

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

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TERRIS, PRAVLIK & MILLIAN, LLP,)	
)	
Plaintiff,)	
v.)	Case No. 2020 CA 003087 B
)	Judge Heidi M. Pasichow
)	Next Event: Status Hearing
DISTRICT OF COLUMBIA,)	10:30 a.m., July 23, 2021
)	
Defendant.)	
_____)	

**STATEMENT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT,
DECLARATORY JUDGMENT, AND A PERMANENT INJUNCTION**

Consistent with the briefing schedule set forth in this Court’s March 16, 2021, Order Granting Parties’ Joint Motion Requesting a Scheduling Order and Related Relief, the Council of the District of Columbia (“Council”), by and through undersigned counsel, hereby submits the following statement as *amicus curiae* in support of Plaintiff’s Motion for Summary Judgment, Declaratory Judgment, and a Permanent Injunction (“Motion”). The Council writes separately to underscore that the Court’s February 12, 2021, Order Denying Defendant District of Columbia’s Motion to Dismiss (“Order Den. Mot. to Dismiss”), correctly held as a matter of law that: (1) the budget request documents prepared by the District of Columbia Public Schools (“DCPS”) and the Office of the State Superintendent of Education (“OSSE”) that have been requested by Plaintiff are not protected from disclosure under the District of Columbia Freedom of Information Act (“D.C. FOIA”) by the deliberative process privilege; (2) the provision of D.C. FOIA that requires the Executive to make publicly available agency budget requests, submissions, and reports, D.C. Code § 2-536(a)(6A), applies to the documents sought by

Plaintiff; (3) the requirements of D.C. Code § 2-536(a)(6A) are entirely consistent with the separation of powers established by the District of Columbia Charter; and (4) no executive communications privilege akin to the presidential communications privilege justifies Defendant in withholding the documents at issue. In its February 12, 2021 Order, the Court stated that it addressed the foregoing legal questions under the standards applicable to the adjudication of a motion to dismiss. Because there are no material issues of fact in dispute and the Court previously has resolved all relevant questions of law in favor of Plaintiff, the Court now should grant summary judgment for Plaintiff pursuant to Super. Ct. Civ. R. 56 and order Defendant to comply with D.C. FOIA by releasing the documents sought by Plaintiff, including the annual budget requests prepared by DCPS and OSSE. *See* D.C. Code § 2-537(b) (“[T]he Superior Court for the District of Columbia may enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure.”). *See, e.g., Washkoviak v. Student Loan Marketing, Ass’n*, 900 A.2d 168, 177-78 (D.C. 2006).

ARGUMENT

In the Court’s February 12, 2021, Order Denying Defendant’s Motion to Dismiss, the Court correctly concluded that Defendant’s reliance on the deliberative process privilege, as incorporated into D.C. FOIA by D.C. Code § 2-534(a)(4), was unavailing, because of D.C. FOIA’s plain directive that § 2-534 “shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.” D.C. Code § 2-534(c). The Court rightly observed that D.C. Code § 2-536(a)(6A), which requires proactive disclosure of agency budget requests, may be considered an “other law” within the meaning of D.C. Code § 2-534(c). Order Den. Mot. to Dismiss at 7. As detailed in the Council’s prior submission to the Court, the Council added paragraph (6A) to D.C. Code § 2-536(a) specifically to ensure that members of

the public have access to “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,” to ensure that “residents can participate more fully in the budget dialogue” and to “promote accountability by making the financial operations of the District government more transparent.” *See* Amendment to the Fiscal Year 2005 Budget Support Act of 2004, attached as Ex. 1 to Att. A to the Council’s October 30, 2020 Memorandum in Support of Plaintiff. Defendant’s claim that these same budget request documents are nonetheless subject to withholding under the deliberative process privilege is clearly contrary to the Council’s stated legislative intent and would render D.C. Code § 2-536(a)(6A) a nullity, a clearly disfavored reading of the statute. *See* Order Den. Mot. Dismiss at 7-8 (citing *Atiba v. Wash. Hosp. Ctr.*, 43 A.3d 940, 941-42 (D.C. 2012), for proposition that Council “could not have intended” to “create a square conflict” between two statutory provisions and that to hold otherwise would be “an absurd outcome”). Permitting Defendant to withhold the requested documents also would be contrary to the public policy of D.C. FOIA, which is to be “construed with the view toward expansion of public access” D.C. Code § 2-531.

The Court also properly rejected Defendant’s argument that D.C. FOIA does not require the disclosure of budget request documents that have been submitted by District agencies to the Mayor rather than to the Office of Budget and Planning (“OBP”). *See* Order Den. Mot. to Dismiss at 9-10. As the legislative history of D.C. Code § 2-536(a)(6A) makes clear, the Council’s intent in adding that provision to D.C. FOIA was to ensure that the public has access to agency budget requests and other key budget documents, with the stated goal of fostering both public participation and governmental transparency in the budget process. Nothing in the legislative history suggests that the Council had any intent to limit the required disclosure of

those documents based upon the manner in which they may happen to be circulated through the Executive branch. To hold otherwise would thwart the clearly expressed will of the Council by insisting upon an implausibly restrictive parsing of the controlling statute. *See Wash. Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 (D.C. 1989) (recognizing that “the provisions of the [D.C. FOIA] giving citizens the right of access are to be generously construed”). *See also Gondelman v. D.C. Dep’t of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1245 (D.C. 2002) (“[S]tatutory meaning is of course to be derived, not from the reading of a single sentence or section, but from consideration of an entire enactment against the backdrop of its policies and objectives.”) (internal quotation and citation omitted).

The Court also was correct to reject Defendant’s claim that ordering the disclosure of the documents at issue pursuant to D.C. Code § 2-536(a)(6A) would somehow violate the separation of powers between the Mayor and the Council under the District Charter. Order Den. Mot. to Dismiss at 10. As the Court correctly observed, the formulation of the District’s budget is “at best a shared power between *both* the legislative and executive branches.” *Id.* at 11 (emphasis in original). The requirements of D.C. Code § 2-536(a)(6A) are fully consistent with the *en banc* D.C. Court of Appeals’ explicit recognition that the “fundamental statutory framework” of the Charter “giv[es] the Council, not the Mayor, ultimate authority (subject to congressional review) over the District’s annual budget,” and that the Mayor’s ability to initiate budget proposals is “subordinate to this fundamental prerogative of the Council.” *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 906 n.31 (D.C. 1981) (*en banc*). *See also Wash., D.C. Ass’n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 305 (D.C. 2012) (“As we have said in the past, the allocation of the District’s financial resources is a ‘core legislative function.’”) (quoting *Quattlebaum v. Barry*, 671 A.2d 881, 885 (D.C. 1995) (*per*

curiam) (*en banc*)). The Council further agrees with the Court that disclosure of budget request documents following submittal of the proposed budget by the Mayor to the Council would not interfere with or undermine the Mayor's budget formulation authority, Order Den. Mot. to Dismiss at 12, as courts have rejected "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. Ct. App. 2010). *See also District of Columbia v. Fitzgerald*, 953 A.2d 288, 292 (D.C. 2008) (*en banc* order) (noting that separation-of-powers doctrine is designed to preclude instances "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 undermines the authority and independence of one or another coordinate branch") (emphasis in original) (cleaned up). Moreover, the Court's conclusion aligns with relevant case law from both the D.C. Circuit and at least one other state high court. *See Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 923-24, 935 (D.C. Cir. 1982) (rejecting Nuclear Regulatory Commission's contention that it was entitled to hold closed sessions to discuss budget preparations and its budget request despite Government in the Sunshine Act, 5 U.S.C. § 552b, lacking blanket deliberative process privilege exemption from open meetings requirement on basis that separation-of-powers principles required budget discussions to be held in private to provide President with candid advice); *Capital Info. Grp. v. State, Office of the Governor*, 923 P.2d 29, 38-39 (Alaska 1996) (rejecting Governor's claim that statute requiring public disclosure of budget impact memoranda to Alaska's version of OMB violates separation of powers).

Finally, the Court correctly refused to recognize an executive communications privilege for the Mayor analogous to the President's presidential communications privilege. Order Den.

Mot. to Dismiss at 12-13. The Superior Court previously has declined to endorse the executive communications privilege as a corollary of the separation of powers and, in at least one other jurisdiction, a court of last resort has done the same. *See Nichols v. Fenty*, No. 2009 CA 006292 2, at 11 (D.C. Super. Ct. Oct. 30, 2009), *appeal voluntarily withdrawn* No. 09-CV-1247 (D.C.)). *Accord Babets v. Sec’y of Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1263 (Mass. 1988) (rejecting argument that executive privilege “inheres in or is a necessary ramification of the doctrine of separation of powers”). In any event, the Council agrees with the Court that this is not an appropriate case in which to recognize such a privilege, even if it may exist as a hypothetical matter. *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 constitutional one, or involves the construction of a statute”) (citation omitted). This is so because the presidential communications “privilege is rooted in constitutional separation of powers principles and the President’s unique constitutional role[.]” *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 v. Adm’r of Gen. Servs.*, 433 U.S. 425, 447 (1977)). *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”). In this case, the Mayor’s role in the budgeting process is inherently collaborative and involves significant overlap with other Charter entities like the Council and OCFO, each of which must carry out significant

Charter-assigned budget responsibilities of its own. Moreover, as noted above, the D.C. Court of Appeals specifically has recognized that it is the Council, not the Mayor, that has ultimate authority over budget matters. *Convention Ctr. Referendum Comm.*, 441 A.2d at 906 n.31. Accordingly, even if there were an executive communications privilege in the District, Defendant cannot establish that it should apply to the budget-related documents at issue here.

CONCLUSION

Because there are no material facts in dispute and the Court previously has ruled in favor of Plaintiff on all relevant questions of law, the Court should grant Plaintiff's Motion for Summary Judgment, Declaratory Judgment, and a Permanent Injunction.

April 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today, April 23, 2021, the foregoing Statement of the Council of the District of Columbia as *Amicus Curiae* 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