

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

TERRIS, PRAVLIK & MILLIAN, LLP,	:	Case No. 2020 CA 003087 B
<i>Plaintiff,</i>	:	
	:	
v.	:	Judge Heidi M. Pasichow
	:	
	:	
THE DISTRICT OF COLUMBIA,	:	
<i>Defendant.</i>	:	

**ORDER DENYING DEFENDANT DISTRICT OF COLUMBIA’S
MOTION TO DISMISS**

This matter is before the Court based upon (1) Defendant District of Columbia’s (“The District”) Motion to Dismiss Plaintiff’s Complaint (“Motion”), filed on September 22, 2020, (2) Plaintiff Terris, Pravlik & Millian, (“TPM”) LLP’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss (“Opposition Motion”), filed on October 20, 2020, (3) Plaintiff’s Response to this Court’s Order for Further Briefing on Three Issues, filed on January 29, 2021, (4) Defendant’s Supplemental Briefing in Support of Motion to Dismiss, filed on January 29, 2021 and (4) Defendant’s Response to Plaintiff’s Supplemental Brief, filed on February 05, 2021. All parties are represented by Counsel.

I. Procedural History

On July 13, 2020, Plaintiff Terris, Pravlik & Millian, LLP (“TPM”) filed the Complaint against Defendant the District of Columbia (“the District”) requesting that the Court order the District “to produce budget-related documents and to put them on its website.” Compl. at 2. Plaintiff properly served the District with the Complaint on July 24, 2020.

On September 22, 2020, the District filed the instant motion to dismiss “contending (1) that the documents are protected by the deliberative process privilege and the DC Code does not

make them public information; (2) that TPM served the FOIA request on the wrong agency; (3) that, even if the D.C. Code does make the documents public information, the provision of the D.C. Code is invalid because it violates the separation of powers in the District of Columbia government, and (4) that the documents are protected by executive privilege; and that even if none of that is true, (5) this Court lacks the power to compel the District to put the documents on its website, and (6) TPM lacks standing to ask the Court to do so.” Pl.’s Consent Mot at 2.

On September 30, 2020, Plaintiff filed its Consent Motion for a Two-Week Extension of Time to Oppose Defendant’s Motion to Dismiss. On October 13, 2020, the Court issued an Order Granting Plaintiff’s Consent Motion, ordering Plaintiff to submit its Opposition to the District’s Motion to Dismiss on or before October 20, 2020. Then, on October 16, 2020, The Council for the District of Columbia submitted an Unopposed Motion for Leave to File a Memorandum as Amicus Curiae in Support of Plaintiff’s Opposition to Defendant’s Motion to Dismiss Plaintiff’s Complaint.

On October 20, 2020, Plaintiff filed an Opposition to the instant motion. On October 21, 2020, Defendant filed a Partial Consent Motion for an Extension of Time to Reply in Support of Motion to Dismiss Plaintiff’s Complaint and for Leave to File a Reply of More than Five Pages. On October 30, 2020, the Council for the District of Columbia filed a Praecipe 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 (“Council’s Praecipe”).

On November 12, 2020, the Court issued an Order (1) Holding the District’s Motion to Dismiss in Abeyance, (2) Granting the Motion of the Council of the District of Columbia to File a Memorandum as *Amicus Curiae* in Support of Plaintiff’s Opposition to Motion to Dismiss, and (3) Granting the District’s Partial Consent Motion for an Extension of Time to Reply in Support

of Motion to Dismiss. On November 13, 2020, the District filed a Reply in Support of its Motion to Dismiss. On January 08, 2021, Plaintiff filed a Joint Motion seeking to continue the parties' January 15, 2021 Scheduling Conference until after the Court has ruled on Defendant's Motion to Dismiss. . On January 13, 2021, Chief Judge Anita Josey-Herring issued an Amended Order, further extending the period of emergency until March 31, 2021.¹ Former Chief Judge Morin's tolling of all deadline remains in place "with the following exceptions: (1) deadlines applicable to parties represented by counsel in pending cases; (2) discovery-related deadlines applicable to all parties, including parties not represented by counsel; (3) effective January 29, 2021, deadlines for service of process applicable to all parties, including parties not represented by counsel; (4) deadlines for responsive pleadings applicable to all parties, including parties not represented by counsel; (5) motions-related deadlines applicable to all parties, including parties not represented by counsel; and (6) deadlines in orders issued after March 18, 2020." Jan. 15, 2021, Order at 3.

On January 14, 2021, the Court issued an Order (1) Granting the Joint Motion to Reschedule, and (2) Holding in Abeyance the District's Opposed Motion to Dismiss, and (3) Requesting the parties provide supplemental briefings on select issues. On January 29, 2021, Plaintiff filed its Response to this Court's Order for Further Briefing on Three Issues ("Plaintiff's Supplemental Brief"), and the District filed its Supplemental Briefing in Support of Motion to Dismiss ("Defendant's Supplemental Brief"). On February 05, 2021, the District filed its Response to Plaintiff's Supplemental Brief ("Defendant's Response").

¹ As of now the end date of the tolling period is March 31, 2021 as set by Chief Judge Josey-Herring's January 13, 2021 Order, but the Court reminds the parties that this end date may be extended by the Chief Judge or based upon further orders extending the period of emergency declared by the Joint Committee on Judicial Administration.

II. Legal Standard

A Super. Ct. Civ. R. 12(b)(6) motion asks that the court dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss under Super. Ct. Civ. R. 12(b)(6) a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Potomac Development Corp., et al. v. District of Columbia, et al.*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); see *Logan v. LaSalle Bank Nat. Ass'n.*, 80 A.3d 1014, 1019 (D.C. 2013). A complaint satisfies the plausibility requirement if it contains sufficient facts for the Court to "draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (quoting *Iqbal*, 556 U.S. at 678; 129 S.Ct. 1937); *Potomac*, 28 A.3d at 544; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While the Court need not quantify the likelihood of a plaintiff's success, it should consider whether "there is more than a sheer possibility that a defendant has acted unlawfully." *Id.*

When the Court conducts an inquiry under Super. Ct. Civ. R. 12 (b)(6), all facts in the Complaint are presumed true and are construed in the light most favorable to the plaintiff. *Sundberg*, 109 A.3d at 1128; *Casco Marina Dev., L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). "[A] complaint [which] pleads facts that are merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." *Sundberg*, 109 A.3d at 1129 (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937) (internal quotations omitted); *Potomac*, 28 A.3d at 544; see also *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. Since conclusory allegations of wrongdoing are not entitled to a presumption of truth, a mere formulaic recitation of the elements of a cause of action is "insufficient to sustain a complaint." *Ashcroft*, 556 U.S. at 679, 129 S.Ct. 1937; *Twombly*, 550

U.S. at 570; *Logan*, 80 A.3d at 1019; *Potomac*, 28 A.3d at 544; *Murray v. Motorola, Inc.*, 982 A.2d 764, n.32 (D.C. 2009).

Super. Ct. Civ. R. 12(b)(1) provides grounds for dismissal for “lack of subject-matter jurisdiction.” A “defect of standing is [likewise] a defect in subject matter jurisdiction,” and therefore, “a challenge to a plaintiff’s standing is properly raised as a challenge to the court’s subject matter jurisdiction via a motion to dismiss under Super. Ct. Civ. R. 12(b)(1).” *UMC Dev., LLC v. D.C.*, 120 A.3d 37, 43 (D.C. 2015) (footnote omitted).

III. Analysis

A. Motion to Dismiss

In its Motion to Dismiss, Defendant asks the Court to dismiss Plaintiff’s Complaint pursuant to Super. Ct. Civ. R. 12(b)(1) and 12(b)(6) for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Mot. at 1. Specifically, Defendant argues “(1) that the documents are protected by the deliberative process privilege and the DC Code does not make them public information; (2) that TPM served the FOIA request on the wrong agency; (3) that, even if the DC Code does make the documents public information, the provision of the DC Code is invalid because it violates the separation of powers in the District of Columbia government, and (4) that the documents are protected by executive privilege; and that even if none of that is true, (5) this Court lacks the power to compel the District to put the documents on its website, and (6) TPM lacks standing to ask the Court to do so.” Pl.’s Consent Mot at 2.

Plaintiff asserts the “requested documents were made public by law,” and are not protected by the deliberative process privilege. Opp. Mot. at 1. Further, Plaintiff argues “TPM asked for the documents from the right office,” FOIA does not violate separation of powers, no

executive privilege applies, and lastly, that as to its second claim for failure to disclose online, TPM has standing and a cause of action.

The Court finds that the District fails to meet the standard necessary for dismissal, and consequently denies the instant Motion to Dismiss. The Court addresses each of the six (6) issues in the District's Motion below.

a. Issue #1

In Plaintiff's FOIA request, Plaintiff requests "budget requests for fiscal year 2019," specifically "expenses and budgetary items." Compl. at 3. Moreover, Plaintiff's FOIA request further listed "policy development and compliance issues impacting 2-5-year-olds, data systems, the provision of screenings, evaluations, and eligibility determinations, and the provision of specialized instruction and related services including special education transportation." *Id.* However, the District invokes FOIA's Exemptions From Disclosure provision pursuant to D.C. Code § 2-534(a)(4), also known as "the deliberative process privilege," which protects "[i]nter-agency or intra-a

gency memorandums or letters." D.C. Code § 2-534(a)(4); Def. Mot. at 6. The District asserts "open government is not absolute," that "advisory opinions, recommendations and deliberations" are sheltered, that disclosure will discourage candid discussion, and importantly, that the budget requests are both pre-decisional and deliberative. Def. Mot. 4 – 6.

As a guiding principle, the Court looks to D.C. FOIA's "Public Policy" provision, which states "The public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and . . . To that end, provisions of this subchapter shall be construed with the view toward *expansion of public access.*" D.C. Code § 2-531 (emphasis added). However, FOIA's Exemptions From Disclosure provision exempts "Inter-

agency or intra-agency memorandums or letters . . . which would not be available by law to a party . . . in litigation with the public body.” D.C. Code § 2-534(a)(4); Mot. At 4. In determining whether a “budget request” is a “memorandum[] or letter,” Plaintiff asserts “[t]he format of the document is irrelevant,” but that the budget requests are likely “financial status report[s].” See P1. Supp. Brief at 2–3, n.2. In agreement, the District urges “a court must focus on the contents of a document rather than its form,” and that the D.C. Court of Appeals “often refers to “documents” and “materials” interchangeably with “memorandums or letters.” See Def. Supp. Brief at 3–4 (citing *Chilivis v. S.E.C.*, 673 F.2d 1205, 1212 n.15 (11th Cir. 1982); *Kane v. District of Columbia*, 180 A.3d 1073, 1077, 1079 (D.C. 2018)). Moreover, the District says “the documents plaintiff seeks contain preliminary budget requests and recommendations made to her by District agencies,” and are therefore protected by the deliberative process privilege. Def. Supp. Brief at 4.

Plaintiff therefore points the Court to D.C. Code § 2-534(c), which states “this section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.” (emphasis added). As such, Plaintiff asserts D.C. Code § 2–536(a)(6A) is an “other law,” which requires disclosure of “Budget requests”. See D.C. Code § 2-536(a)(6A); Opp. Mot. at 4. However, the District contends “other law” must mean “law outside D.C. FOIA.” Def. Resp. at 3.

On a Motion to Dismiss posture, where D.C. FOIA urges construction of the law “toward expansion of public access,” D.C. Code § 2-531, and “the right of access [is] to be generously construed, while the statutory exemptions from disclosure are to be narrowly construed, with ambiguities resolved in favor of disclosure,” *Fraternal Order of Police v. D.C.*, 79 A.3d 347, 354 (D.C. 2013), D.C. Code § 2-536(a)(6A) could be “other law”. See also *Atiba v. Washington*

Hospital Center, 43 A.3d 940, 941–42 (D.C. 2012) (emphasis added) (“To require ninety clear days would create a square conflict between *the two statutory provisions*, a conflict the Council of the District of Columbia could not have intended. Under such an interpretation, an absurd outcome would result”).

Next, the District sets forth a two-prong test in order to invoke the deliberative privilege: the communication must be (1) pre-decisional; and (2) deliberative. *See* Mot. at 7 (citing *Fraternal Order of Police v. District of Columbia*, 79 A.3d 347, 355 (D.C. 2013)). A communication is “pre-decisional” when it is prepared in order to assist an agency decision-maker in arriving at their decision, and is “deliberative” when it makes recommendations or expresses opinion on legal or policy matters. *See Fraternal Order*, 79 A.3d at 355. The District asserts the budget requests are *both*: “they inform the Mayor during the budget development process,” and “make advisory recommendation to the Mayor regarding the level of funding” to each agency. *See* Mot. at 6. However, “[a]s a rule, to be deliberative, the document must ‘reflect the personal opinions of the writer rather than the policy of the agency.’” *Fraternal Order*, 79 A.3d at 355. “Thus, ‘when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.’” *Id.*

Plaintiff requests “budget requests” that are statutorily required to be made public pursuant to D.C. Code § 2-536(a)(6A). In TPM’s FOIA request, Plaintiff asserted they “do not object to the production being narrowed accordingly.” Compl. at 3; P1.’s Ex. 1. Further, the District explains these requests are “made to [the Mayor] *by District agencies*,” but the deliberative process privilege must “reflect the personal opinions of the writer,” not the “policy of the agency.” *Fraternal Order*, 79 A.3d at 355.

As such, when construing the facts of Plaintiff’s Complaint as true, and “in the light most favorable” to TPM, *Sundberg*, 109 A.3d at 1128, the Court finds the deliberative process privilege does not apply. The Court therefore denies the District’s Motion to Dismiss on these grounds.

b. Issue #2

Next, the District moves to dismiss because they claim Plaintiff served its FOIA request on the wrong office by requesting the documents from the Mayor. According to the District, “D.C. Code § 2-536(a)(6A) provides for the public disclosure of the budget requests submitted to the Office of Budget and Planning (OBP)—located within the Office of the Chief Financial Officer (OCFO); D.C. FOIA includes no such disclosure requirement for budget requests submitted to the Mayor.” Mot. at 8.

However, D.C. Code § 2-536(a) begins: “the following categories of information are *specifically made public information*, and *do not* require a written request for information.” D.C. Code § 2-536(a)(6A) (emphasis added). Further, § 2-536(a)(6A) orders the disclosure of “Budget requests, submission, and reports available that agencies . . . transmit to [OBP] during the budget development process, as well as reports on budget implementation and execution prepared by the [OCFO].” *Id.* OCFO is located *within* the D.C. executive branch, and the Chief Financial Officer (CFO) works *with* the Mayor to formulate budget policy. *See* D.C. Code §§ 1-204.24(a), 1-204.24(d)(26). Plaintiff reasonably requested documents that “do not require a written request” from the correct agency. *See also Kane v. D.C.*, 180 A.3d 1073, 1079 (D.C. 2018) (“[T]he Mayor does not appear to be as ‘powerless’ to secure . . . compliance with its FOIA obligations as the District suggests. For one thing, FOIA itself empowers the Mayor upon petition to ‘order’ a public body to disclose a wrongfully withheld public record.”).

When accepting the Complaint’s factual matter as true, and “in the light most favorable” to TPM, *Sundberg*, 109 A.3d at 1128, the Court finds Plaintiff has satisfied the plausibility requirement of serving its FOIA request on the correct agency. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. As such, the Court denies the District’s Motion to Dismiss for Plaintiff serving its FOIA request upon the Mayor.

c. Issue #3

Third, the District contends that disclosure will violate separation of powers principles. Mot. at 8–10. Under the District Charter in the Home Rule Act, D.C. Code § 1-201-01, financial affairs are assigned to the Mayor and CFO, who are required to collaborate in preparing the annual budget, before submitting to the Council and “mak[ing] [the budget] available to the public”. D.C. Code § 1-204.48(c) (explaining the CFO shall coordinate with the Inspector General of D.C. to audit financial statements and reports for a fiscal year); D.C. Code § 1-204.24d(26) (“Preparing under the direction of the Mayor, who has the specific responsibility for formulating budget policy using [CFO] technical and human resources”); D.C. Code § 1-204.42(a)(1) (Council provision). The District therefore contends that because the Mayor has ultimate authority for developing and submitting the budget to the Council, requiring disclosure will impede the Mayor’s ability to perform her executive functions. Mot. at 9.

As such, the District argues the Mayor must be allowed to consult “freely and openly” so she may exercise her executive budgeting authority. Mot. at 9. The Mayor has “discretionary authority to establish spending priorities and manage the city’s budget.” Def. Mot. at 10 (citing *District of Columbia v. Sierra Club*, 670 A.2d 354, 365 (D.C. 1996)). “Absent ‘contrary provisions drawn expressly or [impliedly] from . . . other statutes,’ requiring disclosure will impinge on the Executive’s exercise of her exclusive authority. Mot. at 10 (citing *Wilson v.*

Kelly, 615 A.2d 229, 231 (D.C. 1992)). According to the District, disclosure will impair the Mayor in performance of her constitutional duties because it gives D.C. Council power to “participate in the executive deliberations that precede [her] initial determinations.” Def. Mot. at 10 (citing *In re Sealed Case*, 121 F.3d 729, 751 (D.C. Cir. 1997)). Further, the District asserts “[r]equiring public disclosure would interfere with the Mayor’s access to ‘honest and informed advice,’ as well as her ability to “explore possible policy options privately.” Def. Mot. at 10 (citing *In re Sealed Case*, 121 F.3d at 751).

However, the power of the budget is at best a shared power between *both* the legislative and executive branches. “[T]he legislative power granted to the District . . . is vested in and shall be exercised by the Council,” D.C. Code § 1-204.04, and “the allocation of the District’s financial resources is a ‘core legislative function.’” *Washington, D.C. Ass’n of Realtors, Inc. v. D.C.*, 44 A.3d 299, 305 (D.C. 2012). According to the D.C. Charter, the Council may establish additional funds as they find necessary “for the efficient operation of the government of the District,” D.C. Code § 1-204.50, and further, the Council may request the Mayor “[s]ubmit to the Council a financial statement in any detail and at such times as the Council may specify.” D.C. Code § 1-204.48(a)(3).

Moreover, the Court finds D.C. FOIA’s “Public Policy” provision persuasive and on point, which states “all persons are entitled to full and complete information regarding the affairs of government.” D.C. Code § 2-531. FOIA’s Public Policy Statement, and FOIA’s Budget Request disclosure requirement under D.C. Code § 2-536(a)(6A), are two “contrary provisions” both express and implied from an “other statute” that require disclosure. *See Wilson v. Kelly*, 615 A.2d at 231. TPM’s FOIA request for budget requests does not implicate the Council, nor does it give the Council power to participate in initial executive deliberations — budgeting power is

shared between the two branches of government, and construing the facts favorably to Plaintiff, the request fit squarely within separation of powers principles. *Sundberg*, 109 A.3d at 1128. Lastly, the Court is not persuaded by the District’s argument that disclosure will chill candid conversation. FOIA’s public policy goals urge the Court to construe its provisions in favor of expansion and transparency in government. D.C. Code § 2-531. A budget request made two years after budget deliberations occurred, and not *during* the Mayor’s discussions with agency leaders and the CFO, does not “interfere” with the Mayor’s access to “honest and informed advice”. Mot. at 10.

When accepting the Complaint’s factual matter as true, *Potomac*, 28 A.3d at 544, and “in the light most favorable” to TPM, *Sundberg*, 109 A.3d at 1128, the Court finds Plaintiff’s FOIA request raises no separation of powers violations. Therefore, the Court denies the District’s Motion to Dismiss that Plaintiff’s request violates separation of powers principles.

d. Issue #4

Next, the District provides the Executive Communications Privilege bars disclosure of TPM’s budget requests. Mot. at 11–13. The District cites to the Declaration of Jennifer Reed, Mot. at 11; Def.’s Ex. A ¶¶ 6–7, to represent that these budget documents have always been treated as privileged executive communications.

At the Motion to Dismiss phase, the Court will not consider Jennifer Reed’s affidavit, notwithstanding the fact that failure of a past practice does not legalize current potential unlawful conduct. *Grimes v. D.C., Bus. Decisions Info. Inc.*, 89 A.3d 107, 111 (D.C. 2014). “Rules 12(b)(6) and 12(c) provide that if ‘matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of . . .’” A trial court is not required to convert a Rule 12(b)(6) or Rule 12(c) motion into a motion for

summary judgment, however, as long as the court does not consider matters *outside the pleadings*.” *Id.* (emphasis added).

Further, the District contends that the Executive Communications Privilege is “inextricably rooted in separation of powers,” flowing from the “nature of enumerated power” of the Mayor. Mot. at 11. Similar to the President of the United States, the Mayor needs to obtain candid and informed opinions from advisors to make confidential decision, and therefore the privilege must shield communications “directly involving and documents actually viewed by” the Mayor. *Id.* at 12 (citing *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008)). “[D]isclosure would chill the full, candid and objective advice . . . needed for executive decision making.” *Id.* at 12 (citing *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004)).

However, the Court has not in the past, and will not at this juncture, recognize the Executive Communications Privilege. Opp. at 14, Ex. 1. Notwithstanding the Court failing to find a separation of powers violation, *see supra* Section III.A.(c), “[t]he Separation of Powers doctrine expressed in D.C. Code § 1-301.44 (2001) does not require a recognition of the executive privilege and this Court similarly declines to recognize one as well in this context.” *Nichols v. Fenty*, No. 2009 CA 006292 2, at 11 (D.C. Super. Ct. Oct. 30, 2009). In that case too, Defendants argued “the executive privilege is a ‘logical consequence’ of the separation of powers doctrine.” *Id.* Then, as now, this Court will continue not to recognize that executive privilege.

Even if the Court wishes to apply the Executive Communications Privilege, the District has not met its burden in showing it applies here.

Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege

. . . [T]he privilege should apply *only to communications authored or solicited and received* by those members of an *immediate* White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President . . . Only communications at this level are close enough to the President . . . to pose a risk to the candor of his advisors.

Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec., 592

F. Supp. 2d 111, 118 (D.D.C. 2009) [hereinafter *CREW*] (emphases added). “The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President.” *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

Here, the District has not met its burden to show that Plaintiff’s budget request fall within this privilege. As previously discussed, *see supra* Section III.A.(c), the power of the budget is a mixed power between the Mayor and the Council. D.C. Code § 1-204.48(a)(3); D.C. Code § 1-204.24d(26). Further, the Mayor does not formulate the budget on her own, but with the advice of the CFO. D.C. Code § 1-204.48(c); D.C. Code § 1-204.24d(26). The District has not shown these are documents authored, solicited, or received by members of the Mayor’s immediate advisers, nor that these are “direct” decisions made by her. *See CREW*, 592 F. Supp. 2d at 118; *In re Sealed*, 121 F.3d at 752.

Therefore, the Court denies the District’s Motion to Dismiss pursuant to the Executive Communications Privilege.

e. Issues #5 & #6

Lastly, the District moves to dismiss Plaintiff’s Complaint pursuant to the Plaintiff’s request that the District publish the requested budget documents online. Mot. at 13–17. D.C. Code § 2-536(b) requires public bodies “shall make records available on the Internet or . . . by other electronic means,” and Plaintiff asserts the District has a “policy or practice” of not posting

the documents, which interferes with their work of monitoring the District's compliance with a previous injunction. Compl. at 8.

First, the District claims the Court lacks judicial review because the "legislature committed the challenged action to executive discretion," and the statute lacks an explicit judicial review provision, which "constitutes conclusive evidence of legislative intent to preclude judicial review." Mot. at 13–14 (citing *United States v. Fausto*, 484 U.S. 439, 448–49 (1988)). In response, Plaintiff asserts the statutory scheme of FOIA provides for judicial review because its procedural instructions mandate that after petitioning the Mayor for online publication, the "person seeking disclosure may institute proceedings for injunctive or declaratory relief." Opp. Mot. at 17–18; D.C. Code § 2-537(a)(1). Further, Plaintiff claims that because this Motion is brought pursuant to Super. Ct. Civ. R. 12(b)(6), "the question of remedy is premature," and that the Court must only analyze whether Plaintiff has stated a sufficient claim. Opp. Mot. at 19.

The Court first disagrees with Plaintiff. The plain text of a Super. Ct. Civ. R. 12(b)(6) Motion to Dismiss states "Failure to state a claim *upon which relief can be granted*." Super. Ct. Civ. R. 12(b)(6) (emphasis added). As such, the Court must analyze whether the Plaintiff's requested relief is sufficiently stated in their pleadings.

The Court thereby rejects the District's contention that judicial review is inappropriate because "the Council did not intend a private party to sue" under the online publication requirements. Mot. at 15. As both parties represent, Mot. at 14, Opp. Mot. at 17–18, the statutory scheme provides for the procedures Plaintiff exercised: First, the District "shall" post the documents online. D.C. Code § 2-536. If the District fails to publish those documents, a person has the right to petition the Mayor, D.C. Code § 2-537(a), and if the Mayor denies or fails to respond within ten (10) business days, the "person seeking disclosure may institute proceedings

for injunctive or declaratory relief.” D.C. Code § 2-537(a)(1). “The Court may enjoin the public body from withholding records and order production of records improperly withheld.” D.C. Code § 2-537(b).

Contrary to the District’s interpretation, FOIA provides explicit judicial review for the procedures Plaintiff followed, *see* Compl. at 3–5. Plaintiff requested the documents from the Mayor, failed to receive a timely response, and therefore has the right to bring a private suit enjoining the District. *Id.*

This brings the Court to the District’s final issue under its Motion to Dismiss: that Plaintiff has not alleged sufficient injury in its request for online publication of the budget documents, and therefore lacks standing. Mot. at 16–17. The District claims Plaintiff has failed to show they suffered an injury in fact — “an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent.” Mot. at 16 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Instead, the District claims Plaintiff has only asserted a harm that is a “generalized grievance” because it is “shared in substantially equal measure by all or a large class of citizens.” Mot. at 16 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Plaintiff asserts they have suffered an injury because the failure to publish the documents online pursuant to D.C. Code § 2-536 “has and will interfere” with their “monitoring of the District’s compliance” from a previous injunction. Opp. Mot. at 16–17; P1. Supp. Brief. at 9.

The Court denies the District’s Motion here as well. First, Plaintiff’s request for the publication of documents is similar to other Plaintiffs that have been granted standing when denied access to a reading room. *See Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017) (explaining that an unsuccessful attempt to get an agency to make records public confers standing to file a reading-room lawsuit); *Campaign for Accountability v. U.S.*

Dep't of Justice, 278 F. Supp. 3d 303, 318 (D.D.C. 2017) (“Plaintiffs have standing where ‘[t]heir inability to inspect documents in virtual reading rooms harmed in real-world ways’”).

Here, Plaintiffs cannot monitor compliance with a past injunction to ensure the needs of “pre-school aged children with disabilities” are met after the District previously violated them. P1. Supp. Brief. at 9. It is the District’s responsibility to publish these documents in the first place, and their failure to publish may constitute a “causal connection between the injury and the conduct complained of.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Regardless, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Id.* At 561. “Thus, the examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion; the burden of proof is less demanding when the standing question is raised in a motion to dismiss.” *Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011).

As such, the Court denies the Defendant’s Motion to Dismiss for lack of judicial review and lack of standing.

IV. Conclusion

As the Court denies the District’s Motion to Dismiss in its entirety, the District has fourteen (14) days from the instant Order to file a responsive pleading. Super. Ct. Civ. R. 12(a)(4). Therefore, the District’s Answer to the Complaint is due **on or before February 26, 2021.**

If the District is able to file a responsive pleading, the Court is *strongly encouraging* the parties to file a Praecipe Requesting a Scheduling Order as permitted under the Rules, or a Joint

Motion Requesting a Scheduling Order, so that the parties do not have to wait to receive a Scheduling Order weeks from now. Super. Ct. Civ. R. 16(b)(2). If the parties are not eligible to file a Praecipe as permitted pursuant to Super. Ct. Civ. R. 16(b)(2), or choose not to file a Joint Motion for such an Order, and instead have reason to appear, then the parties must appear at their Initial Scheduling Conference.

Due to the ongoing issues surrounding coronavirus, the Court understands that parties will need to be flexible and need to make decisions on how they intend to conduct business, including discovery, remotely. The Court appreciates the parties' attempts to move this case forward. *The Court reiterates that the current health crisis has significantly impacted its hearing and trial schedule and strongly encourages the parties to resolve this case more expeditiously than the alternative of continuing the matter until late next year for further litigation.* In order to ensure that the Court has available communication with all parties, please make sure that all parties submit *an email address and/or an updated telephone number in all future filings* or directly to Chambers via email JudgePasichowChambers@dcsc.gov.

Further, during the period of emergency caused by COVID-19, the Civil Division Clerk's Office restricted the acceptance of filings not filed through CaseFileXpress. The Civil Division Clerk's Office designated an email address (CivileFiling@dcsc.gov) that only accepts filings for **emergency matters**. Currently, parties may submit filings via U.S. Postal mail or via the after-hours drop box located on the 1st Floor of the Moultrie Courthouse Building. The Court is aware that there are severe delays in processing paper filings. Finally, the Civil Division Clerk's Office still accept filings submitted electronically via CaseFileXpress.²

² More information regarding this process can be found on the Court's website at www.dccourts.gov under the DC Superior Court eFiling "Learn More Tab". If you have any questions or need additional support with using the

Additionally, **if the parties are interested in engaging in Early Mediation through Multi-Door remotely**, the Multi-Door Director provided guidance on how to schedule those mediations remotely as follows:

Multi-Door ceased all mediations on March 16th . . . Mediations are now set for 3 hour blocks (previously 2 hours blocks) with four mediations set on each of the three mediation days (Tues, Wed, Thurs) per week, with two at 9:00 and two at 1:30.

Mediations can be scheduled via the existing Civil 1 and 2 Multidoor calendars available for courtrooms clerks and chambers staff. Litigants may contact Pam Marqu at 202-879-0667 with any questions regarding remote mediation.

For any further questions as to the court's resources please access Chief Judge Josey-Herring's January 13, 2021 Amended Order at

https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/Amended-Order-1-13-21_FINAL.PDF. Additionally, please see attached the Court's preliminary

instructions for remotely attending Hearings. For updates on DC Superior Court's available resources and protocol in handling the ongoing coronavirus please continue to check:

<https://www.dccourts.gov/coronavirus>. If the parties are able to resolve or settle their case before their next hearing before the court, then the parties may submit a filing (Praecipe of Dismissal, Stipulation of Dismissal, Consent Judgment, etc.) dismissing the case.

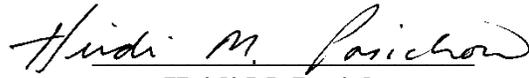
For the aforementioned reasons, it is this 12th day of February 2021,

ORDERED that the District's Opposed Motion to Dismiss the Complaint is **DENIED**; it is

FURTHER ORDERED that Defendant **SHALL FILE** an Answer to the Complaint **on or before February 26, 2021**; and it is,

eFiling system, please contact File & ServeXpress by the following methods: Client Support at [1.888.529.7587](tel:1.888.529.7587); or email them at support@fileandserve.com; or the chat line feature at <https://www.fileandserveexpress.com>.

FURTHER ORDERED that the parties' **REMAIN SET** for an Initial Scheduling Conference on **March 19, 2021 at 9:30 a.m. to be held in Courtroom 516.**



Heidi M. Pasichow
Associate Judge
(Signed in Chambers)

Copies e-served to:

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