

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

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TERRIS, PRAVLIK & MILLIAN, LLP,

Plaintiff,

v.

DISTRICT OF COLUMBIA,

Defendant.

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Case No. 2020 CA 003087 B  
Judge Heidi M. Pasichow

**DEFENDANT'S PARTIAL CONSENT MOTION FOR ADMINISTRATIVE  
STAY AND STAY OF EXECUTION OF JUDGMENT PENDING APPEAL**

Under Super. Ct. Civ. R. 62(d), defendant the District of Columbia (the District) moves to stay the execution of the Court's July 23, 2021 Order entered in this case requiring that the District produce to plaintiff and publish preliminary budget-related documents from the Office of the State Superintendent of Education (OSSE) and District of Columbia Public Schools (DCPS) on or before August 5, 2021. The District also moves for an administrative stay until seven days after the Court decides this stay motion to allow the District to request a stay from the D.C. Court of Appeals, if necessary. As discussed in the attached memorandum of points and authorities, the District is considering an appeal because the Order improperly limits the applicability of the D.C. FOIA's deliberative process privilege to the documents requested, misapplies separation of powers law, and misunderstands the scope of the executive communications privilege. Without a stay, the District will necessarily face irreparable harm because once it produces and publishes the documents, it can no longer invoke any privilege to protect the documents from disclosure if it is successful on appeal. Finally, the public interest supports the protection of deliberative governmental communications, and plaintiff will face no harm from a stay pending appeal. The Court should grant the District's motion and stay execution of the July 23, 2021 Order pending

any appeal, and it should grant an administrative stay until seven days after the Court decides this stay motion. Proposed orders are attached.

Dated: August 3, 2021

Respectfully submitted,

KARL A. RACINE  
Attorney General for the District of Columbia

CHAD COPELAND  
Deputy Attorney General  
Civil Litigation Division

/s/ Fernando Amarillas  
FERNANDO AMARILLAS [974858]  
Assistant Deputy Attorney General

/s/ Honey Morton  
HONEY MORTON [1019878]  
Assistant Attorney General  
ANDREW J. SAINDON [456987]  
Senior Assistant Attorney General  
Equity Section  
400 Sixth Street, N.W., Suite 10100  
Washington, D.C. 20001  
Phone: (202) 724-6591  
honey.morton@dc.gov

*Counsel for the District of Columbia*

**CERTIFICATION UNDER SUPER. CT. CIV. R. 12-I(A)**

As required under Super. Ct. Civ. R. 12-I(a), the undersigned conferred with plaintiff's counsel. Plaintiff consents to a stay of the District's injunctive obligations under the July 23, 2021 Order until any appeal is adjudicated, or, if there is no appeal, until seven days after the time for noticing an appeal has run.

/s/ Honey Morton  
HONEY MORTON  
Assistant Attorney General

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DISTRICT OF COLUMBIA,

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Case No. 2020 CA 003087 B  
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**DEFENDANT'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF PARTIAL CONSENT  
MOTION FOR ADMINISTRATIVE STAY AND STAY OF  
EXECUTION OF JUDGMENT PENDING APPEAL**

**INTRODUCTION**

Defendant the District of Columbia (the District) respectfully moves to stay the Court's Order of July 23, 2021, pending any appeal. *See* Super. Ct. Civ. R. 62(d). The District also moves for an administrative stay until seven days after the Court decides this stay motion to allow the District to request a stay from the D.C. Court of Appeals.

In its Order, this Court held that the District cannot invoke the deliberative process privilege to prevent disclosure of the documents plaintiff requested, that the mandatory disclosure of these documents does not violate separation of powers, and that the documents do not fall within the executive communications privilege. The District is considering an appeal because the Court misinterpreted D.C. FOIA, misapplied separation of powers principles, and misunderstood the scope of the executive communications privilege. This Court should maintain the status quo and stay its Order pending any appeal. Requiring the disclosure of the documents before the District has an opportunity to appeal will necessarily cause irreparable harm: once the documents are produced to plaintiff and published, the District can no longer invoke any privilege to prevent their

disclosure and its appeal would become moot. Further, the public interest, which is enhanced by the executive's ability to deliberate and consider varying policy considerations in confidence, also supports the grant of a stay pending appeal.

## **BACKGROUND**

The relevant legislative history and procedural background is recounted in the Court's Order of July 23, 2021. *See* Order at 1–4. In short, on October 18, 2019, plaintiff submitted a D.C. FOIA request to the Executive Office of the Mayor (EOM) requesting:

[T]he following documents related to (a) the Office of the State Superintendent of Education (“OSSE”) and (b) District of Columbia Public Schools (“DCPS”) (together, the “agencies”): (1) actual copies—not summaries—of the agencies’ budget requests for fiscal year 2019, including “Form B”; (2) any similar documentation describing in detail the agencies’ budget needs or requests for fiscal year 2019; and (3) information identifying corresponding totals from the final approved budget.

Pl.’s Mot. Summary Judgment, Ex. 3, D.C. FOIA Request, at 1. In response, the FOIA Officer at OSSE provided plaintiff with a copy of the Mayor’s fiscal year 2019 proposed budget, *id.*, Ex. 4, Ex. 2, Dec. 4, 2019 Email from Mona Patel, at 1; DSMF ¶ 11, and then explained to plaintiff that “OSSE would not be producing [budget requests made by OSSE to the Mayor’s office] because they are protected deliberations.” Compl. ¶ 10.

On January 22, 2020, plaintiff appealed that decision under D.C. Code § 2-537(a). *See* Pl.’s Mot. Summary Judgment, Ex. 4, D.C. FOIA Appeal, at 3–6. Plaintiff then filed this action on July 13, 2020, bringing two claims: (1) that the District unlawfully failed to produce the documents in response to plaintiff’s D.C. FOIA request, Compl. ¶ 26 (Claim I); and (2) that the District has a policy or practice of failing to make [the budget requests] available to the public online in violation of D.C. Code § 2-536(b), Compl. ¶ 27 (Claim II). Plaintiff sought declaratory and injunctive relief and attorney’s fees.

On April 16, 2021, after the Court denied the District’s motion to dismiss, *see* Feb. 12, 2021 Order, plaintiff moved for summary judgment, challenging the District’s invocation of the deliberative process privilege to deny its request for documents under D.C. FOIA and its decision not to post the documents online. On April 23, 2021, the D.C. Council (as *amici*) filed a statement in support of plaintiff’s motion. The District then cross-moved for summary judgment on May 14, 2021. After the conclusion of briefing, the Court granted summary judgment to plaintiff on July 23, 2021 and ordered the District to respond to plaintiff’s FOIA request and publish the necessary documents online on or before August 5, 2021.

The District now moves to stay the order requiring that the District respond to plaintiff’s request and publish the required documents on or before August 5, 2021. A stay is appropriate here to preserve the status quo because the District will be irreparably injured by disclosing the requested documents before it has the opportunity to appeal, and because the District is likely to succeed on the merits of any appeal.

### **STANDARD OF REVIEW**

Courts have equitable power to issue administrative stays to preserve the status quo pending further judicial review. *See Dickey v. Fair*, 768 A.2d 540, 541 n.2 (D.C. 2001) (“A stay can be granted by ... the trial court ... for any lawful reason.”); *Horton v. United States*, 591 A.2d 1280, 1284 (D.C. 1991).

The Rules of this Court also permit a party to seek a stay pending an appeal. Super. Ct. Civ. R. 62(d); *Dickey v. Fair*, 768 A.2d 540, 541 n.2 (D.C. 2001) (“A stay can be granted by ... the trial court ... for any lawful reason.”); *Horton v. United States*, 591 A.2d 1280, 1284 (D.C. 1991). “To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay.” *Barry v. Washington*

*Post Co.*, 529 A.2d 319, 320–21 (D.C. 1987) (citing *In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980)) (other citation omitted), as cited in *Akassy v. William Penn Apts. Ltd. P’Ship*, 891 A.2d 291, 309 (D.C. 2006). The four factors are considered on a sliding scale. *Salvaterra v. Ramirez*, 105 A.3d 1003, 1004 (D.C. 2014). Thus “[a] stay may be granted with either a high probability of success and some injury, or *vice versa*.” *Akassy*, 891 A.2d at 310 (internal quotation marks omitted) (quoting *Cuomo v. United States Nuclear Regulator Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). Accordingly, “if irreparable harm is clearly shown, the movant may prevail by demonstrating he or she has a substantial case on the merits.” *Id.* (internal quotation marks omitted). When a private party seeks to enjoin the government, the final two factors—harm to the other side and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

## ARGUMENT

### I. Requiring Disclosure of the Requested Documents Would Necessarily Cause Irreparable Harm to the District.

“Particularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant’s right to appeal.” *People for the Am. Way Found. v. U.S. Dep’t of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (citing cases); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, Civil Action No. 09-2312, 2011 WL 13377578, at \*2 (D.D.C. Nov. 14, 2011). The Court’s Order requires that the District produce the preliminary budget documents requested from OSSE and DCPS on or before August 5, 2021 and publish the requested documents online by the same date, weeks before the deadline to file a notice of appeal. *See* D.C. Ct. App. R. 4(a)(1) (30 days to file notice of appeal in Superior Court). Once the documents are disclosed, the protections provided by the deliberative process privilege and executive communications privilege would be lost, along with the confidentiality of the documents, and any appeal of the Court’s decision requiring disclosure of the documents would be moot. That is, even if the District were successful on appeal, it would be too late to prevent the disclosure of the documents. Thus, “a stay

is necessary to avoid irreparable injury [to the District] by having to release documents prior to having the opportunity to seek meaningful appellate review.” *People for the Am. Way Found.*, 518 F. Supp. 2d at 177.

Further, in September or October, the Mayor will again solicit preliminary budget requests from OSSE and DCPS. *See* Def.’s Mot. Summary Judgment, Ex. A, Declaration of Jennifer Reed (Reed Declaration) ¶ 6. If her agency directors believe that their recommendations will be made public pursuant to the Court’s order, they may not provide as candid and comprehensive advice as they otherwise would if the information could still be protected by the deliberative process and executive communications privileges, and this could impair the Mayor’s ability to prepare a budget that best meets the District’s needs. *See id.* ¶ 11; *Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”). For all those reasons, requiring disclosure would necessarily cause the District irreparable harm.

## **II. The District Is Likely to Succeed on the Merits of Any Appeal.**

Although the District is still considering whether to note an appeal, the District submits that it is likely to succeed in an appeal. Even if the Court believes otherwise, interpretation of the District’s disclosure requirements under D.C. Code § 2-536(a)(6A) is a novel question that has not been previously addressed by the Court of Appeals and raises complex questions of statutory interpretation and separation-of-powers principles. This alone counsels in favor of granting a stay. *See Akassy*, 891 A.2d at 310 (D.C. 2006) (citing *Doe v. Axelrod*, 527 N.Y.S.2d 385, 390 (Sup. Ct. 1988) (“although movant may not be ultimately successful, the case presented ‘novel issues of first impression’ and an injunction should be granted”)).

In any event, there are at least three grounds for reversal. First, the Court erred when it found that D.C. FOIA's exemptions from disclosure do not apply to the documents plaintiff requested under D.C. Code § 2-536(a)(6A). *See* Order at 10–11. There is no dispute that the documents plaintiff requested fall within the scope of the deliberative process privilege. *See* Def.'s Mem. In Opp'n to Pl.'s Mot. for Summary Judgment and In Support of Cross-Mot. for Summary Judgment (Def.'s Mem.) at 6–9; Pl.'s Reply In Support of Mot. for Summary Judgment and Opp'n to Def.'s Cross-Mot. for Summary Judgment (Pl.'s Opp'n) at 10. Further, the Court of Appeals, when presented with similar arguments, has twice held that documents that fall under D.C. FOIA's exemption provisions are protected from disclosure under proactive publication requirements. *See Kane v. District of Columbia*, 180 A.3d 1073, 1082 (D.C. 2018); *Office of People's Counsel v. Pub. Serv. Comm'n of D.C.*, 955 A.2d 169, 176 (D.C. 2008). There is also no conflict between D.C. FOIA's budget documents disclosure requirement and the deliberative process exemption, *see* Order at 11–12: just like under every other D.C. FOIA disclosure provision, the District is required to publish budget-related documents under D.C. Code § 2-536(a)(6A) unless an exemption in D.C. Code § 2-534(a) applies. The Court does not cite any case to the contrary.

Second, the Court incorrectly held that the required disclosure of internal, deliberative executive communications carried out as part of the Mayor's charter-delegated duty to prepare and submit a budget does not violate the separation of powers. Although the overall “power of the budget is shared between *both* the legislative and executive branches,” Order at 13 (emphasis in original), the Court ignores the clear demarcations in the Charter and the specific duties assigned to each branch in that document. Specifically, the duty to prepare and submit a proposed budget under D.C. Code § 1-204.42(a) is explicitly and exclusively delegated to the Mayor. To carry out this duty, the Mayor must be permitted to receive unvarnished advice and recommendations from executive branch agencies while formulating her proposed budget.



And third, the Court is mistaken in its understanding of the executive communications privilege. The Court found that the release of the budget related documents containing executive deliberations would not “chill full, candid” conversations because plaintiff requested the documents “a full year after the initial solicitation for information and at least six months after the Mayor submit[ted] her budget proposal to the Council.” Order at 14. Whether documents are protected, however, does not depend on whether the District receives a request for their disclosure during the deliberations or after. *See Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 913 F.3d 1106, 1109 (D.C. Cir. 2019) (documents sought four years after their creation, and after final action taken in response, were protected by executive communications privilege); *Loving v. Dep’t of Def.*, 550 F.3d 32, 36, 41 (D.C. Cir. 2008) (documents related to appellant’s death sentence remained protected executive communications even after the sentence was final and upheld by the Supreme Court).

Of course, the release of the documents now cannot affect deliberations that occurred in the past; that is true for any document covered by the executive communications privilege. However, the release of the requested documents will interfere with the Mayor’s ability to obtain candid and informed budget recommendations from her advisors *in the future*. “[U]nless [s]he can give [her] advisers some assurance of confidentiality, a [mayor] could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of [her] duties depends.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 448–49 (1997)). Because the budget process happens annually, if the Mayor’s agency directors believe that their preliminary recommendations and advice will be made public going forward, they will not provide the “candid

and comprehensive advice and recommendations” that the Mayor needs to create the budget that “best meet[s] the needs of D.C. residents and businesses.” *See* Reed Declaration § 11.<sup>1</sup>

Further, the fact that the documents are transmitted to the Mayor through the Office of the Chief Financial Officer does not remove them from the protections of the executive communications privilege. *See* Order at 14–15. The limitations on the privilege outlined in *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Homeland Sec.*, 592 F. Supp. 2d 111, 118 (D.D.C. 2009), *see* Order at 14–15, do not apply here. The budget documents are not solicited by a member of the Mayor’s staff, but rather directly by the Mayor herself, *see* Reed Declaration ¶ 6; *Loving*, 550 F.3d 32 at 37 (quoting *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004)) (executive privilege covers “communications directly involving and documents actually viewed by the President”), and the Charter calls “ultimately for direct decision-making by the [Mayor]” on the final budget submission, *see* Order at 15 (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)). *See also* D.C. Code § 1-204.42(a).

### **III. A Stay Pending Appeal Is In the Public Interest and Will Not Harm Plaintiff.**

The public interest and the lack of harm to the opposing party also favor granting a stay. Courts have recognized that protecting confidential government deliberations is in the public interest. *See Mapother v. U.S. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (explaining that the deliberative process privilege exists to “encourage[ ] a frank discussion of the legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl.”) (internal quotations omitted); *Trump v. Mazars*, 140 S. Ct. 2019, 2032 (2020) (noting that the executive privilege, which “safeguards the public interest in candid, confidential deliberations within the

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<sup>1</sup> Further, D.C. Code § 2-536(a)(6A) requires that the documents be made public but does not specify when they must be published. There is nothing in the statute that prevents somebody making a request for the documents in October during the deliberative process and before the Mayor submits her budget proposal to the Council.

Executive Branch” is “fundamental to the operation of Government”); *Judicial Watch*, 913 F.3d at 1111. At the very least, it is in the public interest to maintain the status quo while the Court of Appeals considers the novel questions raised by this case. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin., Executive Office of the President*, 593 F.Supp.2d 156, 159 (D.D.C. 2009) (“a stay pending appeal ‘is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.’”) (quoting *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

The lack of harm to plaintiff also favors granting a stay. Plaintiff requested these documents in October 2019, and the request was denied shortly thereafter. Not having the documents for an additional period of time while this issue of first impression is resolved by the D.C. Court of Appeals will impose no additional hardship to plaintiff.

Further, plaintiff has asserted that it requested the documents because they are relevant to its work “monitoring the District’s compliance with” a federal injunction. *See* Pl.’s Mot. Summary Judgment, Ex. 5, Affidavit of Kathleen Millian ¶ 2. Plaintiff has monitored the District’s compliance with the injunction for over five years without this information and has never requested access to this information until now. Further, the District participates in monthly check-in discussions and quarterly (now tri-annual) meetings with plaintiff’s counsel and regular written communications in that case, and it produces two detailed reports to the plaintiffs and the Court annually, for which plaintiffs receive supporting data. *See D.L. v. District of Columbia*, Civil Case No. 05-01437, Defendants’ March 1, 2021 Report on Programmatic Requirements [645-1]; *id.*, Defendants’ September 30, 2020 Report on Numerical and Programmatic Requirements [639-1]. Plaintiffs in *D.L.* have and will continue to have ample information to monitor the District’s compliance with the injunction, even if the Court orders a stay pending appeal.

**CONCLUSION**

For the foregoing reasons, the Court should grant the District’s motion and enter a stay of its July 23, 2021 Order pending appeal, and it should grant an administrative stay until seven days after the Court decides this stay motion.

Dated: August 3, 2021

Respectfully submitted,

KARL A. RACINE  
Attorney General for the District of Columbia

CHAD COPELAND  
Deputy Attorney General  
Civil Litigation Division

/s/ Fernando Amarillas  
FERNANDO AMARILLAS [974858]  
Assistant Deputy Attorney General

/s/ Honey Morton  
HONEY MORTON [1019878]  
Assistant Attorney General  
ANDREW J. SAINDON [456987]  
Senior Assistant Attorney General  
Equity Section  
400 Sixth Street, N.W., Suite 10100  
Washington, D.C. 20001  
Phone: (202) 724-6591  
honey.morton@dc.gov

*Counsel for the District of Columbia*