No. 21-CV-543

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

V.

TERRIS, PRAVLIK & MILLIAN, LLC,
APPELLEE.

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

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

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I. DC FOIA Does Not Require The Disclosure Of Preliminary Budget Documents Because They Are Protected By DC FOIA'S Deliberative Process Privilege.

In its opening brief, the District of Columbia recognized that DC FOIA promotes public access to documents, but that it also includes several exemptions that shield certain documents from disclosure, including the deliberative process privilege. District Br. 13-15. TPM does not dispute that preliminary budget documents that the Mayor requests from agencies are pre-decisional and part of the Mayor's deliberative process of crafting her budget proposal. However, TPM argues that the deliberative process privilege does not (and cannot) apply because another DC FOIA provision—D.C. Code § 2-536(a)(6A)—requires their publication.

This Court has already held otherwise. In *Office of the People's Counsel v. Public Service Commission of the District of Columbia* (*OPC*), 955 A.2d 169 (D.C. 2008), the Court explicitly concluded that Section 2-536(a), DC FOIA's publication provision, "does not mandate disclosure of data that satisfy the requirements of D.C. Code [§] 2-534(a)," DC FOIA's exemptions provision. *Id*. at 176. The Court "bas[ed] 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 in this subchapter.'" *Id.* (quoting D.C. Code § 2-536(a)). The Court "construe[d] that qualifying language to denote that information that is determined

to be exempt from disclosure under Section 2-534(a) *need not be . . . made available pursuant to section 2-536*." *Id.* (emphasis added). That reasoning could not be clearer, and it applies squarely here.

TPM's attempts to distinguish *OPC* are unpersuasive. TPM notes that "the information sought [in *OPC*] . . . was qualitatively different," TPM Br. 20, but that is irrelevant. The Court's reasoning was that Section 2-536 cannot override a FOIA exemption in Section 2-534(a) because of Section 2-536's introductory language, which applies to *all* of the publication provisions. Relatedly, TPM argues that the disclosure provisions at issue in *OPC* were "phrased generally," while paragraph 6A "explicitly made" the budget documents public. TPM Br. 20; *see* Brief of Amicus Curiae Council of the District of Columbia ("Council Br.") 4-6. But the Court *assumed* that the revenue data at issue in *OPC* "f[e]ll within the scope of" Section 2-536. *Id.* at 176. Nevertheless, the Court construed Section 2-536's introductory language to mean that information that is exempt from disclosure under Section 2-534(a) need not be published online pursuant to Section 2-536. *Id.* That construction is controlling here, and this Court should avoid "giv[ing] the same statutory text different meanings in different cases." *United States v. Santos*, 553 U.S. 507, 522 (2008) (internal quotation marks omitted).

Kane v. District of Columbia, 180 A.3d 1073 (D.C. 2018), only confirms *OPC*'s reasoning. There, the Court held that the mandatory disclosure provision in

the Advisory Neighborhood Commissions Reform Amendment of 2000 did not preclude the ANC "from asserting the deliberative process privilege to withhold information in response to [appellant's] FOIA request." *Id*. at 1083-84. The Court based this holding on the Act's caveat that the public can "inspect and copy 'any public record of [an ANC], except as otherwise expressly provided by [D.C. Code] § 2-534.'" *Id.* at 1082 (citing D.C. Code § 309.13(p)). So too here. Section 2-536 explicitly says that it does not "limit[] the meaning of other sections in this subchapter," and Section 2-534 is another section of the subchapter.

In sum, Section 2-536(a)'s qualifying language that the publication provisions do not "limit[] the meaning of other sections in this subchapter," combined with this Court's definitive construction of that language in *OPC*, decide the question at issue in this case. TPM's other arguments are unavailing.

First, TPM points to a sentence in Section 2-534—"[t]his section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law," D.C. Code § 2-534(c)—and suggests that "other law" must include the mandatory disclosure provisions in Section 2-536(a). But if "other law" includes the publication provisions of Section 2-536(a), the exemptions in Section 2-534 would be inoperable in *every* instance where a paragraph of Section 2-536(a) applies. *Cf. Kane*, 180 A.3d at 1080 (an interpretation that a mandatory disclosure provision could override Section 2-534's exemptions "would virtually obliterate

FOIA's explicit recognition of a government-wide privilege for non-public deliberations"). It would also directly flout the holding in *OPC*. Sensing these defects, TPM suggests that "other law" includes just "*parts* of DC FOIA," TPM Br. 15 (emphasis added), but neither explains how the text could bear that meaning nor identifies which "parts of DC FOIA" override the Section 2-534 exemptions and which parts do not. It is therefore the *District's* interpretation, not TPM's, that offers a "fair and holistic reading" that harmonizes the various DC FOIA provisions. TPM Br. 13.[1]

Second, TPM argues that even if "other law" refers "only to a law outside DC FOIA," allowing the District to withhold documents subject to paragraph (6A) of Section 2-536 would render that provision a nullity. TPM Br. 15-16; *see* Council Br. 8. But TPM acknowledges that paragraph 6A would still require the disclosure of "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." TPM Br. 16 (quoting District Br. 19). TPM's only response is that this is a "cramped view" and that "Paragraph

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[1] The Council pointedly does not adopt TPM's reading. The Council instead declares this sentence irrelevant because it is not "the only means by which the [DC FOIA] exemptions" may be "rendered inapplicable." Council Br. 10, n.10. In its view, Section 2-536(a) does so all on its own. *Id.* But as just explained, that misreads both Section 2-536(a) and this Court's decisions.

6A makes the entire agency budget submissions and related documents public." TPM Br. 16. But that is no answer at all. The point is that even applying Section 2-534's exemptions, paragraph (6A) still requires the disclosure of *some* information, which means that the District's construction does not render that paragraph a nullity.

To the contrary, it is TPM's interpretation that would render statutory language a nullity—specifically, the language that Section 2-536(a) does not "limit[] the meaning of other sections in this subchapter." TPM offers no logical explanation of what that language could mean if it is correct that Section 2-534's exemptions cannot prevent the disclosure of information referenced in Section 2-536(a). *See Thomas v. D.C. Dep't of Emp. Servs.*, 547 A.2d 1034, 1037 (D.C. 1988) (discouraging interpretations that "render[] any provision superfluous").

Third, TPM suggests that legislative history favors its interpretation of DC FOIA. TPM Br. 12, 17, 19. But nothing in the legislative history suggests that the Council intended to limit the scope of the deliberative process privilege—a long-standing feature of government practice—when it made the budget documents referenced in Section 2-536(a)(6A) public. *See Newell-Brinkley v. Walton*, 84 A.3d 53, 58 (D.C. 2014) ("[I]t is highly unlikely that the Council would have altered preexisting law in so fundamental a way implicitly rather than explicitly."). As the District argued in its opening brief, the provision was instead designed to increase access to certain information already available via FOIA requests by proactively

making that information public, without the need to submit "a written request." D.C. Code § 2-536(a); District Br. 19-20. Although paragraph (6A) added a category of public information, there was no change to Section 536(a)'s instruction that the information was made public "[w]ithout limiting the meaning of other sections of [DC FOIA]." Notably, after this Court's definitive construction of that language in *OPC* in 2008, the Council has not taken any legislative action in response.

To be sure, the legislative history does indicate that it was the Council's purpose to "expand public access" to information and "promote accountability." JA 95.[2] But that is the purpose of every DC FOIA disclosure provision, yet each is limited by the exemptions in Section 2-534. TPM also points to the amicus briefs that the Council submitted to the trial court to show that withholding the requested documents "would be contrary to the intent of the Council." TPM Br. 17 (quoting JA 188). But "the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE*

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[2] TPM also argues that Mayor's Order 2014-170 "underscored" the District's "commitment to open government" and describes the actions agencies are to take to facilitate the online accessibility of public information. TPM Br. 12-13. While true, the Mayor's Order also provided that the "publication of an agency's datasets shall exclude protected data," which it defined as "any dataset or portion thereof to which an agency may deny access pursuant to [DC FOIA]." JA 97 at Section 1.b.5; JA 100 at Section 3.a.1.

Sylvania, Inc., 447 U.S. 102, 117 (1980) (internal quotation marks omitted). TPM provides no good reason for ignoring this bedrock canon of statutory construction.

The Council, for its part, proclaims that by "amending DC FOIA in 2004 expressly to compel the public disclosure" of budget documents, it "abrogated any common-law or statutory privilege that otherwise might pertain to" them. Council Br. 9. But if the Council wishes to abrogate a well-settled legal privilege, it must explicitly amend the statutory text. It cannot do so merely by filing an amicus brief. *See Newell-Brinkley*, 84 A.3d at 58; *see generally P&Z Co. v. District of Columbia*, 408 A.2d 1249, 1251 (D.C. 1979) (repeals by implication are disfavored).[3]

Finally, TPM does not even address the argument in the District's opening brief that if there were any ambiguity, the trial court's interpretation raises serious separation-of-powers concerns. District Br. 21-22. The Council addresses that issue in its amicus brief, but its only response is to say that (in its view) there is no serious constitutional question, and (also in its view) the statute is not ambiguous. Council Br. 11-12. As amply demonstrated both above and below, neither contention is

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[3] TPM's reliance on *Hargrove v. District of Columbia*, 5 A.3d 632 (D.C. 2010), is misplaced. TPM Br. 17. There, the Court looked to post-enactment legislative history only after carefully analyzing the plain language of the statute, and it held that a long-standing interpretation of the Council comported with that plain meaning. *See Hargrove*, 5 A.3d at 635-38. Here, however, the plain language of the statute supports the District's interpretation (as this Court held in *OPC*), and TPM cannot use "subsequent legislative history [to] override a reasonable interpretation of a statute." *Id.* at 637 (quoting *Doe v. Chao*, 540 U.S. 614, 626-27 (2004)).

correct. Thus, at the least, this Court should interpret the statute to avoid the serious separation-of-powers questions a contrary interpretation would raise.

II. The Executive Communications Privilege Inherent In The Separation Of Powers Protects The Requested Documents.

A. This Court should recognize an executive privilege in the District.

In its opening brief, the District in detail explained why an executive privilege—which protects the deliberations of and documents requested or received by the President and state governors—is equally applicable to the District's Mayor. District's Br. 23-28. To summarize: separation-of-powers principles are part of the District's structure, *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992); its Charter (created by Congress) vests executive power in the Mayor, D.C. Code § 1-204.22; an executive communications privilege is inherent in the separation of powers because it protects the executive's ability to confidentially obtain candid opinions from her advisors, *United States v. Nixon*, 418 U.S. 683, 708 (1974); and it should therefore be a privilege the Mayor—like the President and state governors—enjoys.

TPM argues that an executive communications privilege has never been recognized in the District and was explicitly rejected by a Superior Court judge in *Nichols v. Fenty*, No. 2009 CA 006292 (D.C. Super. Ct. Oct. 30, 2009). TPM Br. 22. But *Nichols* is not binding, and this Court has never addressed the question. In any event, the *Nichols* court declined to recognize an executive privilege after determining that the requested documents were not subject to the deliberative

process privilege because they involved a subpoena from a government-appointed auditor. JA 152-53. In contrast, TPM's interpretation of D.C. Code § 2-536(a) would mandate disclosure of the Mayor's internal, deliberative documents to members of the public. That squarely implicates the separation of powers.

TPM also suggests that no executive communications privilege applies given "the District's unique constitutional structure and position." TPM Br. 23. But this Court has already rejected that theory. In the District, "separation of powers principles should govern *as they may be authoritatively pronounced by the Supreme Court from time to time*." *Wilson*, 615 A.2d at 232 n.8 (emphasis added). Thus, "the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level." *Id.* at 231 (emphasis added); *see* D.C. Code § 1-301.44. The executive communications privilege indisputably applies to the President, and dozens of state courts have applied it to governors on the same rationale. *See* District Br. 25-28. As the head of the executive branch in the District, the Mayor—like the President and state governors—requires an executive communications privilege to preserve her "ability to obtain candid and informed opinions from h[er] advisors and to make decisions confidentially" and "protect the effectiveness of the executive decision-making process." *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008). TPM

offers no reason why the President and state governors should enjoy the privilege but the Mayor should not.

B. The executive communications privilege protects the agencies' preliminary budget documents from disclosure.

Preliminary budget documents are covered by the executive communications privilege because they are "communications in performance of [a Mayor's] responsibilities of [her] office and made in the process of shaping policies," and "reflect [Mayoral] decision-making and deliberations." *Jud. Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (internal quotation marks omitted); *see Am. Oversight v. OMB*, No. 18-cv-2424, 2020 WL 1536186, at *7 (D.D.C. Mar. 31, 2020) (Office of Management and Budget (OMB) official's email and attachments were privileged "because they concerned a request by the President [or a] White House advisor . . . for a pre-published draft of a volume of the President's Budget, a subject that falls squarely within the realm of presidential decisionmaking" (internal quotation marks omitted)). TPM's arguments to the contrary lack merit.

First, TPM argues that the Council may "abolish any common law or statutory privileges," and that it did so in paragraph 6A, which was a "valid exercise of the Council's legislative authority." TPM Br. 24-25; *see* Council Br. 9. But the executive communications privilege is constitutionally based, "inextricably rooted in the separation of powers," and derived "from the supremacy of each branch within its own assigned area of constitutional duties." *Nixon*, 418 U.S. at 708. Here, the

District Charter reserves exclusively for the Mayor the decision over what budget to propose to the Council. D.C. Code § 1-204.42(a)(1) (the "Mayor shall prepare and submit to the Council" the "budget for the forthcoming fiscal year in such detail as the Mayor determines necessary"). Thus, the privilege precludes the Council from forcing the disclosure—through paragraph (6A)'s publication requirement or otherwise—of internal policy documents exchanged between the Mayor and her subordinates related to this exclusive duty. *Cf. Vandelay Ent., LLC v. Fallin*, 343 P.3d 1273, 1278 (Okla. 2014) (holding that the "principle of separation of powers expressed" in Oklahoma's Constitution "protects [the executive communications] privilege from encroachment by Legislative acts, such as the Open Records Act").

Second, TPM argues that the District failed to "show that paragraph 6A impermissibly burdens or unduly interferes with" the Mayor's authority to submit an annual budget. TPM Br. 26. Not so. During the budget development process, confidentiality is needed "to protect the effectiveness of the executive decision-making process" and ensure that the Mayor and those who assist her are "free to explore alternatives in the process of shaping policies and making decisions" and can "do so in a way many would be unwilling to express except privately." *Jud. Watch*, 365 F.3d at 1115 (internal quotation marks omitted); *see Nixon*, 418 U.S. at 708. Without protection from disclosure, agency directors could not confidently provide candid advice or disclose sensitive information regarding

agencies' strengths, vulnerabilities, and needs. Removing confidentiality would therefore unduly interfere with the Mayor's ability to understand the competing desires of executive-level agencies and decide how best to apportion a limited budget. Put simply, it would force her "to operate in a fishbowl." *Elec. Frontier Found. v. U.S. Dep't of Just.*, 739 F.3d 1, 7 (D.C. Cir. 2014).[4]

TPM's argument that the Mayor remains "free to submit the budget proposal of her choosing" misses the point. TPM Br. 27. The disclosure of the budget documents would *interfere* with the Mayor's ability to prepare her budget proposal, even if she can eventually submit one. TPM also complains that the District's claim of a chilling effect lacks specificity and questions the declaration of Jennifer Reed, the Director of the Mayor's Office of Budget and Performance Management. TPM Br. 27-28. But TPM offers no facts to dispute the testimony of Ms. Reed—who is involved in the budget process and familiar with the documents at issue—that the documents' disclosure would "interfere with the Mayor's ability to obtain candid and comprehensive advice and recommendations from her agencies." JA 174 ¶ 11. The Mayor should not have to disclose the information to establish a chilling effect. "Human experience teaches that those who expect public dissemination of their

[4] For the same reasons, whatever TPM's need for the agencies' preliminary budget documents, that need cannot outweigh the Mayor's need for confidentiality in the communications and deliberations that assist her in developing her budget.

remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705.

Third, in its amicus brief, the Council argues that the Mayor's "ability to initiate budget proposals" is "subordinate" to its ultimate authority over the budget, and for "that reason alone," the Council's passage of DC FOIA's publication provision "cannot be read to intrude on a core executive function." Council Br. 18. To be sure, the Charter gave "the Council, not the Mayor, *ultimate* authority . . . over the District's annual budget." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 906 n. 31 (D.C. 1981) (en banc) (emphasis added). But as already explained, the Mayor has her own independent duty under the Charter to prepare and submit a *proposed* budget. D.C. Code § 1-204.42(a)(1). Indeed, the responsibility for preparing the proposed budget and formulating its content is a core and exclusive function of the Mayor under the Home Rule Act and, given the wide-ranging policy implications of the Mayor's budgetary decisions, it is among her most important responsibilities. That duty to craft a budget proposal is not subordinate to any other branch.[5]

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[5] The Council also points to its authority to direct the timing of the Mayor's submission, Council Br. 18, but just because the Council can dictate timing, that does not imply that the Council may unduly interfere with the Mayor's process of preparing and submitting a budget in the first place.

Fourth, TPM and the Council argue that a case from Alaska, *Capital Information Group v. Office of Governor*, 923 P.2d 29 (Alaska 1996); TPM Br. 37-39; Council Br. 21-22, supports their position, since that court ordered disclosure of budget documents sent from department heads to Alaska's OMB. To the extent the reasoning of that out-of-jurisdiction case is at all persuasive it actually supports the Mayor's position. The Alaska court considered whether executive privilege protected two separate sets of documents: (1) budget-related documents prepared by executive agencies pursuant to a statutory mandate, and (2) legislative proposals prepared by executive agencies in response to the Governor's request. The court held that the budget documents were subject to disclosure because "the *legislature itself* created the requirement" that the executive agencies prepare the budget reports; they were not the result of a discretionary request for information from the governor. *Cap. Info. Grp.*, 923 P.2d at 40. By contrast, the court held that the legislative proposals submitted by agencies at the governor's discretionary request were protected, reasoning:

> [T]he proposals to the Governor, constituting advice as to what programs he should include in his legislative proposals for the year, fall squarely under the privilege and should be protected from disclosure. The Governor . . . is formulating his own political legislative package which will reflect his own priorities and agenda. In doing so, he must determine not only which of the agency proposals have merit but also which warrant the expenditure of his own political capital in their pursuit. This is one of the most sensitive and important functions that the Governor performs while in office, and the need for frank

> discussion of policy matters among the Governor's advisors is perhaps greater here than in any other area.

Id. at 38. That reasoning protects the budget documents at issue here. Those documents were submitted at the discretionary request of the Mayor as part of her deliberations on what to include in her legislative budget proposal.

Fifth, TPM contends that withholding the requested documents would improperly impinge on the Council's ability to pass an appropriate final budget, and to carry out other functions like investigations, creating and organizing agencies, and establishing additional funds. TPM Br. 20-33; *see* TPM Br. 33 ("[a]gencies' 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 District does not dispute that the Council requires information about the financial state and needs of the District to make informed decisions about the budget and other governmental operations. But the Council has access to that information through its various oversight powers and activities, including annual agency-specific performance and budget hearings and additional requests for non-privileged executive agency information and documents. *See, e.g.*, D.C. Council, *Budget Process* (*Step by Step*), https://bit.ly/3hjOqhb (last accessed Feb. 9, 2022). Indeed, the Mayor and agencies provide thousands of pages of budget-related information to the Council, attend dozens of hearings, and answer hundreds of questions each year—and the Council remains free to ask agency directors whether

there are any other needs that should be funded. Moreover, nothing prevents the Council from asking the Mayor to submit an "issue analysis statement" or "a financial statement in any detail and at such times as the Council may specify." D.C. Code §§ 1-204.42(a)(6), 1-204.48(a)(3); *see* Council Br. 23.

The documents requested here, however, are not simply financial statements or analyses of issues identified in the prior year's budget; instead, the documents contain the substance of the Mayor's deliberations with her agency heads, which inform the Mayor's formulation of *her* budget policy. The Charter explicitly gives the Mayor, not the Council, discretion over what information to include in her annual budget proposal. D.C. Code § 1-204.42(a)(1). Only after the Mayor submits her proposal does the Council's primary role in the budget process—holding public hearings and adopting an annual budget—begin. *See id.* § 1-204.46.[6]

Sixth, and finally, TPM argues that the D.C. Circuit "effectively" 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*, 674

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[6] TPM also argues that the agencies' preliminary budget documents fall outside the scope of an executive communications privilege because they are sent to the Office of Budget and Planning ("OBP"), an independent agency "outside the Mayor's office." TPM Br. 40. Though it is true that agency directors submit their budget requests and recommendations through OBP, the information is transmitted and belongs to the Mayor and is used in formulating her budget policy. JA 177 ¶¶ 9, 11. A document does not lose "its privileged status simply because it traveled up the chain of command before the [Mayor] received it." *Loving*, 550 F.3d at 40.

F.2d 921 (D.C. Cir. 1982). TPM Br. 33-35; *see* Council Br. 19-22. Not so. *Common Cause* dealt with the Sunshine Act's requirement "that meetings of multi-member federal agencies shall be open to the public," but that case "express[ed] no view with regard to any constitutional issue of Executive privilege." 674 F.2d at 929. Moreover, the Court acknowledged that the federal FOIA "specifically exempt[ed] predecisional memoranda and other documents on the premise that government cannot operate in a fishbowl." *Id*. at 929 (internal quotation marks omitted).

III. There Is No Cause Of Action For DC FOIA's Publication Provision.

Next, TPM argues that it had a right to sue the District in order to require it to post certain budget-related documents online. TPM Br. 6-10; *see* Brief for Amicus Curiae Open Government Coalition ("OG Br.") 7-9. It relies on the statutory text that provides: "[a]ny person has a right to *inspect*" or "copy any [non-exempt] public record" and "may petition the Mayor" when "denied the right to *inspect*." D.C. Code §§ 2-532(a), 2-537(a) (emphases added). Thereafter, a requester who is "denied the right to inspect a public record" "may institute proceedings for injunctive or declaratory relief in the Superior Court." *Id.* § 2-537(a)(1), (2).

TPM is wrong. The scope of injunctive relief available to a requester follows from the right that has allegedly been denied. Here, that right is limited to "inspect[ing]" or "copy[ing]" a record, not viewing it online. TPM contends that the word "inspect" could include a right to read the documents on a public

website. TPM Br. 8 n.3. But that is not the natural reading of "inspect" in this context. Because it is paired with the term "copy," "inspect" refers to a *production* of documents to the requester—not publication online. That construction is supported by the statute's text, which authorizes the court to "order the *production* of any records improperly withheld *from the person seeking disclosure*," not the public more broadly. *Id.* § 2-537(b) (emphases added); *see* District Br. 36-37. Ultimately, TPM does not point to any DC FOIA provision stating that requesters like TPM are authorized to sue if the District does not post documents online.

Even if TPM could sue the District for such relief, the court lacked authority to order the District to publish online the documents that TPM requested. As the District argued in its opening brief, a court may enjoin withholding of documents by ordering *production* to the *requestor*, not by requiring *publication* more generally. District Br. 36-37. Indeed, in analyzing an analogous federal FOIA provision, the D.C. Circuit found that "a district court lacks authority to order an agency to make available for public inspection documents subject to the [publication] provision." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just. (CREW)*, 846 F.3d 1235, 1243 (D.C. Cir. 2017). This holding stems directly from federal FOIA's focus, which like DC FOIA, "is aimed at relieving the injury suffered by the individual complainant, not by the general public." 846 F.3d at 1243 (internal quotation marks omitted); *see* D.C. Code § 2-537(b).

Seeking to distinguish that decision, TPM argues that *CREW* felt bound by an earlier case's analysis that did not assess the first part of the federal provision—5 U.S.C. § 552(a)(4)(B)—which granted "the power to enjoin the agency from withholding records." TPM instead suggests that the court focused on the provision granting the "power to order production of any agency records improperly withheld from the complainant." *Id.*; *see* TPM Br. 45-46. To the contrary, the *CREW* court found that in the earlier decision, the court "did not so cabin its holding; rather it construed the scope of section 552(a)(4)(B) as a whole." 846 F.3d at 1244.

TPM also argues that the court has "broad equity power to issue injunctions." TPM Br. 43; *see* TPM Br. 42, 44; OG Br. 18-19. But "an injunction is an extraordinary remedy" that "is to be granted sparingly." *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991); *see CREW*, 846 F.3d at 1243 (rejecting similar remedial claim). In any event, the lower court failed to engage in any balancing of whether a prospective injunction to post the required documents online was warranted in this case. *See* JA 178-93.

IV. The Superior Court Erred In Ordering Prospective Publication Of Documents That TPM Did Not Request.

TPM argues that the DC FOIA provision empowering a court to enjoin "the withholding of documents" provided ample authority for the court to order the prospective publication of future budget documents. TPM Br. 41-42; *see* OG Br.

10-12. But again, a court may enjoin the withholding of documents by ordering *production* to the *requestor*, not by requiring prospective *publication*.

Moreover, TPM requested copies of only DCPS's and OSSE's preliminary budget requests for fiscal year 2019. Nevertheless, it argues that "the fact that the Superior Court ordered broader relief than [TPM] sought does not impact TPM's standing" because "[s]tanding hinges on the claims and form of relief sought in the Complaint, not the scope of the relief awarded." TPM Br. 44. Not so. Standing is a limitation not on pleadings, but on the power of the courts to entertain cases and provide relief. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The actual injury requirement would hardly serve [its] purpose" "if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration").[7] Because TPM has not alleged any cognizable interest in documents it did not request, it lacks standing to obtain such relief. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). (standing required for "each form of relief that is sought").

CONCLUSION

This Court should reverse the orders of the Superior Court.

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[7] TPM argues that the lower court's decision comports with opinions of two District entities that posting information online pursuant to Section 2-536(a) is a proactive disclosure obligation. TPM Br. 49-50. But neither of those opinions spoke to whether Section 2-536(a) abrogates DC FOIA's exemptions, let alone whether a court could prospectively order publication online.

Respectfully submitted,

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February 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

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

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

/s/ Richard S. Love
Signature

No. 21-CV-543
Case Number

Richard S. Love
Name

February 25, 2022
Date

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email address

CERTIFICATE OF SERVICE

I certify that on February 25, 2022, this reply brief was served through this Court's electronic filing system to:

Kathleen L. Millian
Todd A. Gluckman
Nicholas Soares

/s/ Richard S. Love
RICHARD S. LOVE