No. 14-CV-1322

IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

KIRBY VINING

Plaintiff-Appellant,

v.

COUNCIL OF THE DISTRICT OF COLUMBIA

Defendant-Appellee.

On Appeal from the
Superior Court of the District of Columbia
Civil Division
No. 2014-CA-568 B

BRIEF *AMICUS CURIAE* OF THE D.C. OPEN GOVERNMENT COALITION IN SUPPORT OF APPELLANT AND URGING REVERSAL

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DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 28(a)(2)(B), undersigned counsel certify that the D.C. Open Government Coalition is a tax-exempt, nonprofit 501(c)(3) corporation, that it has no parent corporations or subsidiaries, and that no publicly held company has a ten percent or greater ownership interest (such as stock or partnership shares) in *amicus*.

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STATEMENT OF INTEREST

The D.C. Open Government Coalition, through undersigned counsel, respectfully submits this brief as *amicus curiae* in support of Appellant Kirby Vining. Pursuant to D.C. App. R. 29(a), this brief is filed with the consent of all parties.

The Open Government Coalition is a non-profit organization founded in 2009 that is dedicated to enhancing governmental transparency and freedom of information in the District of Columbia. Among the directors of the Coalition are individuals who have been involved for over fifteen years in advocating through the District's legislative process for greater government transparency, litigating to enforce the District's Freedom of Information Act, and advising individuals seeking access to city government records.

The Coalition's interest in this case arises from the Superior Court's erroneous recognition of the Speech or Debate statute, D.C. Code § 1-301.42 (2001) *formerly* D. C. Code § 1-223 (1981), as a withholding statute under the D.C. Freedom of Information Act, an issue of first impression.

STATEMENT OF THE CASE

In 2000, the D.C. Council amended the Freedom of Information Act, expressly imposing on itself "the same rules as the executive branch with respect to public access to information." *See* Report of the Committee on Government Operations, Bill 13-829, the Freedom of Information Amendment Act of 2000 at 2 (Oct. 31. 2000).[1] The ruling below, if ratified on appeal, would substantially impair public access to the records of the Council and undermine the purpose of the FOI Act, "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Freedom of Information Act of 1976, D.C. Code § 2-531 (2001) *formerly* D.C. Code § 1-1521 (1981). In this case, therefore, the question for the Court is whether effectively to undo the legislative decision made fifteen years ago.

The Council asserts an overly broad, selectively invoked, and textually unsupported "Speech or Debate statute" exemption to withhold otherwise public records under the FOI Act. This novel assertion of privilege should be rejected for multiple reasons:

First, the Council knowingly and intentionally subjected itself to the FOI Act on an equal footing with executive branch agencies. This was a commendable good-government approach, one taken by legislatures in many states, and the ruling below would significantly impair, if not defeat, the Council's stated purpose.

Second, this outcome is contrary to law. The purpose of the Speech or Debate privilege is to protect Council members from criminal and civil liability and from being compelled to defend their legislative decisions in hostile fora, mainly judicial proceedings. A FOI Act request,

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[1] The Legislative History of the Freedom of Information Act of 2000 (hereafter "2000 History"), is available online at http://www.dcogc.org/content/committee-report-bill-13-829-freedom-information-amendment-act-2000.

which by law is addressed to the Council, not a Council member, does not pose any of the threats to legislative independence the Speech or Debate privilege was intended to prevent.

Third, the Superior Court's statutory interpretation is faulty, erroneously focusing on the Speech or Debate statute, and ignoring the plain language and legislative history of the FOI Act. A more careful analysis shows that the FOI Act—with its numerous explicit exemptions—cannot reasonably be read as implicitly incorporating a legislative privilege exemption.

Fourth, the privilege the Superior Court created lacks any clear limiting principle. It allows the Council to exercise broad discretion to deny the public access to virtually any records related to members' legislative and investigatory functions.

STATEMENT OF FACTS

The governance of the District of Columbia, the nation's capital, home to more than 650,000 residents, and workplace for hundreds of thousands of commuters, has long been the subject of intense public attention. Just two years after achieving home rule, the Council of the District of Columbia enacted the Freedom of Information Act of 1976 to vindicate the "public policy of the District of Columbia . . . that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them." D.C. Code § 2-531. The Council did so "to 'divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon receipt of a request for information.'" Melissa Davenport & Margaret Kwoka, *Good But Not Great: Improving Access to Public Information Under the D.C. Freedom of Information Act*, 13 U.D.C. L. Rev. 359, 361 (Summer 2010) ("Davenport") (quoting legislative history). Modeled on the federal Freedom of Information Act enacted a decade earlier, the District law applied solely to the executive branch. *See* 2000 History at 2.

However, in 2000 the District joined a movement of states to extend public access to legislative records.

A. THE COUNCIL EXPRESSLY CHOSE TO SUBJECT ITSELF TO THE FOI ACT.

The Council enacted the Freedom of Information Amendment Act of 2000, D.C. Law 12-283 ("the 2000 Act"), in part to formally subject itself to the FOI Act. Previously, it had made legislative records public as a matter of practice. 2000 History at 2. The 2000 Act amended the definition of a "public body" in the D.C. Administrative Procedure Act to include "the Mayor, an agency, or the Council of the District of Columbia," and incorporated that definition into the FOI Act. D.C. Code § 2-502(18A) (2001) *formerly* D.C. Code § 1-1502 (1981), *id.* § 2-539 (2001) *formerly* D.C. Code § 1-1529 (1981); *see also* 2000 History at 4. Nothing in the legislative history of the 2000 Act indicates that the Council contemplated giving itself special treatment under the FOI Act—let alone an exclusive legislative exemption from it. Quite to the contrary, the legislation extended the entirety of the FOI Act to the Council. Councilmember Kathy Patterson, chair of the Committee on Government Operations and one of the bill's five sponsors, explained in the Committee Report accompanying the bill that "it is only fair for the Council to abide by the *same rules* as the executive branch with respect to public access to information." 2000 History at 2 (emphasis added).

When the District enacted the 2000 amendments it followed the lead of numerous state legislatures that had extended public records laws to cover legislative records. Now more than forty states open legislative records to public inspection unless a specific exemption applies.[2]

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[2] *See, e.g.*, Ala. Code § 36-12-40; Ariz. Rev. Stat. Ann. § 39-121.01(A)(2); Ariz. Op. Atty. Gen. No. I78-76, 1978 WL 18716 (Apr. 18, 1978) (applying records law to legislature); Ark. Code Ann. § 25-19-103(6); Cal. Gov't Code § 9073; Colo. Rev. Stat. Ann. § 24-72-203(6); Conn. Gen. Stat. Ann. §§ 1-200(1), (5); Fla. Stat. Ann. § 119.01(2), (12); Haw. Rev. Stat. § 92F-

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The desire to provide citizens information about how their government operates underlies application of public records laws to legislative records, as well as executive agency records. *See, e.g.*, *Bedingfield v. Birmingham News Co*., 595 So.2d 1379, 1380 (Ala. 1992) (holding that city council internal audit report must be disclosed under state records law because, "[a]bsent access to this report, the citizens of Birmingham cannot determine whether the City is correctly identifying any needed improvements within the council offices or speak to any proposed strategies for policy changes").

The District is not the only jurisdiction that explicitly treats legislative and executive branch entities equally under public records laws. *See, e.g*., Ky. Rev. Stat. Ann. § 61.870(1); Mo. Ann. Stat. § 610.010(4); Mont. Code Ann. § 2-6-101(2); Nev. Rev. Stat. Ann. § 239.001; N.M. Stat. Ann. §§ 14-2-6(F)-(G); R.I. Gen. Laws Ann. § 38-2-1(1); W. Va. Code Ann. § 29B-1-2(3). Some states have created specific exemptions for categories of legislative records. For

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3; Transparent and Ethical Government – Public Records Act, 2015 Idaho Sess. Laws Ch. 140. § 5 (West) (to be codified at Idaho Code Ann. § 74-101(14); 5 Ill. Comp. Stat. Ann. 140/2(a); Ind. Code Ann. § 5-14-3-2(n)(1); Iowa Code Ann. § 22.1(1); Kan. Stat. Ann. §§ 45-217(f), (g); Ky. Rev. Stat. Ann. § 61.870(1); La. Rev. Stat. Ann. § 44:1(A); Me. Rev. Stat. tit. 1, § 402(2)(A); Md. Code Ann., State Gov't § 4-101(h); Mich. Comp. Laws Ann. § 15.232(d)(ii); Miss. Code. Ann. §§ 25-61-3(a)-(b); Mo. Ann. Stat. § 610.010(4); Mont. Code Ann. § 2-6-101(2); Neb. Rev. Stat. § 84-712.01(1); Nev. Rev. Stat. Ann. § 239.005(5); N.H. Rev. Stat. Ann. § 91-A:1-a; N.J. Stat. Ann. § 47:1A-1.1; N.M. Stat. Ann. §§ 14-2-6(F)-(G); N.C. Gen. Stat. Ann. § 132-1; N.D. Cent. Code Ann. §§ 44-04-17.1(13), (16); Ohio Rev. Code Ann. § 149.43(A)(1); 65 Pa. Cons. Stat. § 67.305(b); R.I. Gen. Laws Ann. § 38-2-2(1); S.C. Code Ann. §§ 30-4-20(a), (c); S.D. Codified Laws § 1-27-1.1; Tenn. Code Ann. §§ 10-7-301, 10-7-503(a)(1)(A); Tex. Gov't Code Ann. § 552.003(1)(A); Utah Code Ann. §§ 63G-2-103(11)(a)(ii), (21)-(22); Vt. Stat. Ann. tit. 1, § 317; Va. Code Ann. § 2.2-3701, *amended by* 2015 Va. Legis. Serv. Ch. 131; Wash. Rev. Code Ann. § 42.56.010(3); W. Va. Code Ann. § 29B-1-2(3); Wis. Stat. Ann. § 19.32; Wyo. Stat. Ann. § 16-4-201. A handful of other states include only subordinate legislative bodies within their records laws. Alaska Stat. §§ 40.25.110, 40.25.220(2); Del. Code Ann. tit. 29, § 10002(h); Or. Rev. Stat. Ann. § 192.410(5). And one or two states make their legislatures subject to open records laws but provide statutory discretion to their legislatures to modify practices. *See, e.g.*, Miss. Code. Ann. § 25-61-17 (reserving to the legislature "the right to determine the rules of its own proceedings and to regulate public access to its records").

example, an Arkansas exemption covers a legislator's "[u]npublished memoranda, working papers, and correspondence," Ark. Code Ann. § 25-19-105(b)(7), and a Hawaii exemption covers "[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports," Haw. Rev. Stat. § 92F-13(5). Kansas exempts proposed legislation and research that has yet to be publicly identified or distributed to a quorum of the body. Kan. Stat. Ann. § 45-221(21)-(22).[3] Like other exemptions to public disclosure laws, these statutory exemptions for legislative records are read narrowly. *See, e.g.*, *Legislative Joint Auditing Comm. v. Woosley*, 722 S.W.2d 581, 92-93 (Ark. 1987) (refusing to extend exemption for a legislator's working papers to working papers of auditors hired by legislature). A couple of states have expressly incorporated a speech or debate exemption in their public records laws. N.J. Stat. Ann. § 47:1A-9(b); 65 Pa. Cons. Stat. § 67.102.

Because the D.C. Council intended to operate in compliance with the FOI Act, it is not surprising that the law includes no exemption specifically applicable to legislative records. The Council, like other public bodies, has discretion to withhold records, including legislative

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[3] *See also, e.g.*, Colo. Rev. Stat. Ann. § 24-72-203(6) (certain legislative research); 2015 Idaho Sess. Laws Ch. 140. § 5, *supra* note 2 (to be codified at Idaho Code Ann. § 74-109 (legislative drafts); 5 Ill. Comp. Stat. Ann. 140/7 (same); Ind. Code Ann. §§ 5-14-3-4(13)-(14) (certain legislative work product); Me. Rev. Stat. tit. 1, § 402(3)(C) (legislative drafts); Neb. Rev. Stat. § 84-712.05("correspondence, memoranda, and records of telephone calls" by legislators); N.J. Stat. Ann. § 47:1A-1.1 (constituent communications and certain legislative records for individual legislators); N.D. Cent. Code Ann. § 44-04-18.6 (private communications); 65 Pa. Cons. Stat. § 67.708(9) (draft bills); S.C. Code Ann. § 30-4-40(a) (certain "[m]emoranda, correspondence, and working papers"); Tex. Gov't Code Ann. § 552.106(a) (legislative drafts); Utah Code Ann. § 63G-2-305(20)-(21) (legislative research); Va. Code Ann. § 2.2-3705.7(2) (working papers and correspondence). A couple of states have confidentiality provisions for certain types of legislative records outside their public records laws. *E.g.*, N.C. Gen. Stat. Ann. §§ 120-130, 120-131; Ohio Rev. Code Ann. § 101.30. New York's Freedom of Information Law specifically identifies categories of state legislative records that are subject to public disclosure requirements. N.Y. Pub. Off. Law § 88; *Polokoff-Zakarin v. Boggess*, 879 N.Y.S.2d 244, 246 (App. Div. 2009) (compelling State Senate to provide records required by statute).

records, that fall under one or more of the specific exemptions in the FOI Act. The Council, like other public agencies, already may properly withhold records that reflect sensitive financial information provided to it, D.C. Code § 2-534(a)(1), material whose disclosure would represent an unwarranted invasion of personal privacy, *id.* § 2-534(a)(2), certain investigative records, *id.* § 2-534(a)(3), inter-agency or intra-agency records that would be subject to a litigation privilege, such as the attorney-client privilege, the attorney work product doctrine, or the deliberative process privilege, *id.* § 2-534(a)(4), information properly classified in the interests of national defense, *id.* § 2-534(a)(7), and documents properly subject to any number of other specific exemptions. *See, e.g.*, D.C. Code § 2-534(a)(6) (requiring withholding of records if disclosure is prohibited by a federal statute or another D.C. statute).

B. THE COUNCIL RECENTLY BEGAN ASSERTING A SPEECH OR DEBATE EXEMPTION.

More than a decade after extending FOIA to itself, the Council began asserting that the Speech or Debate statute, D.C. Code § 1-301.42, justifies withholding of public records under the FOI Act. The Council invoked the privilege in response to one FOI Act request in 2013 (Request 2013-43), after not having done so in previous years.[4] It then began doing so regularly. In fiscal year 2014, the Council withheld records based on a Speech or Debate claim in response to nine requests, about thirteen percent of all FOI Act requests it received that year.

The Council began asserting this broad new exemption to withhold public legislative records even as it sought to distance itself from a series of public corruption scandals, including

[4] The Council made available to the D.C. Open Government Coalition its FOI Act denial letters for fiscal years 2011 to 2013, and provided a summary of exemption claims in fiscal year 2014. Due to record-keeping and reporting issues, the Council was unable to provide records of its denials in fiscal years 2001 through 2010. The Council did not assert a Speech or Debate exemption at all in either fiscal years 2011 or 2012.

felony guilty pleas by three former members and an aide to a fourth member since 2012.[5] In the wake of those investigations, several current Council members have publicly recognized the need for transparency to repair citizen confidence in the Council and other District institutions.[6] The outcome of this case will in no small part shape the validity of those statements with regard to the Council.

In the case at bar, the Council filed a Vaughn Index identifying 149 documents that were responsive to Vining's FOI Act request but which it claimed were exempt from disclosure. Of those records, the Council claimed sixty documents (forty percent) were exempt solely under the Speech or Debate statute. Specifically, relying on D.C. Code § 2-534(a)(6), the Council claimed that the records were "specifically exempt from disclosure" under D.C. Code § 1-301.42. *See* Joint Appendix ("J.A.") at 51, 53-63 ("Vaughn Index").

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[5] See, e.g., Colbert I. King, *Editorial: In D.C. Politics, It Pays to Follow the Money*, Wash. Post (Aug. 23, 2014), at A15.

[6] *See, e.g.*, *D.C. Councilmembers – Kenyan McDuffie*, Council of the District of Columbia, http://dccouncil.us/council/kenyan-mcduffie (last visited Apr. 24, 2015) (discussing legislative efforts to "enhance[] government accountability and transparency"); *Auditor Wants Contempt Ruling Against Mayor*, Wash. Times (Oct. 22, 2009), http://www.washingtontimes.com/news/2009/oct/22/auditor-wants-contempt-ruling-against-mayor/ (quoting Councilmember Mendelson criticizing mayor's office for "fear of transparency"); *Biography*, David Grosso, http://www.davidgrosso.org/about/ (last visited Apr. 24, 2015) (stating that Councilmember Grosso is "committed to . . . promoting transparency and open government"); Mike DeBonis, *Meet an At-Large D.C. Council Candidate: Elissa Silverman*, Wash. Post (Oct. 23, 2014), http://www.washingtonpost.com/blogs/mike-debonis/wp/2014/10/23/meet-an-at-large-d-c-council-candidate-elissa-silverman/ (quoting now-Councilmember Silverman as saying "I've led efforts to increase transparency in District government"); *D.C. Councilmembers – Brianne Nadeau*, Council of the District of Columbia, http://dccouncil.us/council/brianne-nadeau (last visited Apr. 24, 2015) (stating that Councilmember Nadeau is "committed to . . . putting measures in place that allow for government transparency").

ARGUMENT

I. THE D.C. SPEECH OR DEBATE STATUTE IS NEITHER A VALID EXEMPTION NOR A WITHHOLDING STATUTE UNDER THE FREEDOM OF INFORMATION ACT.

The District's Speech or Debate statute protects individual Council members against being drawn into litigation that hinders or delays the legislative process. *Dorsey v. District of Columbia*, 917 A.2d 639, 642 (D.C. 2007). It is interpreted in light of its purpose, *Gross v. Winter*, 277 U.S. App. D.C. 406, 411, 876 F.2d 165, 170 (1989), and this Court has expressly declined to "define the limits of its protections," *Dorsey*, *supra*, 917 A.2d at 643. In ruling that the District's statutory Speech or Debate privilege permits the Council to withhold records under the FOI Act, the trial court demonstrated a fundamental misunderstanding of the privilege's purpose, function and scope and a disregard for the FOI Act's clearly stated policy that the right of access should be interpreted liberally and exemptions from disclosure narrowly. This Court should reject the Council's attempt to greatly expand the privilege beyond the functions it was intended to protect.

D.C. Code § 1-301.42 states, "[f]or any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place." The wording is virtually identical to the constitutional privilege afforded members of Congress. U.S. Const., art. 1, § 6, cl. 1. The privilege is absolute in that "once it is determined that Members are acting within the legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). D.C. law defines "legislative duties" as including:

> Everything said, written or done during legislative sessions, meetings, or investigations of the Council or any committee of the Council, and everything said, written, or done in the process of drafting and publishing legislation and legislative reports.

D.C. Code § 1-301.41(b). The Supreme Court has said there are limits to what activities are absolutely privileged because they are "legislative duties":

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House . . . . [T]he courts have extended the privilege to matters beyond pure speech or debate . . . , but "only when necessary to prevent indirect impairment of such deliberations."

Gravel v. United States, 408 U.S. 606, 625 (1972) (citation omitted). "[W]e find no support in the text or legislative history of the District's speech or debate statute for extending it further than the constitutional provision." *Gross*, *supra*, 277 U.S. App. D.C. at 414, 876 F.2d at 173.

The Superior Court correctly recognized that the "District's Speech or Debate statute was '[p]atterned after the Speech or Debate Clause of the Constitution . . . .'" J.A.11. But it was error to disregard the remainder of text quoted from *Dorsey* that the statute "provide[s] Council members with the same protection afforded to members of Congress *'against civil actions and criminal prosecutions that threaten to delay and disrupt the legislative process.'*" *Id.* (quoting *Dorsey*, *supra*, 917 A.2d at 642) (emphasis added).

Significantly, the judge recognized that the Speech or Debate privilege applies to Council members, *not* to the Council as a body. J.A.16. But, relying on precedent holding that the privilege extends to legislative staff members,[7] he erroneously concluded that "even if [the FOIA request] had been sent directly to the Council, the same legislative immunity that protects Councilmember McDuffie and his staff would protect the Council in general, so long as the activities at issue constitute legislative activities." *Id.*

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[7] *Tenney v. Brandhove*, 341 U.S. 367 (1951).

A. The privilege does not apply to FOI Act requests.

The purpose of the Speech or Debate privilege is "that legislators engaged 'in the sphere of legitimate legislative activity' should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (citations omitted). The privilege secures "to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules." *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880) (quoting *Coffin v. Coffin*, 4 Mass. (1, 27 Tyng) (1808)). According to the Supreme Court, the Speech or Debate privilege:

> is a product of the English experience . . . . [T]he "central role" of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . . [W]hen it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch.
>
> . . . [W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.

Eastland, *supra*, 421 U.S. at 502-03 (citations and internal quotations omitted).

Simply put, a request for public records made to the Council pursuant to the FOI Act does not pose any of the dangers the Speech or Debate privilege guards against. It does not expose Council members or their legislative staffs to civil or criminal liability. It does not compel them, with the threat of penalties for perjury or contempt, to answer questions or disclose legitimately exempt information. Finally, because the Council knowingly and deliberately

subjected itself to the FOI Act, and responding to public records requests is an internal, administrative process, the disclosure requirement does not pose separation of powers concerns.[8]

B. The privilege does not shield the Council from FOI Act requests.

Like most privileges, the Speech or Debate privilege "is personal. It extends to Members and their counsel acting in a legislative capacity . . . ," not to the legislative body. *Eastland*, *supra*, 421 U.S. at 515 (Marshall, J., concurring in judgment); *see also In re Grand Jury Proceedings*, 563 F.2d 577, 585 (3d Cir. 1977) ("[I]t should operate as a shield to those whose public duties would be adversely affected by its absence—the legislators themselves. It is not an institutional privilege belonging to the legislature itself, but rather is personal in nature.").

The privilege provides greater protection to legislators than to legislative employees. *See, e.g.*, *Dombrowski*, *supra*, 387 U.S. 306; *Kilbourn*, *supra*, 103 U.S. 168. When applied to legislative employees, the privilege is more narrowly focused on aides who directly assist legislators to perform duties within the legislative sphere because "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Gross*, *supra*, 277 U.S. App. D.C. at 411, 876 F.2d at 170 (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)):

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a

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[8] The Council clearly was cognizant that making itself subject to the FOI Act created a potential for separation of powers problems. It established an administrative appeal to the mayor for requesters denied access to records by executive branch agencies. D.C. Code § 2-537(a) (2001) *formerly* D.C. Code § 1-1527 (1981). But the only recourse when the Council denies a FOI Act request is for the requester to initiate a suit in the Superior Court. *Id.* § 2-537(a-1). Thus, it is impossible for a situation to arise in which the mayor overrules the Council's decision to withhold documents.

> lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because . . . the litigation questions action taken by the employee within rather than without the House.

Powell v. McCormack, 395 U.S. 486, 505 (1969); *see also Doe v. McMillan*, 412 U.S. 306, 316 (1973).

Under the FOI Act, an information request is made to the agency or public body possessing the records sought. *See generally* D.C. Code § 2-532 (2001) *formerly* D.C. Code § 1-1522 (1981). A FOI Act request, even when addressed to a Council member, is a request *to the Council*, as Appellee recognized in its briefing below. *See* Reply to Pl.'s Opp'n to the Council's Mot. for Summ. J. at 7 n.3. It said that, although Vining "initially made his request . . . to Councilmember McDuffie . . . [t]he Council—noting that individual members are not subject to the DC FOIA—responded to the request." *Id.*

Indeed, all records generated in the legislative process are Council records, not Council members' records. *See Rules of Organization and Procedure for the Council of the District of Columbia*, Council Period 20 (Council Rules),[9] art. VIIIA, § 801. Legislative files maintained by the Secretary include introduced and amended versions of bills, recordings and transcripts of committee hearings, documents submitted for the record, proposed amendments, and files regarding committee consideration of legislation. *Id.* §§ 806, 807. Emails sent or received by Council members and other employees pertaining to "transact[ion of] public business" must be "incorporated into the Council's record." *Id.* art. VIIIB, § 811(g).

[9] Council Period 20 began January 2, 2013 and ended December 31, 2014. Because the FOI Act requests and the Superior Court Order under review in this appeal were filed between those dates, all references to Council rules will be to the version in effect during Council Period 20.

C. The privilege does not apply to Council employees who administer FOI Act functions.

The Council's rules divide responsibility for receiving and responding to FOI Act requests between the Secretary and General Counsel, and anticipate that requests initially may be directed to Council members or other employees. Council Rules, art. VIIIB, § 811. The Secretary is the Council's FOI officer, *id.* § 811(a), and the General Counsel "shall make the final determination on whether particular records are privileged or otherwise subject to disclosure," § 811(f). Section 811(b) instructs that "[t]o ensure accurate and timely compliance with the law, whenever a request is received under the Freedom of Information Act, . . . it shall be forwarded to the Secretary within one business day of receipt."

The Council's Secretary has no legislative duties. Council Rules, art. IIF, § 262. The General Counsel legislative duties include:

> identifying legislative problems, providing members with alternatives in terms of policy options to solve those problems, . . . preparing technical amendment and enactment bills, providing legislative drafting assistance to all members, . . . mak[ing] determinations about the legal sufficiency of legislation, and making necessary technical and conforming changes in measures . . . .

Id. § 263. But in the General Counsel's capacity as final arbiter of how the Council will respond to FOI Act requests, the Speech or Debate privilege does not apply.

In short, the ruling below must be overturned because a request for public records related to legislation, pursuant to the District's FOI Act, simply does not implicate the Speech or Debate privilege. Such requests are directed by statute and the Council's rules to the body, not to individuals to whom the privilege might apply. Responding to records requests does not threaten the independence of individual Council members or their aides acting a legislative capacity. Finally, contrary to the finding of the court below, the privilege does not extend to the Council's Secretary and General Counsel when performing their FOI Act duties.

D. The Speech or Debate statute is not a withholding statute.

If a public body receives a FOI Act request for records that another statute designates as confidential, the FOI Act requires the public body to withhold them. D.C. Code § 2-534(a)(6). This exemption reflects a bedrock principle that a requester should not be able to obtain access under the FOI Act to records he or she could not obtain by any other means.

A classic example of this exemption in operation might involve a government contractor who, as part of the bidding process, had to submit federal income tax return data to a D.C. government agency:

> (a) General rule. Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State, . . .
>
> . . .
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section . . . .

26 U.S.C. § 6103. In response to a FOI Act request for bidding documents, the procurement agency would have to withhold the tax return data pursuant to Exemption (a)(6).

To qualify as a withholding statute, "the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." *Robertson v. Butterfield*, 162 U.S. App. D.C. 298, 299, 498 F.2d 1031, 1032 (1974), *rev'd on other grounds*, 422 U.S. 255 (1975). Interpreting 5 U.S.C. § 552(b)(3), the federal analog to § 2-534(a)(6), the D.C. Circuit explained that:

> Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the public. On the contrary, Congress intended exemption from the FOIA to be a legislative determination and not an administrative one. It provided that only explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.

Irons & Sears v. Dann, 196 U.S. App. D.C. 308, 313, 606 F.2d 1215, 1220 (1979) (footnotes omitted).

The Speech or Debate statute satisfies none of the requirements to be deemed a withholding statute. The plain language of D.C. Code § 1-301.42—"[f]or any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place"—does not address documents at all, much less state that certain documents or categories of documents are nonpublic records. This is so even when viewed in conjunction with D.C. Code § 1-301.41 (2001) *formerly* D.C. Code § 1-222 (1981), which encompasses "[e]verything said, written or done during legislative sessions, meetings, or investigations . . ., and everything said, written, or done in the process of drafting and publishing legislation and legislative reports." In short, nothing in the legislative history of the Speech or Debate statute suggests, even remotely, that Congress or the Council intended it to operate as a withholding statute. As explained above, the statute's purpose is to prevent interference by the executive and judicial branches of government in the legislative process.

Nor do amendments to the FOI Act indicate any such intent. When the Council subjected itself to the FOI Act in 2000, it could have created a Speech or Debate exemption. It did not, and nothing in either the text of the legislative history of the 2000 Act indicates any intent for such an exemption. Moreover, enactment in 2010 of major revisions to the Open Meetings Act, D.C. Code § 2-571 *et seq.*, provides additional support for the proposition that the Council did not intend the Speech or Debate statute to operate as a FOI Act withholding statute. The new Open Meetings Act established that meetings of public bodies are presumptively public and may be closed only during discussion of matters falling within fourteen narrowly circumscribed exemptions. *Id*. § 2-574(b). As it had in 2000, when it enacted the FOI Act

amendments, the Council made itself subject to the Open Meetings Act. In doing so, however, the Council expressly defined how the statute would apply to its proceedings. *Id.* § 2-574(f).

Passage of the Open Meetings Act amendments demonstrates the Council's understanding of transparency issues and its ability to craft statutes to protect its prerogatives and processes. When it enacted the 2000 amendments and in the ensuing fifteen years, the Council could have created a legislative privilege exempting records like those at issue in this case. It chose not to do so, and the Court should not convert the Speech or Debate statute, which serves an entirely different purpose, into a broad privilege to withhold records under the FOI Act.

II. BASIC PRINCIPLES OF STATUTORY CONSTRUCTION CONTRADICT THE SUPERIOR COURT'S RECOGNITION OF A NEW EXEMPTION FOR LEGISLATIVE RECORDS.

When a court interprets a statute it "must account for the statute's full text . . . structure, and subject matter." *Grayson v. AT&T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (citations omitted). The "primary rule" of statutory interpretation is to "ascertain and give effect to legislative intent." *Id.* This is a "holistic endeavor" not to be undertaken with blinders on. *Id.* Interpretations that render statutory provisions superfluous, create absurd results, resort to innuendo and speculation, or contradict the very purpose of the statute should be avoided. *Id.*; *see also Banks v. United States*, 359 A.2d 8, 10 (D.C. 1976). The "fundamental canon of statutory construction" is certain: "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *superseded by statute on other grounds*, Family Smoking Prevention and Tobacco Control Act (the "TCA"), Pub. L. No. 111–31, § 907(d)(3)(A)-(B), 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387g).

When applying these rules to the FOI Act, this Court must consider that the purpose of the statute is "to promote the disclosure of information, not to inhibit it." *Wash. Post Co. v.*

Minority Bus. Opportunity Comm'n, 560 A.2d 517, 521 (D.C. 1989). As such, it is required to interpret relevant statutory provisions with a "view toward expansion of the public access." D.C. Code § 2-531; *see also Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia* (*FOP*), 82 A.3d 803, 813 (D.C. 2014) (disclosure provisions must be "generously construed"). Exemptions to public access, on the other hand, must be given a "narrow" interpretation; they must be approached with what this Court has called "a jaundiced eye." *Washington Post Co.*, *supra*, 560 A.2d at 521. When ambiguity is found between disclosure provisions and exemptions, this Court is constrained to resolve the issue "in favor of disclosure." *FOP*, *supra*, 82 A.3d at 813.

A. The Superior Court erred in applying the rules of construction.

The Superior Court found that Exemption 6 silently incorporates the Speech or Debate statute to allow withholding of any records related to a member's "legislative duties." J.A.13-16. This was so, according to the Superior Court, because "legislative duties" encompass "[e]verything said, written or done during legislative sessions, meetings or investigations of the Council" and "everything said, written or done in the process of drafting or publishing legislation or legislative reports." J.A.14 (citing D.C. Code § 1-301.41).

The Superior Court asked just two questions: whether the Speech or Debate statute is a withholding statute; and if so, whether it covers the records sought here. In doing so, it accepted that it must find in the Council's favor if it answered both questions in the affirmative. As explained above, D.C. Code § 1-301.42 is not a withholding statute under D.C. Code § 2-534(a)(6) and does not fall within any other FOI Act exemption. But the Superior Court also erred by failing to address the broader question of statutory interpretation: Whether the FOI Act can fairly be read as incorporating into Exemption 6 a pre-existing legislative privilege statute—unstated either in the text of the 2000 Act or its legislative history—that is contrary to the FOI

Act's statutory provisions and the Council's express intent. Well-established principles of statutory interpretation demonstrate that the Superior Court erred because such an exemption would all but exempt the Council entirely from the FOI Act's reach.

The Superior Court's interpretation goes astray for multiple, independent reasons. It renders many provisions of the FOI Act meaningless for the Council, creates internal inconsistencies in the FOI Act, and applies a privilege that the text of the FOI Act read as whole rejects. And, even if there is ambiguity about application of the Speech or Debate privilege under Exemption 6, which there is not, the Superior Court impermissibly resolved that ambiguity *against* disclosure. *Barry v. Wash. Post Co.*, 529 A.2d 319, 321 (D.C. 1987) (whenever "doubts about the applicability of a particular exemption" arise, a court must resolve them "in favor of disclosure"). The ruling thus conflicts with the FOI Act's purpose, to increase citizen access to government records.

If the Superior Court is correct, several FOI Act provisions specifically applied to the Council would be superfluous. For example, the Council in the 2000 Act imposed on itself the same disclosure requirements the FOI Act imposes on other government entities. In drafting the 2000 amendments, the Council explicitly chose to exempt from disclosure Council records that are similar to records an agency could withhold under existing law. To accomplish, this the Council amended the text of Exemptions 3 and 4. It included among exempt law enforcement records "the records of Council investigations." D.C. Code § 2-534(a)(3). It incorporated into the deliberative process exemption "memorandums or letters generated or received by the staff or members of the Council." *Id.* § 2-534(a)(4). But the Superior Court ruling creates blanket exemption for essentially "everything" related to one of the Council's main functions, considering and enacting legislation.

The Superior Court found that Exemption 6 would prevent disclosure under the Speech or Debate statute of "[e]verything said, written or done during [an] investigation[] of the Council," a "legislative duty." *Id.* § 1-301.41. Similarly, the exemption would cover "[e]verything said, written or done during legislative sessions [and] meetings" and "everything said, written, or done in the process of drafting and publishing legislation and legislative reports." *Id.* The exemption the Superior Court created clearly is duplicative. The Council would not have gone to the trouble of amending Exemptions 3 and 4 if it intended to incorporate the Speech or Debate statute under Exemption 6. The 2000 Act, read as a whole in light of its legislative history, does not incorporate the Speech or Debate statute.

The Superior Court's interpretation would create internal inconsistencies within the FOI Act. The court interpreted the Speech or Debate statute as "mandatory" in its language and "absolute" in its reach. J.A.14. The court had to do so because Exemption 6 applies only if the underlying statute requires confidentiality. See *supra* at 15. But the court's interpretation conflicts with other FOI Act provisions.

For example the statute requires disclosures of "[f]inal opinions" on a matter, D.C. Code § 2-536(a)(3), "statements of policy and interpretations of policy, acts, and rules," *id.* § 2-536(a)(4), "correspondence and materials referred to" in statements of policy and interpretations; *id.* § 2-536(a)(5), and information in a "contract dealing with the receipt or expenditure of public or other funds," *id.* § 2-536(a)(6). Many types of records related to a Council member's "legislative duties" *must* be published to comply with § 2-536. Arguably, under the Superior Court's interpretation, committee reports, including the legislative history of the 2000 Act, should never have been disclosed because they are protected by the Speech or Debate statute. But statutory interpretation is meant to make "sense," not "nonsense out of the" law. *W. Va.*

Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. Because the court's strained interpretation would create internal consistencies, it should be reversed.

At bottom, the Superior Court's application of the Speech or Debate privilege would frustrate the goals of the FOI Act. *Wash. Post Co.*, *supra*, 560 A.2d at 522 (reversing lower court for using "too broad a brush in sustaining the claims of exemption"). There is no question that the FOI Act must be interpreted with a "view toward expansion of the public access" right, D.C. Code § 2-531, not with overly technical interpretations of its exemptions that shrink the public access right. If this Court reads the FOI Act as a whole and in light of its legislative history, Exemption 6 cannot be interpreted as incorporating the Speech or Debate statute to create a legislative privilege exemption. Thus, even if this Court were to conclude that D.C. Code § 1-301.42 *might* be interpreted to create an exemption, it should reverse because ambiguities must be resolved in favor of disclosure. *FOP*, *supra*, 82 A.3d at 813.

B. The Council's silence was not a legislative oversight.

It is a basic rule of statutory interpretation that the Court must not presume that the Council's failure to identify the Speech or Debate privilege as an exemption was a legislative oversight. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)."). Rather, courts must presume that the omission is purposeful and is not open to judicial revision. *Id.* ("We would not presume to ascribe this difference [between sections] to a simple mistake in draftsmanship."); *see also Sch. St. Assocs. Ltd. P'ship v. District of Columbia*, 764 A.2d 798, 807-08 (D.C. 2001). The trial court violated this canon of statutory construction.

Common rules of statutory interpretation suggest that had the Council, in extending FOIA to itself, intended also to reserve the legislative privilege as a means of withholding, it would have done so explicitly.[10] Other state legislatures, unlike the Council, have carefully defined categories of "legislative records" and enumerated a legislative privilege among valid grounds for exemption. *See, e.g.*, N.J. Stat. Ann. § 47:1A-9(b) ("The provisions of this act shall not abrogate or erode any executive or legislative privilege . . . ." (citation omitted)).[11] For example, the Pennsylvania Right to Know Law makes legislative bodies subject to the statute, 65 Pa. Cons. Stat. § 67.303, identifies nineteen categories of legislative records, 65 Pa.C.S. § 67.102, and defines "privilege" to include "the speech and debate privilege." If the Council had intended to exempt its records, it would have made that clear.

III. THE SUPERIOR COURT'S SPEECH OR DEBATE EXEMPTION HAS NO MEANINGFUL LIMITS.

The Superior Court's opinion establishes no boundaries for the exemption it creates. As the court construed the exemption, most—if not all—Council records would be related in some way to "legislative duties" of members and there staffs. This is so because the Speech or Debate statute as interpreted by the Superior Court encompasses "[e]verything said, written or done" in performance of the Council's main tasks, without regard to whether disclosure would hinder or delay the legislative process, or threaten Council members' independence. J.A.14 (citation omitted).

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[10] Indeed, the Council reserved privileges of *others* elsewhere in the FOI Act but nowhere reserved itself a legislative privilege. *See* D.C. Code § 2-534(a-1)(2).

[11] Section 2-534(e) states that "[a]ll exemptions available under this section shall apply to the Council." But this merely clarifies that the Council may invoke any exemption available to other public bodies. This provision undermines the argument that the Council enjoys an exemption not "available under this section."

Applied to the FOI Act, this broad, undefined exemption could be invoked improperly and selectively to withhold information to protect Council members from embarrassment, from having to defend their actions before voters, from disclosure of ethics or criminal violations, or from charges of fiscal mismanagement. But the FOI Act was enacted to create clear exemptions, removing from disclosure decisions "'broad discretion in determining what, if any government records should be made available to the public." Davenport, *supra*, 13 U.D.C. L. Rev. at 361.

The Council's Vaughn Index demonstrates the untethered nature of the Superior Court's interpretation. Among records withheld because disclosure would violate the Speech or Debate privilege was testimony by a government contractor at a public ANC meeting. J.A.53 (No. 3). In fact, of the sixty documents withheld solely because they related to legislative duties of Councilmember McDuffie and his staff, the first thirteen appear to have been prepared by a government contractor for purposes unrelated to the legislative process. J.A.53. It appears that the Council's Government Operations Committee obtained them in its oversight capacity. *Id.* Among them are publicity materials including "miscellaneous press releases," *id.* (No. 1), "information sheet[s]," *id.* (No. 6), and a "[f]lyer describing McMillan project and urging the community to contact their elected officials," *id.* (No. 9). Similar publicity materials (or perhaps the same materials) are readily available online.[12] The limitless nature of the interpretation is further demonstrated by the Vaughn Index purporting to withhold an email that "contains a tweet" from a non-government Twitter account. J.A.61 (No. 128). The FOI Act never contemplated the withholding of documents that are available to the public already.

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[12] *See, e.g.*, *Vision McMillan Fact Sheet*, Envision McMillan (June 13, 2013), http://envisionmcmillan.com/vision-mcmillan-fact-sheet/; *Save the Date & Save McMillan Park!*, Friends of McMillan, http://friendsofmcmillan.org/wp-content/uploads/2013/05/2-Page-Color-McMillan-Park-6Jun2013-Surplus-Meeting-Flyer.pdf (last visited Apr. 24, 2015).

The Council's Vaughn Index demonstrates the error in designating the Speech or Debate statute as a withholding statute by failing to stake out any clear guidelines. Yet, to qualify, a statute must clearly identify particular records or categories of records that are not public and must eliminate discretion from the disclosure decision. Even a cursory reading of the Vaughn Index shows that the universe of exempt records is undefined and that the Council exercised considerable discretion in deciding which to disclose and which to withhold because they related to "legislative duties."

The FOI Act either applies to the Council or it does not. But the Council cannot purport to subject itself to the open records law under the plain language of that statute and simultaneously reserve to itself the ability to opt out by selectively invoking a non-existent Speech or Debate exemption.

CONCLUSION

For all of the foregoing reasons, this Court should reject the Superior Court's application of the Speech or Debate statute as an independent basis for the Council to shield otherwise public records from public disclosure.

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CERTIFICATE OF SERVICE

I, Matthew L. Schafer, counsel for the D.C. Open Government Coalition, certify that on April 27, 2015, I directed that a true copy of the attached be served by first-class mail on the person(s) listed below.

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