SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TERRIS, PRAVLIK & MILLIAN, LLP, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Case No. 2020 CA 003087 B Judge Heidi M. Pasichow Next Event: Initial Scheduling Conference 9:30 a.m., November 13, 2020

PRAECIPE OF THE COUNCIL OF THE DISTRICT OF COLUMBIA PROVISIONALLY SUBMITTING ITS MEMORANDUM OF POINTS AND AUTHORITIES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The Council of the District of Columbia ("Council"), by and through undersigned counsel, provisionally submits to the Court the attached proposed Memorandum of Points and Authorities as *Amicus Curiae* in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint ("Council Memorandum"). The Council Memorandum, which is the subject of the Council's pending October 16, 2020, unopposed motion for leave to file on or before October 30, 2020 ("Council Motion"), is respectfully submitted prior to such leave being granted in light of Defendant's pending October 21, 2020, unopposed motion for an extension of time in which to file its Reply in Support of its Motion to Dismiss Plaintiff's Complaint and for an enlargement of the page limit. In that motion, Defendant seeks leave to address in a single submission, to be filed on November 13, 2020, the arguments raised in both Plaintiff's Opposition to its Motion and the Council's Memorandum. In order not to prejudice Defendant's ability to respond to the Council's arguments by withholding the Council Memorandum beyond

its proposed due date and to avoid unnecessary motions practice with respect to the briefing schedule in the event the Court grants the Council Motion, the Council hereby respectfully submits the proposed Council Memorandum.

October 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today, October 30, 2020, this Praecipe and the attached proposed Memorandum of Points and Authorities was electronically filed with the Clerk of the Superior Court for the District of Columbia using the Court's CaseFileXpress system, which will effect service on all counsel of record in this case.

/s/ Daniel P. Golden

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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TERRIS, PRAVLIK & MILLIAN, LLP, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Case No. 2020 CA 003087 B Judge Heidi M. Pasichow Next Event: Initial Scheduling Conference 9:30 a.m., November 13, 2020

MEMORANDUM OF POINTS AND AUTHORITIES OF THE COUNCIL OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The Council of the District of Columbia ("Council"), by and through undersigned counsel provisionally submits the following memorandum of points and authorities as *amicus curiae* in support of Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint ("Pltf.'s Opp."), and in response to certain arguments raised in Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Plaintiff's Complaint ("Def.'s Memo."). The Council herein addresses Defendant's contentions regarding the separation of powers under the District of Columbia Charter ("Charter") and the Mayor's asserted ability to withhold certain prior-year budget requests prepared by the District of Columbia Public Schools ("DCPS") and the Office of the State Superintendent of Education ("OSSE") pursuant to either the deliberative process privilege or an as-yet unrecognized Mayoral executive communications privilege. Contrary to Defendant's claims and as discussed in greater detail below: (1) the Council by statute may require public disclosure of the agency budget

requests at issue; and (2) the Council in fact mandated such disclosure in 2004 when it added paragraph (6A) to section 206(a) of the District of Columbia Freedom of Information Act ("D.C. FOIA"), now codified at D.C. Code § 2-536(a)(6A).

I. THE COUNCIL BY STATUTE MAY REQUIRE THE PRODUCTION OF THE BUDGET REQUEST DOCUMENTS SOUGHT BY PLAINTIFF.

Defendant's contention that "[r]equiring the public disclosure of preliminary budget documents," like the agency budget requests at issue, would "violate separation of powers," under the Charter, Def.'s Memo. at 10, is not supported by District law or by persuasive case law from other jurisdictions. As the Supreme Court has explained, the principle of separation of powers does not "require[e] three airtight departments of government." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citation and internal quotation marks omitted). Rather, it permits a "flexible Madisonian approach," whereby the coordinate branches of government have "a degree of overlapping responsibility, a duty of interdependence as well as independence[,]" *Brawner v. United States*, 745 A.2d 354, 357-58 (D.C. 2000) (quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989)). The D.C. Court of Appeals has observed that a separation-of-powers violation occurs only when one branch of government "impermissibly burden[s]" or "unduly interfere[s] with," the performance of one of the "core functions" of another branch. *Bergman v. District of Columbia*, 986 A.2d 1208, 1230 (D.C. 2010) (citing *Hessey v. Burden*, 584 A.2d 1, 6 (1990)). Absent such a violation, the Council remains free to "enact legislation that restricts the actions of the Mayor," *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 73 (D.C. 1997) (recognizing that in passing Procurement Practices Act "the Council deliberately chose to limit the Mayor's and the Corporation Counsel's authority in the procurement area"). And, in light of Congress's "broad delegation of authority and the policy of the Home Rule Act, . . . limitations

on the Council's legislative authority will be construed narrowly." *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 303 (D.C. 2012).

Defendant asserts that, absent contrary authority in congressional enactment, "the Council 'may not impinge on the executive's exercise of her exclusive fiscal authority'" and that such exclusive fiscal authority "necessarily includes the authority to initiate budget proposals." Def.'s Memo. at 10 (quoting *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 871, 879 n.5 (D.C. 1980) ("*CCRC I*"), vacated, 441 A.2d 889 (D.C. 1981) (*en banc*) ("*CCRC II*")). However, there exists no support for the notion that the Mayor enjoys exclusive authority with respect to the District's finances (including with respect to the proposal of an annual budget under D.C. Code § 1-204.42(a)), such that any Council legislation touching on those matters would intrude impermissibly on a core executive function. To the contrary, a majority of the judges of the D.C. Court of Appeals expressly recognized in *CCRC II* that the "fundamental statutory framework" of the District Charter "giv[es] the Council, not the Mayor, ultimate authority (subject to congressional review) over the District's annual budget," and has characterized the Mayor's ability to initiate budget proposals as "subordinate to this fundamental prerogative of the Council." 441 A.2d at 906 n.31 (emphasis added).[1] Defendant's contention

[1] Seven of the nine judges hearing *CCRC II* endorsed this assertion, including the three judges who subscribed to the plurality opinion setting it forth and the four dissenting judges who separately endorsed Part III of the plurality opinion, where it appears. *See id.* at 922 (Gallagher, J., dissenting) ("I agree with Part III of Judge Ferren's opinion where, in net effect, he concludes that a law is a law – including the one before us. But that is the limited extent of my agreement with his opinion.") In stating that the Mayor's budget proposal authority is "subordinate" to the Council's "ultimate authority" for the District's annual budget, Judge Ferren's plurality opinion specifically was addressing a question under subsection (c) of section 442 of the Charter, D.C. Code § 1-204.42(c), which states that "[t]he Mayor from time to time may prepare and submit to the Council such proposed supplemental or deficiency budget recommendations as in his judgment are necessary on account of laws enacted after transmission of the budget or are otherwise in the public interest." However, the same analysis would apply to the Mayor's initiation of the annual budget under subsection (a) of section 442 of the Charter, D.C. Code § 1-

that "the Mayor's budgeting authority is one of the primary executive functions specified in the Charter," Def.'s Memo. at 9, is therefore directly inconsistent with controlling District caselaw.[2]

To the extent the D.C. Court of Appeals has recognized any vesting of significant authority in the Mayor with respect to the District's finances, it has done so not in connection with the proposal (or ultimate passage) of a budget, but instead in connection with Mayor's authority under D.C. Code § 1-204.48(a)[3] and the administration of expenditures that already have been appropriated by the legislature. For example, Defendant cites to *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 543 n.3 (D.C. 2011) and *District of*

204.42(a). Indeed, Judge Ferren specifically looked to the language of subsection (a) to support his conclusion with respect to subsection (c), noting that the Council's "ultimate authority" for the budget was "reflected in the first paragraph of [§ 1-204.42(a)] (captioned 'submission of annual budget'): '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 . . . .'" *Id.* at 906 n.31 (quoting D.C. Code § 1-204.42(a), then codified at D.C. Code § 47-221(a)).

[2] Notably, the D.C. Court of Appeals' interpretation of the Mayor's responsibility to prepare a proposed budget as "subordinate" to the Council's overall budgetary authority is consistent with the federal model, under which the president's responsibility for preparing and transmitting a proposed budget arises out of a congressionally enacted statute as a matter of administrative convenience, and is not constitutionally based prerogative of executive power. *See Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 930-31 (D.C. Cir. 1982) ("The Budget and Accounting Act, 42 Stat. 21 (1921), was designed to centralize formulation of the Executive Branch budget. Previously Congress had received 'uncompared, unrelated, and unrevised' estimates from individual departments and agencies, 'representing the personal views and aspirations of bureau chiefs(.)' S.Rep.No. 524, 66th Cong., 2d Sess. 6 (1920). The disadvantages of this uncoordinated system led Congress to delegate to the President exclusive authority to submit budgetary requests on behalf of the Executive Branch. . . . Congress thereby sought to enhance the government's ability to control the overall level of expenditures and to choose among conflicting priorities.").

[3] In the mid-1990s, Congress transferred the vast majority of the Mayor's powers under D.C. Code § 1-204.48(a) to the District's Chief Financial Officer ("CFO"), *see id.* § 1-204.24d, who, while residing in the executive branch of the District government, *see id.* § 1-204.24a, nevertheless enjoys a fundamental level of independence from the Mayor, given that he or she may only be removed for cause and with the approval of two-thirds of the Council, followed by a period of congressional review, *see id.* § 1-204.24c. Accordingly, the Mayor's Charter-based role with respect to the District's finances has only diminished in the years following the decisions relied on here by Defendant.

Columbia v. Sierra Club, 670 A.2d 354, 365 (D.C. 1996) for the proposition that the Mayor has the "discretionary authority to establish spending priorities and manage the city's budget." Def.'s Memo. at 10. But, in *Sierra Club*, the Court considered the Mayor's responsibility to "have charge of the administration of the financial affairs of the District," D.C. Code § 1-204.48(a) (emphasis added), and not the Mayor's role in proposing a budget under D.C. Code § 1-204.42.[4] 670 A.2d at 362. Indeed, the *Sierra Club* Court expressly distinguished the "core" executive function of "having charge of the administration of the financial affairs of the District" and "apportion[ing] all appropriations, funds, and authorizations . . . so as to achieve the most effective and economical use thereof[,]" 670 A.2d at 365 (internal quotations and citations omitted), from the "core" legislative function of appropriating such funds in the first instance, *id.* (citing *Quattlebaum v. Barry*, 671 A.2d 881, 885 (D.C. 1995) (*en banc*)). Similarly, Defendant cites the panel decision in *CCRC I* for the proposition that "the Council 'may not impinge on the executive's exercise of [her] exclusive fiscal authority,'" Def.'s Memo. at 10 (quoting *CCRC I*, 441 A.2d at 879 n.5); however, the panel there was addressing the powers of the Mayor once "Congress has appropriated and thereby made available, public monies for the financing of [a] capital fund project," and "all that is left to be accomplished is the management and successful execution of the project." 441 A.2d at 879.[5] Nothing in *Sierra Club* or *CCRC I* addresses the

[4] *Potomac Development Corp.* concerned the Mayor's authority with respect to the timing of the initiation of condemnation proceedings and not any fiscal authority assigned to the Mayor under the Charter. 28 A.3d at 542-43 & n.3.

[5] Moreover, the panel decision in *CCRC I* relied on by Defendant in fact was vacated when the court granted *en banc* consideration and was published alongside the *en banc* decision in *CCRC II* only because it was incorporated by reference into the opinion of the two concurring judges. *See CCRC II*, 441 A.2d at 921 (Newman, C.J., concurring) ("The basic rationale for my view on this question is set forth in the opinion I authored in this case for a division of this court, which was vacated when we went en banc. That opinion is being published at 441 A.2d 889, simultaneously with this en banc decision."). *See also Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 14 n.25 (D.C. 1991) (*en banc*) ("*Hessey II*") (recognizing that panel decision in

preparation and passage of the District's annual budget, which are the Charter-based functions at issue in this case.

Nor does Defendant's position find support in other D.C. Court of Appeals cases that address the separation of powers under the Charter. In *Hessey v. Burden*, for example, the Board of Elections and Ethics ("Board") refused to accept a proposed initiative to create an Office of Public Advocate for Assessments and Taxation ("OPA") with the authority to contest tax assessments made by the Mayor because it believed that the creation of such an office would interfere unduly with the Mayor's then-Charter-based responsibility for the assessment of taxable property.[6] 584 A.2d at 2-3 ("*Hessey I*"). The D.C. Court of Appeals disagreed with the Board, however, because, although OPA may contest tax assessments, its authority was limited by, among other factors, its lack of a role in the initial property assessment process, its inability to order an increase or decrease in the preliminary estimate of a property's value, and the fact that the OPA was appointed by the Mayor with the advice and consent of the Council and subject to discharge by the Mayor, thereby providing the Mayor with sufficient control and overcoming concerns that the OPA would undermine the Mayor's authority. *Id.* at 4. The Court further noted that because both the OPA and Mayor are charged with the duty to assess property at the estimated market value, "it is not unreasonable to view the OPA's proposed role before the

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Convention Center Referendum Committee was vacated by *en banc* consideration). To the extent the panel decision in *CCRC I* suggests that the Council may not take legislative action to stop the Mayor from executing a capital project once it had been appropriated for, a clear majority of the *en banc* court expressly rejected that proposition. *See CCRC II*, 441 A.2d at 922 (Gallagher, J., dissenting) ("Chief Judge Newman's opinion reaches its conclusion by vesting rather alarming legislative powers in the Mayor. Judge Ferren's plurality opinion, on the other hand, disputes rather vigorously that approach and instead finds another avenue to decision.").

[6] That authority now falls within the purview of the CFO's duties. *See* D.C. Code § 1-204.24d(9).

agency as collaborating with the Mayor . . . to achieve that common aim." *Id.* at 4 (emphasis added).

Similarly, in *Bergman*, the D.C. Court of Appeals concluded that the Council's enactment of an act that, with certain exceptions, made it unlawful for attorneys to solicit business from an individual immediately following a motor vehicle accident, did not violate the separation of powers by infringing on the Court's Charter-based right to regulate the conduct of attorneys practicing in the District. 986 A.2d at 1211-12, 1225. Specifically, the Court observed that its having "primary" power to discipline attorneys did not mean that the "legislature is precluded from playing any role in the regulation of the conduct of attorneys and of the practice of law." *Id.* The Court ultimately held that the act in question did not violate separation of powers because it did not affect the organization or jurisdiction of the courts, nor did it infringe on the Court's "core functions relating to Bar admissions and the discipline of attorneys," even if there were some degree of "overlap" between the respective responsibilities of the Court and the Council. *Id.* at 1229-30.

The results in *Hessey I* and *Bergman* are consistent with the more general observation of the D.C. Court of Appeals that the encroachment or aggrandizement of power that the separation-of-powers doctrine seeks to prevent is evident only "'where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department,' or where one branch of government 'undermine[s] the authority and independence of one or another coordinate [b]ranch." *District of Columbia v. Fitzgerald*, 953 A.2d 288, 292 (D.C. 2008) (*en banc* order) (quoting *Mistretta*, 488 U.S. at 381, 382) (emphasis in original). Turning to the facts of this case, the Council does not exercise the "whole power" of the Mayor when it legislates with respect to the budget proposal process; rather, it acts squarely within the

ambit of its own core functions.[7] As noted above, the D.C. Court of Appeals recognizes that "the allocation of the District's financial resources is a 'core legislative function,'" *Washington, D.C. Ass'n of Realtors, Inc.*, 44 A.3d at 305 (quoting *Quattlebaum*, 671 A.2d at 885 (D.C. 1995)), and that the Council possesses "ultimate authority (subject to congressional review) over the District's annual budget," *CCRC II*, 441 A.2d at 906 n.31. *See also Restaurant Ass'n of Metro. Wash. v. D.C. Bd. of Elections & Ethics*, No. 04-CA-1785, 2004 WL 2102203, at *3 (D.C. Super. Ct. May 21, 2004) ("[T]he Charter intended that the Council retain control of the local budget process."). Having received the Mayor's proposed budget pursuant to D.C. Code § 1-204.42, the Council is in no way constrained with respect to whether to accept, reject, or modify any or all of the Mayor's recommendations. *See id.* § 1-204.46(a). Accordingly, 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. Because the Mayor's role in the process of developing the District budget is inherently "collaborat[ive]," *Hessey I*, 584 A.2d at 4, involving significant "overlap," *Bergman*, 986 A.2d at 1229, with the Council's core budgetary (and information-gathering) functions, no separation-of-powers violation inheres in

[7] The Charter specifically provides that the Council "after receipt of the budget proposal from the Mayor . . . shall by act adopt the annual budget for the District of Columbia government." D.C. Code § 1-204.46(a). More generally, it also vests the Council with "power to investigate any matter relating to the affairs of the District," *id.* § 1-204.13(a). As Justice Jackson's well-known concurrence in *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J. concurring) posits, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," *id.* at 635, and "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter," *id.* at 637 (emphasis added).

the Council mandating the release of the agency budget requests gathered in the course of that process.

Requiring the disclosure of agency budget requests similarly does not "undermine" the Mayor's "authority" or "independence," *Fitzgerald*, 953 A.2d at 252, or otherwise "prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. Even if agency budget requests were to be made public, the Mayor would retain full discretion to express her spending preferences and otherwise fashion her budget proposal as provided for by the Charter; she would remain free to accept, modify, or reject any portions of those requests that she receives. In the absence of any indication that the Mayor's performance of her Charter-based functions actually would be "prevent[ed]," *id.*, by disclosure of the agency budget requests, the crux of Defendant's argument appears to be that mandating their disclosure would impinge on "[t]he ability of the Mayor and the CFO to consult freely and openly with each other and agency leaders about the financial requirements and objectives of each agency . . . ." Def.'s Memo. at 9. However, the privileging of such discussions finds no support in the text of the Charter, given that it specifically requires the Mayor to disclose her deliberations with respect to the costs and benefits of alternatives associated with particular budgetary issues identified by the Council. *See* D.C. Code § 1-204.42(a)(6) (requiring that Mayor's proposed budget include "[a]n issue analysis statement consisting of a reasonable number of issues, identified by the Council . . . , having significant revenue or budgetary implications, . . . <u>which shall consider the cost and benefits of alternatives and the rationale behind action recommended or adopted</u>") (emphasis added). Courts reject "the proposition that some unspecified chilling effect alone would constitute sufficient undue interference to create a separation of powers violation." *Tex. Comm'n on Env't Quality v. Abbott*, 311 S.W.3d 663, 675 (Tex. App. 2010).

Cf. In re Lindsey, 158 F.3d 1263, 1276 (D.C. Cir. 1998) (observing that "the Supreme Court has not been troubled by the potential chill on executive communications" arising out of qualified nature of executive privilege"). Moreover, because the Mayor retains administrative control over most of the agencies that submit budget requests, any concerns that the disclosure of such requests otherwise would "undermine the chief executive's authority[,]" *Hessey I*, 584 A.2d at 4, would appear to be unfounded.

The Council's position in this matter finds significant support in persuasive case law holding that legislative enactments requiring the public disclosure of preliminary agency budget conversations or requests do not unduly infringe on the rights of the executive and thereby violate the separation of powers. In *Common Cause*, the Nuclear Regulatory Commission ("Commission") sought to hold closed sessions to discuss budget preparations and its budget request to the Office of Management and Budget ("OMB") despite the fact that the Government in the Sunshine Act, 5 U.S.C. § 552b, lacked a blanket deliberative process privilege exemption from its open-meetings requirement. 674 F.2d at 923-24. The Commission nevertheless asserted its entitlement to claim such a privilege based on the separation of powers because requiring its budgetary discussions to be held in public would interfere with the Commission's ability to provide the President with candid advice. *Id.* at 935. The D.C. Circuit rejected this claim, noting the well-recognized principle that separation of powers does not require "three airtight departments of government[,]" and that legislative regulation of information "generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." *Id.* at 935 (quoting *Nixon*, 433 U.S. at 443, 445). The D.C. Circuit further rejected the Commission's claim that secrecy is essential to the President's preparation of the federal budget, noting that the

statute authorizing the President to submit the federal budget[8] "makes no reference to confidentiality" and "does not prescribe any method by which he must develop the consolidated budget figures which he submits. Nor does it require that the President's proposals be the only budgetary information available to the public." *Id.* at 931-32.

Similarly, the Supreme Court of Alaska, in *Capital Information Group v. State, Office of the Governor*, 923 P.2d 29 (Alaska 1996), rejected the Governor's claim that public disclosure of budget impact memoranda to Alaska's version of OMB violates separation of powers. *Id.* at 38-39.[9] As Defendant claims here, the State argued "that the legislature cannot override a constitutionally based deliberative process privilege[.]" *Id.* at 39. However, the Court disagreed and noted that it was "not sufficient to say that because the deliberative process privilege has constitutional underpinnings the legislature may never enact a statute which has the effect of overriding the executive's request for secrecy." *Id.* at 39-40. In particular, the Court noted that the legislature "implicitly determined that the need for public disclosure outweighs any risk of lack of candor on the agencies' part[,]" and that this "determination was 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 department." *Id.* at 40.

Notably, the factors cited as persuasive by the courts in *Common Cause* and *Capital Information Group* apply here as well. Similar to the Budget and Accounting Act at issue in *Common Cause*, nothing in the Charter mandates confidentiality with respect to the agency

[8] Specifically, the Budget and Accounting Act of 1921, 31 U.S.C. 1101, *et seq.*
[9] Similar to D.C. Code § 2-536(a)(6A), Alaska Statute 37.07.050(g) states that: "All goals and objectives, plans, programs, estimates, budgets, and other documents forwarded to the office of management and budget by a state agency under this section are public information after the date they are forwarded."

budget requests, nor does it otherwise specify a method by which the Mayor must formulate her budget proposal. Instead, the Charter appears to favor a posture of disclosure, requiring that the Mayor prepare a budget proposal that is to be made "available to the public," and that includes information "reflect[ing] the actual financial condition of the District government for such fiscal year." D.C. Code § 1-204.42(a) & (a)(1) (emphasis added). And, like the Alaska state constitution provision relied on for support in *Capital Information Group*, the Charter similarly provides the Council with the "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). For these additional reasons, the Court should conclude that the Council may statutorily require public disclosure of agency budget requests without violating the separation of powers.

Finally, this Court need not decide whether a Mayoral "executive communications" privilege exists in the District if the Court agrees with Plaintiff and the Council that requiring the Mayor to produce the agency budget requests at issue would not violate the separation of powers. *See* Def.'s Memo. at 11-13 & n.6 (noting that "the privilege has yet to be recognized as applying to the Mayor," but arguing that "the Court should find that the executive communications privilege protects the requested budget documents from disclosure under D.C. FOIA"). This is so because any "executive communications" privilege is rooted in "constitutional separation of powers principles," *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997), and "derives from the supremacy of the Executive Branch within its assigned area of constitutional

responsibilities," *Nixon*, 433 U.S. at 447.[10] *See also United States v. Nixon*, 418 U.S. 683, 705, 708 (1974) (recognizing the "presidential communications privilege" as one that was "inextricably rooted in the separation of powers under the Constitution" and which "flow[s] from the nature of enumerated powers"); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 1996) (observing that at its core, the presidential communications privilege is rooted in the president's need to "effectively and faithfully carry out his Article II duties"). As discussed above, the Mayor's role in the budgeting process is inherently collaborative and involves significant overlap with the Council. Thus, even if assuming *arguendo* that there may be an implicit Mayoral "executive communications" privilege,[11] for the reasons already explained above, Defendant fails to explain why that privilege would protect budget communications that implicate the responsibilities of several Charter entities, including the Council itself. Accordingly, the Court need not address this novel question of District law. *See District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993) (cautioning that courts should not render decisions unnecessary to resolution of case, "particularly when the question is a

[10] It is well-established that the Council, like any legislature, can abrogate the application of a common-law privilege. *See, e.g.*, *Johnson v. United States*, 616 A.2d 1216, 1223 (D.C. 1992) (identifying instances in which Council has abrogated components of common-law marital privilege). *See also Nelson v. Nelson*, 548 A.2d 109, 117 (D.C. 1988) (observing that statute may preclude or abolish common law tradition); *District of Columbia v. Thompson*, 593 A.2d 621, 629 n.17 (D.C. 1991) (same); *1137 19th Street Assocs., Ltd. P'ship v. District of Columbia*, 769 A.2d 155, 169 n.21 (D.C. 2001) (same). Accordingly, to the extent Defendant relies on a privilege that it asserts cannot be abrogated by the Council, it necessarily would be a privilege based in the Charter's separation of powers.

[11] Notably, the Superior Court has declined previously to adopt the "executive communications privilege" as a necessary implication of the separation of powers. *Nichols v. Fenty*, No. 2009 CA 0062922, at 11 (D.C. Super. Ct. Oct. 30, 2009), *appeal voluntarily withdrawn* No. 09-CV-1247 (D.C.)) (attached to Pltf.'s Opp. as Exhibit 1). And courts in other jurisdictions have not been unanimous in acknowledging the existence of such a privilege. *See Babets v. Sec'y of Exec. Office of Human Servs.,* 526 N.E.2d 1261, 1266 (Mass. 1988) (rejecting notion that recognition of executive communications privilege is "a necessary ramification of the doctrine of separation of powers").

constitutional one, or involves the construction of a statute") (citation omitted).

II. THE PRODUCTION OF THE BUDGET REQUEST DOCUMENTS SOUGHT BY PLAINTIFF IS REQUIRED BY D.C CODE § 2-536(a)(6A)

Defendant's alternative contention that, in enacting D.C. Code § 2-536(a)(6A), "[t]he Council made preliminary budget documents public, but subject to the invocation of a recognized privilege," Def.'s Memo. at 7, is also mistaken. In 2004, as part of the Fiscal Year 2005 Budget Support Act of 2004, the Council passed the Freedom of Information Amendment Act of 2004 that amended D.C. Code § 2-536(a) by adding a new paragraph (6A). It requires the proactive disclosure of:

> 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(a)(6A). As indicated in the Declaration of Council Chairman Philip H. Mendelson, attached to this Memorandum as Attachment A ("Mendelson Declaration"), this new paragraph (6A) was the subject of a standalone amendment that was added on second reading to the bill that became the Freedom of Information Amendment Act of 2004. *See* Mendelson Dec. at ¶¶ 2-5. The amendment, attached to the Mendelson Declaration as Exhibit 1, sets forth the following rationale:

> 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.

See Mendelson Dec., at Ex. 1. The amendment's stated purpose of ensuring that members of the public have full access to budget-related documents, including baseline budget submissions and appeals, so that they may participate more effectively in the budget dialogue and promote governmental transparency, together with the high degree of specificity with the amendment identifies the documents subject to it, make it clear that the Council did not contemplate that those documents would be subject to withholding by the Mayor or the CFO.[12] To adopt Defendant's contrary interpretation of D.C. Code § 2-536(a)(6A) – as a public disclosure statute that grants the Mayor carte blanche to withhold all the documents that are subject to it – would in effect render it a nullity, a clearly disfavored reading of the statute. *See Lewis v. Wash. Hosp. Ctr.*, 77 A.3d 378, 380 (D.C. 2013). Indeed, if Defendant's interpretation is correct, the addition of paragraph (6A) would be entirely superfluous, given that the Mayor already was empowered to disclose such documents whenever she desired to do so. In short, the text and legislative history of D.C. Code § 2-536(a)(6A) cannot be squared with Defendant's position that the public release of agency budget requests is only required "where the Mayor or other executive agency determines not to assert a privilege . . ." Def's Memo. at 7.

Finally, Defendant's argument that D.C. Code § 2-536(a)(6A) "provides for the public disclosure of budget requests submitted to the Office of Budget and Planning (OBP) – located

[12] Even if the Council did consider the documents at issue to be among those subject to D.C. FOIA's deliberative process privilege exemption, D.C. Code § 2-534(a)(4), (e), the text and legislative history of D.C. Code § 2-536(a)(6A) make clear that the Council's intent was to override the applicability of that exemption. It is well-established that the Council is not bound by its own prior enactments. *See Washington, D.C. Ass'n of Realtors, Inc*, 44 A.3d 299, at 306 (noting that "[i]t is well established that one legislature cannot bind a future legislature" and that the Council is "free to repeal, amend, or override" its prior legislation) (internal quotation and citation omitted).

within the Office of the Chief Financial Officer (OCFO)," and that "[a]ny preliminary budget requests from OSSE or DCPS to the Mayor are therefore not covered by the disclosure requirement in D.C. Code § 2-536(a)(6A)," Def.'s Memo. at 8, ignores the Council's stated goal of making agency budget requests generally available to encourage public participation and government transparency – priorities that bear no relationship to the process by which agency budget requests happen to be transmitted through the executive branch. The reference to OBP in D.C. Code § 2-536(a)(6A) is most sensibly read as an effort to identify the subject class of documents (i.e. the agency budget requests utilized in the preparation of the Mayor's budget proposal) in a manner that reflects the administrative practice at the time, and not as a limiting principle or trap for the unwary FOIA litigant. Indeed, Defendant does not appear to dispute that the same agency budget requests that go to the Mayor also go to the CFO, and the Budget Director of the Mayor's Office of Budget and Performance Management appears to have conceded as much in her declaration in support of Defendant's Motion. *See* Def.'s Memo. at Exhibit A, Declaration of Jennifer Reed at ¶¶ 6-7 (noting that "agency budget request to the Mayor's office" have "always been treated as confidential, subject to the deliberative process and executive communications privileges, and not released to the public, through D.C. FOIA or otherwise," and that "the Office of the Chief Financial Officer has taken the same position, *i.e.*, that such documents are protected by the deliberative process privilege and has declined to produce these documents when requested") (emphasis added). Accordingly, the Mayor cannot avoid D.C. Code § 2-536(a)(6A) simply by claiming that budget documents at issue are submitted to her as well as to the CFO.

Taking all of the above together, it is clear that the Council's intent was for the agency budget requests at issue be made public pursuant to D.C. Code § 2-536(a)(6A) and not subject to

a claim of privilege by the Mayor. This reading finds support not only in the legislative history of that provision, as detailed above, but also as a matter of statutory construction as set forth in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss. *See* Pltf.'s Opp. at 5-8. Accordingly, the Court should conclude that the agency budget requests at issue are required to be produced, irrespective of any privilege claim, and that Defendant's Motion therefore should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss Plaintiff's Complaint.

October 30, 2020

Respectfully submitted,

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Attachment A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TERRIS, PRAVLIK & MILLIAN, LLP, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Case No. 2020 CA 003087 B Judge Heidi M. Pasichow Next Event: Initial Scheduling Conference 9:30 a.m., November 13, 2020

DECLARATION OF COUNCIL CHAIRMAN PHILIP H. MENDELSON

I, Philip H. Mendelson, hereby declare as follows:

1. I am the Chairman of the Council of the District of Columbia ("Council") and have served in that position since 2012. From 1999 until becoming Chairman, I served as an elected at-large member of the Council. I have personal knowledge of the matters set forth herein and am competent to testify to the same.

2. On June 29, 2004, the Council held the second and final reading on the Fiscal Year 2005 Budget Support Act of 2004, which added paragraph (6A) to section 206(a) of the District of Columbia Administrative Procedure Act. This paragraph (6A), now codified at D.C. Code § 2-536(a)(6A), is the statutory provision at issue in the pending lawsuit before the Court.

3. At the Council's June 29, 2004 legislative meeting, during consideration of the Fiscal Year 2005 Budget Support Act of 2004, then-Councilmember Kathy Patterson introduced the amendment that would add the new paragraph (6A) to section 206(a) of the District of Columbia Administrative Procedure Act.

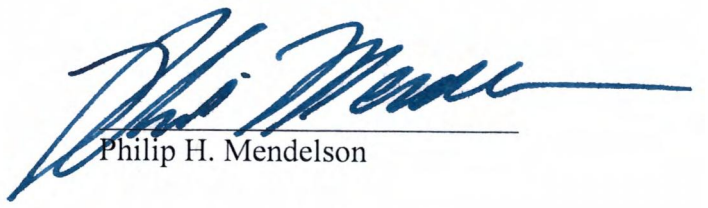
4. A true and correct copy of the amendment introduced by Councilmember Patterson, which I have maintained in my file for the June 29, 2004 legislative meeting and contains my contemporaneous handwritten notations, is attached to this declaration as Exhibit 1. The section of the amendment entitled "Rationale" indicates Councilmember Patterson's purpose in offering the amendment.

5. At the June 29, 2004 legislative meeting, the Council passed the amendment introduced by Councilmember Patterson, as modified by a minor change reflected in my handwritten notations and thereafter modified by other, minor technical changes. The amendment, as modified, therefore was included as part of the Fiscal Year 2005 Budget Support Act of 2004 passed by the Council that same day on final reading.

6. Following the June 29, 2004 legislative meeting, the Fiscal Year 2005 Budget Support Act of 2004 was enrolled, signed by the Mayor, and transmitted to Congress, where it completed the required period of congressional review.

7. Upon completion of the required congressional review period, the Fiscal Year 2005 Budget Support Act of 2004 became law, including the provision now codified at D.C. Code § 2-536(a)(6A) that is at issue in the pending lawsuit before the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of October, 2020.



Philip H. Mendelson

Exhibit 1

Councilmember Kathy Patterson

#3

AMENDMENT TO THE FISCAL YEAR 2005 BUDGET SUPPORT ACT OF 2004 (BILL 15-768)

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

VERSION: Chairman Cropp's amendment in the nature of a substitute (6/24/04 version)

DATE: June 29, 2004

accepted as revised by Cropp with one change (to ease paperwork burden)

Amendment

Title I, Subtitle U, is amended by deleting lines 9 through 11 on p. 58, and inserting the following text in its place:

"Sec. 1222. Section 206(a) of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-536(a)), is amended by adding new paragraph 6(A) and a new paragraph 8(A) to read as follows:

"(6)(A) Budget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of 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. This shall include, but not be limited to, baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions.".

Rationale

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.