly grants the Council the "power to investigate any matter relating to the affairs of the District . . . ." D.C. Code § 1-204.13(a). The views of individual agencies on the funds needed to carry out their missions—the type of information that TPM sought here—are relevant and important. According to the D.C. Council, "it is difficult to imagine a more helpful source of information for the Council in the discharge of its Charter-assigned functions (a process that necessarily involves the Council's independent assessment of agency budgetary needs), than the agencies' own budget requests." Council's *Amicus* Brief, dated October 30, 2020, p. 8.

The Mayor's argument represents an attempt to leverage her specific and

narrow duty to submit a proposed budget to the Council to allow her to control access to a broad swath of the budget-related information of the District's agencies.[14] Allowing the Mayor to control the agency budget information available to the public and the Council would limit the opportunity for the public to participate in the budget process, and would afford the Mayor undue influence over the Council's decision-making process and increase her power over the budget relative to that of the Council in a manner inconsistent with the Charter. Although the Mayor is required to propose a budget, it is the Council that is obligated to formulate and pass an appropriate final budget. If information regarding the agencies' views on the budget they require to carry out their assigned functions is important to the process of formulating an appropriate budget, then the Council's need for and entitlement to it is at least as great as the Mayor's. Neither the Mayor's responsibility to submit a proposed budget—nor any other provision of the Charter—gives her the right to prevent the Council from receiving important information about the financial needs of the District's agencies. *See also* JA 190 ("the Court does not believe that the

[14] Although it is TPM's access to the information that is directly at issue in this case, the Mayor's argument, rooted as it is in the separation of powers, extends beyond DC FOIA. If the Council lacks the power under the Charter to order the release of these documents under DC FOIA, that calls into question its authority to obtain the documents for itself. *See, e.g.*, D.C. Code § 47-318.05a (mandating that the Mayor and Chief Financial Officer submit the same information to the Council). *See also* JA 173, paras. 9-10 (indicating that the Mayor will claim privilege over this information in other forums, including Council budget hearings).

Charter expressly limit[s] the Council's role").

The information at issue is also relevant to other functions that the Charter assigns to the Council. The Charter states that the "Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality." D.C. Code § 1-204.04(b). The Council is entitled to receive information relevant to its discharge of that duty. An agency's views on how much money it needs to carry out its mission (which is what is requested here) is relevant to the Council's ability to evaluate whether it should alter, abolish, or otherwise change the scope or existence of that agency. *See Comm. on Jud. of U.S. House of Rep. v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc) (Congress "cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies.").

The Council is also empowered to "from time to time establish such additional special funds as may be necessary for the efficient operation of the government of the District." D.C. Code § 1-204.50. "In vesting the Council with the decision whether special funds are necessary, Congress required that a determination be made that such funds would advance governmental efficiency." *Hessey v. D.C. Bd. of Elections and Ethics*, 601 A.2d 3, 11 (D.C. 1991) (en banc). Such a determination cannot be made without "a proper understanding and appreciation of all the pertinent

facts." *Ibid.* (quotation omitted). Agencies' positions on the funds needed to carry out their missions are pertinent to the Council's understanding of what funds are required for the efficient operation of the government. The Charter does not contemplate that the Mayor may interpose herself between the agencies and the Council and allow the Council only those "pertinent facts" that she desires.

The Mayor cites to many cases in which courts outside this jurisdiction have recognized the existence of an executive privilege. Def. Br. 24-27. None of them found that a statute mandating release of government documents, like paragraph 6A here, exceeded the legislature's authority and violated the separation of powers.

3. The Mayor's Theory was Effectively Rejected by the U.S. Court of Appeals for the D.C. Circuit Forty Years Ago

Although the Mayor relies heavily on analogy to the federal system (*see* Def. Br. 23-34), the U.S. Court of Appeals for the District of Columbia Circuit rejected a similar attempt to evade the dictates of an open government statute by invoking the separation of powers. In *Common Cause v. Nuclear Regulatory Commission*, the D.C. Circuit considered whether the Government in the Sunshine Act, 5 U.S.C. § 552b ("Sunshine Act"), violated the federal separation of powers by requiring that meetings addressing budget deliberations be public. 674 F.2d 921 (D.C. Cir. 1982).

A close analogue to the federal FOIA, the Sunshine Act requires that, subject to enumerated exceptions, "meetings of multi-member federal agencies shall be

open to the public." *Id.* at 923 (citing 5 U.S.C. § 552b).[15] The plaintiff sued after the Nuclear Regulatory Commission (NRC) closed meetings that addressed the agency's budget proposals, which would be made to the President for inclusion in his proposed budget to send to Congress (*Common Cause*, 674 F.2d at 923-924):

> At that meeting the Commissioners received a preliminary briefing from the staff concerning the Commission's budgetary needs and the relationship of each office's budget requests to agency and Office of Management and Budget (OMB) guidelines and previous appropriation levels. [footnote omitted]

Mirroring the Mayor's contentions here, the NRC argued, *inter alia*, that (*id.* at 935):

> Congress may not require agency budget meetings to be open to the public because openness would interfere with the [NRC's] role of providing opinions and advice to the President under . . . the Constitution.

See also id. at 928 n.15 ("The [NRC's] brief refers generally to 'budget deliberations' and to the need for confidentiality in preparing budget proposals for consideration by the President."). The NRC argued that the Sunshine Act violated the separation of powers by impermissibly intruding on the President's constitutional authority to "require the Opinion, in writing, of the Principal Officer in each of the

[15] As the D.C. Circuit noted, the Sunshine Act "went farther than any previous federal legislation in requiring openness in government," in part because "[u]nlike FOIA, which specifically exempts 'predecisional' memoranda and other documents . . . the Sunshine Act was designed to open the predecisional process in multi-member agencies to the public." *Common Cause*, 674 F.2d at 929. DC FOIA has similarly removed any potential protection for the documents at issue by opening them to the public through paragraph 6A.

executive Departments, upon any subject relating to the Duties of their respective Offices." *See id.* at 935 n.43 (quoting U.S. Constitution, Article II, § 2).

Like the Superior Court below (JA 189-192), the D.C. Circuit rejected the idea that "the separation of powers principle" prevents the disclosure of such budget information. *Common Cause*, 674 F.2d at 935. It stated that there is "abundant statutory precedent for the regulation and mandatory disclosure of [information] in the possession of the Executive Branch" and that "[s]uch regulation . . . has never been considered invalid as an invasion of its autonomy." *Ibid*. (quoting *Nixon*, 433 U.S. at 445-446) (ellipses added).

This Court should reject the Mayor's claim to exclusive control over information important to the Council's discharge of its own Charter-assigned authority. *See Maloney v. Murphy*, 984 F.3d 50, 70 (D.C. Cir. 2020) ("The separation of powers, it must be remembered, is not a one-way street that runs to the aggrandizement of the Executive Branch.").

C. Even if an Executive Communications Privilege Exists, It Would Not Cover the Information at Issue

Even if this Court were to establish an executive communications privilege in the District and conclude that it could be invoked here, that would not permit the Mayor to withhold the information at issue. Where an executive communications privilege has been recognized, as in the federal government and other states, it is not an absolute bar to disclosure. *See, e.g., In re Sealed Case*, 121 F.3d 729, 745 (D.C.

Cir. 1997) ("[T]he privilege is qualified, not absolute, and can be overcome by an adequate showing of need"); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 485 (Ohio 2006) (it "is ultimately the role of the courts to determine, on a case-by-case basis, whether the public's interest in affording its governor an umbrella of confidentiality is outweighed by a need for disclosure").

The executive communications privilege cases the Mayor cites from other jurisdictions (Def. Br. 24-27) are all distinguishable in at least two critical respects. First, none involved a statute deliberately making the information at issue "public." Indeed, in the Ohio case highlighted by the Mayor (*see* Def. Br. 25-26), the Ohio Supreme Court noted (*Taft*, 848 N.E.2d at 478) that the statute requiring disclosure explicitly excluded privileged documents. In contrast, paragraph 6A explicitly made the information "public."

Second, all of the cases cited by the Mayor involved decisions wholly within the discretion of the executive. For example, *Loving v. Department of Defense*, 550 F.3d 32 (D.C. Cir. 2008) (*see* Def. Br. 31), relates to the power to approve death sentences imposed under the Uniform Code of Military Justice and *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108 (D.C. Cir. 2004) (*see* Def. Br. 31), dealt with documents related to the President's pardon power. Here, by contrast, the information sought relates to the formulation of the proper District budget, a responsibility that lies

ultimately on the Council.[16]

The Mayor omits mention of an analogous case from the Alaska Supreme Court. In *Capital Information Group v. Office of Governor*, that court considered whether the governor could withhold agency budget materials sent to the Alaska Office of Management and Budget ("Alaska OMB") as part of the process of preparing the governor's proposed budget. 923 P.2d 29, 33-34 (Alaska 1996).[17]

The documents at issue in *Capital Information Group* were "the budget memoranda sent from each department head to [Alaska] OMB in response to [Alaska] OMB's request." *Capital Information Group*, 923 P.2d at 38. Alaska Statute 37.07.050 required that certain documents related to agencies' budget needs be prepared and forwarded to the Alaska OMB. *Ibid.* Like paragraph 6A, the Alaska statute further declared that all "goals and objectives, plans, programs, estimates,

[16] The Mayor implies that a federal court has found that similar budget information is protected at the federal level. *See* Def. Br. 32 n.6 (citing *N.Y. Times Co. v. Off. of Mgmt. and Budget*, 531 F. Supp. 3d 118, 126, 129 (D.D.C. 2021)). However, the documents sought there were "all email correspondence" between OMB's "Principal Associate Director for National Security Programs" and "an Assistant to the President and Senior Advisor to the White House Chief of Staff" "related to the hold [President Trump] placed on financial assistance to Ukraine." 531 F. Supp. 3d at 121-122. Those documents are entirely unlike those requested here, and implicated the federal executive communications privilege, which does not exist here.

[17] Just like the District Charter, the Alaska constitution requires that the "governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year . . . ." AK Const., Art. 9, § 12. *Compare with* D.C. Code § 1-204.42 ("At such time as the Council may direct, the Mayor shall prepare and submit to the Council each year, and make available to the public, an annual budget . . .").

budgets, and other documents forwarded to the [Alaska OMB] by a state agency under this section are public information after the date they are forwarded." *Id.* at 39 (quoting AS 37.07.050(g)). The court recognized that these documents were part of the process "allowing the Governor to hear the needs and opinions of each of the agencies which need to be accommodated in the budget." *Ibid.*

The governor argued that the legislature could not "define and limit the parameters of [the governor's] constitutional privilege [against disclosure] or the Governor's constitutional budgetary powers." *See id.* at 39. The court disagreed, noting that the "executive privilege, even though constitutionally rooted, was not absolute and may be outweighed by the legitimate needs of a coordinate branch." *Ibid.* In "balancing the executive's assertion of the privilege against the legislature's attempt to override it," the court considered certain factors (*id.* at 40):

> Primary among them is that the legislature itself created the requirement for this type of report in AS 37.07.050. Forwarding the document thus is an official action, required by statute. The legislature has not only mandated that the reports be made and submitted to [Alaska] OMB, it has, in declaring the reports to be public, implicitly determined that the need for public disclosure outweighs any risk of lack of candor on the agencies' part. This determination is entitled to significant weight, given the legislature's constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of the state government. [footnotes omitted]

See also id. at 39 ("Since the documents are predecisional and deliberative, we would normally proceed to question whether the demonstrated need for disclosure outweighs the government's interests in confidentiality. However, in this case, the

legislature has already weighed those interests, and resolved them in favor of public disclosure.") (citation omitted).

The same logic applies here, where the Council enacted statutes ordering that the documents be made public and be provided to the Council (D.C. Code § 47-318.05a) and to the public (paragraph 6A), and where the District Charter, like the Alaska constitution, empowers the Council to create, define the duties of, and abolish all District agencies (D.C. Code § 1-204.04(b)).

The Mayor's assertion that this process begins with her solicitation of agency information (Def. Br. 4, 29) does not alter the analysis. In *Capital Information Group*, the court underscored that the governor could not circumvent the duty to disclose by initiating the process with a request (*see* 923 P.2d at 40):

> The failure of the statute to affirmatively mention "impact memoranda" does not alter the analysis. The legislature clearly contemplated that there would be variations in [Alaska] OMB's requests to the agencies when it made public "[a]ll goals and objectives, plans, programs, estimates, budgets, *and other documents* forwarded" to OMB. AS 37.07.050(g) (emphasis added). The executive branch cannot avoid the disclosure requirements of subsection (g) by asking for the agencies' response to a proposed budget instead of for an estimated budget for the coming year. [emphasis added by Alaska Supreme Court]

So, too, here.

Further, the budget documents that went from OSSE and DCPS to the Mayor and the Office of Budget and Planning (OBP) are not the type of confidential materials that fall under the aegis of the executive privilege. At the federal level,

where the executive privilege exists, it only covers communications between the President and his close advisors. *See In re Sealed Case*, 121 F.3d at 752 (the "presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected. . . . In particular, the privilege should not extend to staff outside the White House in executive branch agencies."); *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013) ("[I]t is axiomatic that the privilege's purpose of promoting candor and confidentiality between the President and his closest advisers becomes more attenuated, and the public's interest in transparency and accountability more heightened, the more extensively a presidential communication is distributed.") (citation omitted). Here, the documents sought by TPM are sent by the agencies to the OBP, which is within the Office of the Chief Financial Officer, an independent executive agency outside the Office of the Mayor. Documents that originate and are distributed outside the Mayor's office to individuals outside her control do not fall within the privilege.[18] *Accord* JA 192.

[18] The Mayor presents the declaration of an employee, Eric Cannady, from within the Office of Chief Financial Officer (OCFO) that OCFO has, in his experience, deferred to the Mayor's refusal to produce these documents. Def. Br. 33 (citing JA 176, para. 6). As the Superior Court recognized (JA 69), that the Mayor has in the past disobeyed the law does not justify continued disobedience.

IV. THE SUPERIOR COURT DID NOT ERR WHEN IT ISSUED ITS REMEDY

A. The Superior Court Has the Power to Order the District to Produce the Documents and to Post Them Online

The Superior Court ordered the District to respond to TPM's DC FOIA request (JA 193) and produce the requested documents, which relate to fiscal year 2019. That was not error and the Mayor does not challenge that part of the remedy.

The Superior Court also ordered the District to "publish the required documents pursuant to D.C. § 2-536" online. JA 193; *see also* JA 196-197. The Mayor contends that "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." Def. Br. 37. The Mayor is incorrect. DC FOIA empowers the Superior Court to "enjoin the public body from withholding records."[19] D.C. Code § 2-537(b). That is ample authority to order the District to post documents on a website.

B. The Superior Court Has the Power to Order the District to Post Documents Online Prospectively

The Mayor also contends that the Superior Court may not issue prospective relief for "documents not yet in existence." Def. Br. 38. The response is the same—

[19] The Superior Court has the power to "enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure." D.C. Code § 2-537(b) (emphasis added).

DC FOIA empowers the Superior Court to "enjoin the public body from withholding records." D.C. Code § 2-537(b).

In *CREW I*, under the similar language of federal FOIA,[20] the D.C. Circuit had "little trouble concluding that a district court possesses authority" to order an agency to produce documents to a plaintiff "prospective[ly]" as new documents are created "without [the] need for a specific prior request."[21] 846 F.3d at 1241-1242.

C. The Superior Court Did Not Err in Issuing its Injunction that Required the District to Post Required Documents Online

Beyond the powers under DC FOIA to "enjoin the public body from

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[20] Federal courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (emphasis added); compare with DC FOIA provision in the preceding footnote. As a general matter, case law interpretating similar provisions under federal FOIA is viewed as "instructive." *Fraternal Order of Police*, 79 A.3d at 354.

[21] The Mayor ignored this portion of *CREW I* and, in support of the contrary proposition, cited (Def. Br. 38) *Humane Soc'y v. U.S. Fish and Wildlife Serv.*, 838 Fed. Appx. 721 (4th Cir. 2020) (unpublished and marked as "not binding precedent in [the Fourth] Circuit"). *Humane Society* explains the "narrow" scope of its decision (*Humane Soc'y*, 838 Fed. Appx. at 732):

> By our narrow decision, we do not hold that Appellants can never receive injunctive relief pursuant to Section 552(a)(4)(B) [federal FOIA]. But where all Appellants' eFOIA request have been satisfied (per the district court's finding), and the prospective relief sought is with regard to documents not yet created, we fail to see how FOIA provides any entitlement to relief.

The holding there is entirely distinct from this case, since here the Mayor refused to turn over any documents.

withholding records and order the production of any records improperly withheld from the person seeking disclosure" (D.C. Code § 2-537(b)), the Superior Court retains its usual broad equity power to issue injunctions, and that power is particularly broad given the public issues at stake. *See CREW I*, 846 F.3d at 1242; *ALDF*, 935 F.3d at 873.

Injunctive relief pursuant to the Superior Court's equity power is appropriate here because "there is no adequate remedy at law, the balance of equities favors the moving party, and success on the merits has been demonstrated." *Ifill v. D.C.*, 665 A.2d 185, 188 (D.C. 1995) (cleaned up). There is no remedy other than access to information. The balance of equities strongly favors posting the required documents online since paragraph 6A was incorporated specifically to "expand public access" (JA 95) and "[a]n injunction requiring the District to do nothing more than comply with its legal obligations cannot, by definition, harm it." *DL v. D.C.*, 194 F. Supp. 3d 30, 98 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). TPM succeeded on the merits and has shown (sections II and III above) why that should be affirmed.

The Superior Court exercised its discretion by ordering the District to put online all documents required by D.C. Code § 2-536. JA 193, 195-197. That is a broader remedy than ordering the District to put online all documents required by D.C. Code § 2-536(a)(6A). The Mayor argues that it is overly broad and prohibited. Def. Br. 39. However, that relief is exactly what the Code allows when it states that

the Superior Court may "enjoin the public body from withholding records." D.C. Code § 2-537(b). That relief also falls within the Court's broad equitable authority. *See Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986) ("[W]e do not see how enforcing compliance [with the law] imposes any burden on [defendants]. The [Food Stamp] Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it."); *DL*, 194 F. Supp. 3d at 98. Here, the Superior Court took steps to avoid future violations by ordering the District to comply with its own law. That action falls within the Court's authority.[22]

The Mayor also raised various standing arguments (Def. Br. 39-40), which TPM addressed above (Section I). Standing hinges on the claims and form of relief sought in the Complaint, not the scope of the relief awarded. Contrary to the Mayor's implication (Def. Br. 39-40), the fact that the Superior Court ordered broader relief than TPM sought does not impact TPM's standing.

It would be extremely wasteful and inconsistent with the purpose behind paragraph 6A if TPM were forced to serve repeated DC FOIA requests and litigate this suit over and over again only to receive the requested documents years after the period to which they relate. It would also violate the policy of the District that its FOIA law "shall be construed with the view toward expansion of public access and

[22] TPM notes that the Mayor only argues that the Superior Court lacked authority to issue the relief, not that it abused its discretion in crafting it. *See* Def. Br. 38-40.

the minimization of costs and time delays to persons requesting information." D.C. Code § 2-531. The Superior Court avoided all of those problems by ordering the District to put the documents online. This Court should affirm that injunction.

D. The Trend in Federal Caselaw Strongly Supports the Relief Awarded

The Mayor contends that her argument that the Superior Court lacks the authority to order the District to put any documents online "accords with federal caselaw." Def. Br. 37. She cites *CREW I* on that point but failed to report that the two Circuit-level decisions that followed *CREW I* soundly rejected that conclusion.

Preceding *CREW I,* in *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191, 1201-1202 (D.C. Cir. 1996), the plaintiff requested, pursuant to federal FOIA, that the district court order the Department of the Interior to publish in the Federal Register environmental regulations that were issued and then withdrawn. Federal FOIA includes a provision (5 U.S.C. § 552(a)(1))—absent from DC FOIA—related to publication of regulations in the Federal Register.

The D.C. Circuit addressed the federal FOIA remedy provision (5 U.S.C. § 552(a)(4)(B)) quoted above (n. 20) but did not assess the first part of that provision: the power "to enjoin the agency from withholding agency records."[23] *See Kennecott*,

[23] *Amicus curiae* in *CREW I* subsequently noted this omission. 846 F.3d at 1244. In *CREW I*, the Circuit explained that it was nonetheless bound by the holding of *Kennecott* since the issue had been addressed in the briefing in *Kennecott*, even though it was not addressed in the opinion. *Ibid*.

88 F.3d at 1202-1203. Instead, it focused on the second part (5 U.S.C. § 552(a)(4)(B)): the power "to order the production of any agency records improperly withheld from the complainant."[24] The D.C. Circuit stated that that language made it sufficiently clear that the remedy should relate to the complainant, not the public, and therefore the federal courts lacked the power to order the government to publish the withdrawn regulations. *Kennecott*, 88 F.3d at 1203. In *Kennecott*, the Court also based its conclusion on the fact that regulations are not effective if they are not published, and therefore agencies have a "powerful incentive to publish any rules they expect to enforce." *Ibid*. It explained that "[w]hile 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, we think that is exactly what Congress intended." *Id*. at 1202.

Then, in 2017, in *CREW I*, the D.C. Circuit, bound by *Kennecott*, concluded that federal courts lack the power to order agencies to post required documents online. 846 F.3d at 1243-1244. Since then, the Circuits to consider this issue—the Ninth and Second—rejected *CREW I*'s conclusion that courts lack the necessary power. In 2019, in *ALDF*, 935 F.3d at 866-876, the Ninth Circuit explained:

[24] The Mayor did the same thing in its brief here under DC FOIA. *See* Def. Br. 36-37 (italicizing the second part of the remedial power) & 38 (quoting just the second part of the remedial power).

> FOIA vests in district courts the "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). This provision cloaks district courts with the authority to order an agency to post records in an online reading room. We reach this conclusion by following familiar lodestars: text, structure, and precedent.

Then, in 2021, in *NYLAG*, 987 F.3d at 215, the Second Circuit agreed for largely the same reasons.[25] *See also Smith v. U.S. Immigration & Customs Enforcement*, 429 F. Supp. 3d 742, 767-768 (D. Colo. 2019) (*CREW I*'s reasoning "ignores half of the statutorily authorized remedies"), *appeal dismissed*, No. 20-1048, 2020 WL 4757040 (10th Cir. May 5, 2020).

The thorough analyses in *ALDF* and *NYLAG* explained that the conclusion that courts can order agencies to put documents online is supported by (1) FOIA's text (*ALDF*, 935 F.3d at 869-871; *NYLAG*, 987 F.3d at 214, 216-219)[26]; (2) FOIA's

[25] The panels in *ALDF* and *NYLAG* each had a dissenting judge who concluded that *CREW I* should be followed.

[26] *See ALDF*, 935 F.3d at 869-870 ("Not only does the plain meaning of the phrase 'jurisdiction to enjoin [an] agency from withholding agency records' allow courts to order agencies to comply with their [obligations to post records online], but surrounding words confirm our reading. . . . [If] Congress only authorized federal courts to 'order the production' of records to a particular complainant, then the judicial-review provision would not need the words 'jurisdiction to enjoin the agency from withholding agency records'; the latter phrase would do all of the necessary work." (citations omitted)); *NYLAG*, 987 F.3d at 214 ("We do not find [*CREW I*] persuasive . . . . First, both parties to the case 'narrowly construe[d] FOIA's remedial provision,' assuming that, on its face, the text does not permit the court to order that documents be made available for public inspection. Consequently the Court spent little time parsing the text . . . ." (quoting *CREW I*, 846 F.3d at 1241)).

structure and evolution (*ALDF*, 935 F.3d at 871-873; *NYLAG*, 987 F.3d at 219-223)[27]; (3) caselaw, including prior D.C. Circuit decisions ordering public disclosure that *CREW I* did not address (*ALDF*, 935 F.3d at 873-875)[28]; (4) and FOIA's purpose (*NYLAG*, 987 F.3d at 223-224).[29] They also explained that the rule in the D.C. Circuit does not appear settled. *ALDF*, 935 F.3d at 876; *NYLAG*, 987 F.3d at 214.[30]

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[27] *See ALDF*, 935 F.3d at 871 ("FOIA's structure confirms what the text of the judicial-review provision makes plain: district judges can order agencies to comply with their obligations under § 552(a)(2)") & 872 (without the power to order online posting, "if an agency shrugs that congressional command, the statute forces plaintiffs right back into the requests and backlogs Congress sought to avoid in the first place"); *NYLAG*, 987 F.3d at 223 ("Congress intended to give district courts the authority to order agencies to make documents available for public inspection when they fail to comply with their affirmative obligations in § 552(a)(2)").

[28] *See ALDF*, 935 F.3d at 874-875 ("At one time, the D.C. Circuit allowed district judges to order agencies to produce records for public inspection per FOIA's reading-room requirements. . . . We can easily imagine the significant implications of rendering § 552(a)(2) a dead letter; an agency would have no enforceable duty to post its important staff manuals, or its interpretation of the statute it's charged with enforcing, or its final opinions in agency adjudication. . . ." (citation omitted)).

[29] *See NYLAG*, 987 F.3d at 223 ("A broad reading of FOIA's remedial provision is also consistent with the statute's purpose. FOIA was enacted to facilitate public access to Government documents. It was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.") (cleaned up; citations omitted).

[30] *See ALDF*, 935 F.3d at 876 ("[In *CREW II* (*Citizens for Responsibility and Ethics in Washington v. U.S. DOJ*, 922 F.3d 480, 485 (D.C. Cir. 2019))], the D.C. Circuit seemed to read *CREW I* narrowly, as though the earlier decision was limited to the proposition that '*CREW* improperly brought its claim under the [Administrative Procedures Act] instead of FOIA's judicial-review provision."); *NYLAG*, 987 F.3d at 214 ("[T]he D.C. Circuit itself appears to have reservations about the interpretation of the remedial provision expressed in *CREW I*.").

This Court is not bound by the D.C. Circuit's decision in *CREW I* (*see M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)) and should not follow its conclusions as to the power to order the government to post documents online. Those conclusions are fundamentally flawed and are based on *Kennecott's* analysis of a provision related to publishing proposed regulations, which does not exist under DC law. The basic question is whether—pursuant to the Superior Court's broad equitable authority, its DC FOIA authority "to enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure" (D.C. Code § 2-537(b)), and the broad reading of DC FOIA law required by DC law (*see* pp. 10-11 above)—the Superior Court can order the District to comply with its law and put documents on a website. The answer is yes.

E. The District's Statements Outside of this Litigation Comport with the Superior Court's Injunction

The D.C. Office of Open Government ("DC OOG") is tasked with monitoring the implementation of DC FOIA and is authorized to issue advisory opinions. D.C. Code § 1-1162.05c. On April 12, 2021, DC OOG issued an advisory opinion (JA 160-165) explaining that the obligation to post material online is a "proactive disclosure" obligation and that the failure to do so constitutes an improper withholding in violation of Sections 2-536(a) and (b). JA 163-165. It further stated that DCPS must make the documents at issue there "publicly available on its website." JA 165 (citation omitted).

Similarly, in a February 8, 2016 decision on a FOIA Appeal (JA 166-170), the Mayor's own Office of Legal Counsel found that the failure to post online documents made public under Section 2-536(a) constitutes an improper withholding even when those records were available for physical inspection. JA 167.

Those statements by the District outside of this litigation comport with the Superior Court's injunction and the "public policy of the District of Columbia [] that all persons are entitled to full and complete information regarding the affairs of government." D.C. Code § 2-531. The Mayor's arguments to the contrary do not.

CONCLUSION

The judgment of the Superior Court should be affirmed and the case remanded for implementation of the remedy.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

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D.C. Code § 2-531. Public policy.

The 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. To that end, provisions of this subchapter shall 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 § 2-532. Right of access to public records; allowable costs; time limits.

(a) Any person has a right to inspect, and at his or her discretion, to copy any public record of a public body, except as otherwise expressly provided by § 2-534, in accordance with reasonable rules that shall be issued by a public body after notice and comment, concerning the time and place of access.

. . .

D.C. Code § 2-534. Exemptions from disclosure.

(a) The following matters may be exempt from disclosure under the provisions of this subchapter:

(1) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;

(2) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(2A) Any body-worn camera recordings recorded by the Metropolitan Police Department:

(A) Inside a personal residence; or

(B) Related to an incident involving domestic violence as defined in § 4-551(1), stalking as defined in § 22-3133, or sexual assault as defined in § 23-1907(a)(7).

(3) Investigatory 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:

(A) Interfere with:

(i) Enforcement proceedings;

(ii) Council investigations; or

(iii) Office of Police Complaints ongoing investigations;

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government; or

(F) Endanger the life or physical safety of law-enforcement personnel;

(4) Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.

(5) Test questions and answers to be used in future license, employment, or academic examinations, but not previously administered examinations or answers to questions thereon;

(6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(7) Information specifically authorized by federal law under criteria established by a presidential executive order to be kept secret in the interest of national defense or foreign policy which is in fact properly classified pursuant to such executive order;

(8) Information exempted from disclosure by § 28-4505;

(9) Information disclosed pursuant to § 5-417;

(10) Any specific response plan, including any District of Columbia response plan, as that term is defined in § 7-2301(1), and any specific vulnerability

assessment, either of which is intended to prevent or to mitigate an act of terrorism, as that term is defined in § 22-3152(1);

(11) Information exempt from disclosure by § 47-2851.06;

(12) Information, the disclosure of which would reveal the name of an employee providing information under subchapter XV-A of Chapter 6 of Title 1 [§ 1-615.51 et seq.] and subchapter XII of Chapter 2 of this title [2-233.01 et seq.], unless the name of the employee is already known to the public;

(13) Information exempt from disclosure by § 7-2271.04;

(14) Information that is ordered sealed and restricted from public access pursuant to Chapter 8 of Title 16;

(15) Any critical infrastructure information or plans that contain critical infrastructure information for the critical infrastructures of companies that are regulated by the Public Service Commission of the District of Columbia;

(16) Information exempt from disclosure pursuant to § 38-2615;

(17) Information exempt from disclosure pursuant to § 50-301.29a(13)(C)(i); and

(18) Information exempt from disclosure pursuant to § 24-481.07(a); and

(19) Information exempt from disclosure under subchapter XIV of Chapter 1A of Title 41.

. . .

(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from the Council of the District of Columbia. This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.

. . .

(e) All exemptions available under this section shall apply to the Council as well as agencies of the District government. The deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege are incorporated under the inter-agency memoranda exemption listed in subsection (a)(4) of this section, and these privileges, among other privileges that may be found by the court, shall extend to any public body that is subject to this subchapter.

D.C. Code § 2-536. Information which must be made public.

(a) Without limiting the meaning of other sections of this subchapter, the following categories of information are specifically made public information, and do not require a written request for information:

(1) The names, salaries, title, and dates of employment of all employees and officers of a public body;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(4) Those statements of policy and interpretations of policy, acts, and rules which have been adopted by a public body;

(5) Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party;

(6) Information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies;

(6A) Budget 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, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions;

(7) The minutes of all proceedings of all public bodies;

(8) All names and mailing addresses of absentee real property owners and their agents;

(8A) All pending applications for building permits and authorized building permits, including the permit file;

(9) Copies of all records, regardless of form or format, which have been released to any person under this chapter and which, because of the nature of their subject matter, the public body determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(10) A general index of the records referred to in this subsection, unless the materials are promptly published and copies offered for sale.

(b) For records created on or after November 1, 2001, each public body shall make records available on the Internet or, if a website has not been established by the public body, by other electronic means. This subsection is intended to apply only to information that must be made public pursuant to this subsection.

(c) For the purposes of this section "absentee real property owners" means owners of real property located in the District that do not reside at the real property.

D.C. Code § 2-537. Administrative appeals.

(a) Except as provided in subsections (a-1) and (a-2) of this section, 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. Such determination shall be made in writing with a statement of reasons therefor in writing within 10 days (excluding Saturdays, Sundays, and legal holidays) of the submission of the petition.

> (1) If the Mayor denies the petition or does not make a determination within the time limits provided in this subsection, or if a person is deemed to have exhausted his or her administrative remedies pursuant to subsection (e) of § 2-532, the person seeking disclosure may institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia.
>
> (2) If the Mayor decides that the public record may not be withheld, he shall order the public body to disclose the record immediately. If the public body continues to withhold the record, the person seeking disclosure may bring suit in the Superior Court for the District of Columbia to enjoin the public body from withholding the record and to compel the production of the requested record.

(a-1) Any person denied the right to inspect a public record in the possession of the Council may institute proceedings in the Superior Court for the District of Columbia for injunctive or declaratory relief, or for an order to enjoin the public body from withholding the record and to compel the production of the requested record.

(a-2) Any person denied the right to inspect a public record in the possession of the Attorney General may institute proceedings in the Superior Court of the District of Columbia for injunctive or declaratory relief, or for an order to enjoin the public body from withholding the record and to compel the production of the requested record.

(b) In any suit filed under subsection (a), (a-1), or (a-2) of this section, the Superior Court for the District of Columbia may enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure. The burden is on the public agency to sustain its action. In such cases the court shall determine the matter de novo, and may examine the contents of such records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in § 2-534.

. . .

D.C. Code § 1-204.04. Powers of the Council.

. . .

(b) The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality.

. . .

D.C. Code § 1-204.13. Investigations by the Council.

(a) The Council, or any committee or person authorized by it, shall have power to investigate any matter relating to the affairs of the District, and for that purpose may require the attendance and testimony of witnesses and the production of books, papers, and other evidence. For such purpose any member of the Council (if the Council is conducting the inquiry) or any member of the committee may issue subpoenas, and administer oaths upon resolution adopted by the Council or committee, as appropriate.

. . .

D.C. Code § 1-204.42. Submission of annual budget.

(a) At such time as the Council may direct, the 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 which shall include:

> (1) The budget for the forthcoming fiscal year in such detail as the Mayor determines necessary to reflect the actual financial condition of the District government for such fiscal year, and specify the agencies and purposes for which funds are being requested; and which shall be prepared on the assumption that proposed expenditures resulting from financial transactions undertaken on either an obligation or cash outlay basis, for such fiscal year shall not exceed estimated resources from existing sources and proposed resources;

. . .

D.C. Code § 1-204.46. Enactment of local budget by Council.

(a) Adoption of Budgets and Supplements. The Council, within 70 calendar days, or as otherwise provided by law, after receipt of the budget proposal from the Mayor, and after public hearing, and by a vote of a majority of the members present and voting, shall by act adopt the annual budget for the District of Columbia government. The federal portion of the annual budget shall be submitted by the Mayor to the President for transmission to Congress. The local portion of the annual budget shall be submitted by the Chairman of the Council to the Speaker of the House of Representatives pursuant to the procedure set forth in § 1-206.02(c). Any supplements to the annual budget shall also be adopted by act of the Council, after public hearing, by a vote of a majority of the members present and voting.

. . .

D.C. Code § 1-204.50. General and special funds.

The General Fund of the District shall be composed of those District revenues which on January 2, 1975 are paid into the Treasury of the United States and credited either to the General Fund of the District or its miscellaneous receipts, but shall not include any revenues which are applied by law to any special fund existing on January 2, 1975. The Council may from time to time establish such additional special funds as may be necessary for the efficient operation of the government of the District. All money received by any agency, officer, or employee of the District in its or his official capacity shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund, except that all money received by the District of Columbia Courts shall be deposited in the Treasury of the United States or the Crime Victims Fund.

D.C. Code § 1-309.11. Advisory Neighborhood Commissions--Meetings; bylaws governing operation and internal structure; officers.

. . .

(g) Each Commission, including each committee of a Commission, shall be subject to the open meetings provisions of § 1-207.42. No meeting may be closed to the public unless personnel or legal matters are discussed. Without limiting the scope of § 1-207.42, the following categories of information shall be specifically made available to the public subject to § 2-534;

(1) The names, salaries, title, and dates of employment of all employees of the Commission;

(2) Final decisions of the Commission, including concurring and dissenting opinions;

(3) Information of every kind dealing with the receipt or expenditure of public or other funds by the Commission;

(4) All documents not related to personnel and legal matters;

(5) The minutes of all Commission meetings; and

(6) Reports of the District of Columbia Auditor.

D.C. Code § 1-1162.05c. Director of Open Government.

(a) The Director of Open Government shall:

(1) Issue advisory opinions pursuant to § 2-579(g);

(2) Provide training related to subchapter IV of Chapter 5 of Title 2 pursuant to § 2-580; and

(3) Pursuant to subchapter I of Chapter 5 of Title 2, issue rules to implement the provisions of subchapter IV of Chapter 5 of Title 2.

(b) The Office of Open Government may bring suit to enforce subchapter IV of Chapter 5 of Title 2 pursuant to § 2-579.

(c)(1) If an advisory opinion regarding subchapter IV of Chapter 5 of Title 2 is issued by the Director of Open Government pursuant to a request for an advisory opinion, the requesting employee or public official may appeal the opinion for consideration by the Board.

(2) If the Director of Open Government issues an advisory opinion regarding subchapter IV of Chapter 5 of Title 2 on his or her own initiative, any person aggrieved by the opinion may appeal the opinion for consideration by the Board.

(d) The Office of Open Government may issue advisory opinions on the implementation of subchapter II of Chapter 5 of Title 2.

D.C. Code § 47-318.05a. Budget submissions required; agency enhancement requests.

The Mayor and the Chief Financial Officer shall supplement all proposed budgets submitted pursuant to § 1-204.42, and related budget documents required by §§ 1-204.42, 1-204.43, and 1-204.44, by submitting to the Council simultaneously with the proposed budget submission:

(1) Actual copies, not summaries, of all agency budget enhancement requests, including the "Form B" for all District agencies; and

(2) Any similar documentation describing in detail agencies' budget needs or requests.

5 U.S.C. § 552

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless

provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

> (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.
>
> (C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
>
> . . .

(4) . . . (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and

may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

. . .

REDACTION CERTIFICATE
DISCLOSURE

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/ *Todd A. Gluckman*
Signature

21-CV-0543
Case Number

Todd A. Gluckman
Name

January 28, 2022
Date

tgluckman@tpmlaw.com
Email Address

CERTIFICATE OF SERVICE

I certify that on January 28, 2022, the foregoing brief was served through this Court's electronic filing system to Defendant-Appellant District of Columbia through its counsel Richard S. Love (richard.love@dc.gov).

Respectfully submitted,

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January 28, 2022