

**ELAINE J. MITTLEMAN
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Falls Church, VA 22043
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Admitted in the District of Columbia; Not Admitted in Virginia**

**STATEMENT BEFORE THE
COMMITTEE ON GOVERNMENT OPERATIONS
AND THE ENVIRONMENT**

On

Bill 18-777, the "Open Government Act of 2010"

JUNE 7, 2010

I appreciate the opportunity to present a statement to the Committee on Government Operations and the Environment concerning Bill 18-777, the "Open Government Act of 2010." I strongly support this Bill and its emphasis on transparency and openness in the District of Columbia government. I have comments on Title I, concerning the Open Government Office, and on Title VII, concerning spending transparency.

1. Title I. Open Government Office

I believe there is a strong need for an Open Government Office, based on my recent experience with a request for documents pursuant to the D.C. Freedom of Information Act ("FOIA"). Attached are documents concerning that request.

I represent several property owners and tenants at the Skyland Shopping Center in Southeast Washington, D.C., which the District plans to redevelop after taking the property by eminent domain. I have spent considerable time reviewing the records of the Office of Tax and Revenue concerning the Skyland properties.

I submitted FOIA requests dated March 25, 2009, and April 28, 2009, for records for Squares 5632 and 5633 maintained in the Office of Tax and Revenue from July 2005 to the present. The FOIA requests were denied by the Office of Tax and Revenue in a letter dated July 14, 2009. The request was denied based on the claim of a "pending litigation" exception. The denial also relied upon the exemption provision in D.C. Code § 2-534(a)(3)(A), which exempts investigatory records compiled for law-enforcement purposes to the extent that the production of such records would interfere with enforcement proceedings.

By letter dated October 22, 2009, the Office of the Mayor addressed my appeal of this denial and remanded the appeal to the Office of Tax and Revenue for further information about the status of pending litigation. In the October 22, 2009, letter, Andrew T. Richardson, III, General Counsel to the Mayor, stated that "the pending litigation exception is a creature of caselaw, and is not found in the DC FOIA. Generally, it is invoked to ensure that no one uses FOIA to enlarge their discovery rights."

In a letter dated December 8, 2009, to Mr. Richardson, General Counsel to the Mayor, the Chief Counsel for the Office of Tax and Revenue asserted that "[t]here are strong reasons for applying the 'pending litigation' exception for the duration of legal proceedings relating to the subject of a FOIA request."

By letter dated January 21, 2010, the Office of the Mayor found that the Office of Tax and Revenue had met its burden. The Mayor's Office upheld the decision of the Office of Tax and Revenue and dismissed the FOIA Appeal. The letter stated that the existence of pending cases in the Superior Court of the District of Columbia supports the decision of the Office of Tax and Revenue to continue to withhold the requested records.

In an email dated February 9, 2010, I requested reconsideration of the decision concerning the FOIA appeal. I explained that there is no such thing as a "pending litigation" exception. I noted that the case relied upon in the October 22, 2009, letter, *Ehringhaus v. F.T.C.*, 525 F.Supp. 21 (D.D.C. 1980), concerned documents that were part of a Federal Trade Commission investigation into advertising practices of cigarette manufacturers. Those documents were withheld under Exemption 7(A), which involves investigatory records compiled for law enforcement purposes. I further explained that the October 22, 2009, letter had noted that the Office of Tax and Revenue records were not compiled for law enforcement purposes. I reiterated that there is no "pending litigation" exception to FOIA.

In an email dated February 9, 2009, the Executive Assistant to Mr. Richardson stated that "While we will not reconsider the decision, you have the right to appeal that decision to DC Superior Court."

In light of my experience in which the FOIA request was denied, I strongly believe that the Open Government Office is needed. The denial was based on the "pending litigation" exception. In the letter dated October 22, 2009, Mr. Richardson explained that the pending litigation exception is a creature of caselaw and is not found in the DC FOIA. However, the denial provision of the DC FOIA, D.C. Code § 2-533(a)(1), provides that the denial shall contain "[t]he specific reasons for the denial, including citations to the particular exemption(s) under § 2-534 relied on as authority for the denial."

It is clear that the provisions of the DC FOIA and its emphasis on disclosure are being violated. My FOIA request was denied based upon a non-existent "pending litigation" exception. The denial was not supported by any statutory exemption, but was

premised upon a fabricated exception allegedly based on caselaw. The bald denial of my FOIA request indicated that I could commence a civil action against the District of Columbia government in D.C. Superior Court. The option of litigation in Superior Court would cause further delay in receiving the documents and burdensome litigation. Moreover, it is not clear that I would receive attorney's fees if I would prevail in court because I am the person who requested the records.

If there were an Open Government Office, I believe that it would ensure that FOIA requests are treated according to the law. The agencies could not deny requests based on a non-existent exception which is not in the statute. The clear abuse of the FOIA process in my FOIA request shows that an Open Government Office is necessary.

2. Title VII. Spending Transparency.

I am in favor of measures to provide for spending transparency. I believe that there is significant information concerning the Skyland Shopping Center project which should be made available and readily accessible to the public.

I am unaware of any website available which permits the review of the expenditures and revenues associated with the Skyland project. It appears that the RLA Revitalization Corporation received \$28.7 million in August 2004. These funds were Community Development Block Grant program income funds. RLARC received these funds in exchange for the Government Printing Office site. See RLARC Management Recommendation, dated November 18, 2005 (attached hereto). These funds have apparently been used to acquire the properties at the Skyland Shopping Center. The expenditures for the Skyland properties should be available on a website. It would also be useful to have available expenditures related to the acquisitions, including consulting and legal fees.

A National Capital Revitalization Corporation memo dated December 7, 2005 (attached hereto), provides an update on the Skyland project. The memo discusses next steps which include resubmitting TIF legislation, renegotiating the development agreement, execution of a purchase and sale agreement with the anchor and relocating tenants.

The spending information about TIF funding, any purchase and sale agreements, any relocation assistance to Skyland tenants and agreements with the development team, including Gary Rappaport, should be available to the public. The purchase and sale agreements and agreements or memoranda of understanding with the development team also should be public information.

A hearing on Skyland was conducted by the Committee on Finance and Revenue on March 14, 2007. John Ross, Senior Adviser and Director of Economic Development Finance in the Office of the Chief Financial Officer, presented testimony (attached hereto) about the Skyland project and the District's potential exposure. He stated that "[t]o

minimize the District's exposure, we recommend that the District require signed commitments with private developers for the retail and residential square footage in the Skyland project as conditions for the release of the TIF funds. It is important to note that the OCFO's analysis is contingent upon the proposed development program and financing plan. If the development program or financing plan are altered, the OCFO's analysis will need to be revised." Based on this testimony, it is important that the information about the development programs and financing plans at Skyland be maintained on a public website.

In addition, the District has the obligation to manage the property at Skyland and serve as the landlord to the businesses operating at Skyland Shopping Center. The District collects rent from the tenants. The rental income and expenditures related to managing the Skyland property should be available to the public.

In light of the uncertainties about the District's obligations and expenditures concerning the Skyland project, the financial information should be available to the public on a website. It is necessary to have this information to further the objective of transparency.

FW: E. Mittleman Final Decision

From: **Anthony, Lavita (EOM)** (lavita.anthony@dc.gov)
Sent: Tue 2/09/10 3:58 PM
To: elainemittleman@msn.com
Cc: Levine, Alan (OCFO) (alan.levine@dc.gov); Spears, George (EOM) (george.spears@dc.gov)

Good afternoon Ms. Mittleman,

I have received your request to reconsider Mr. Richardson's decision. While we will not reconsider the decision, you have the right to appeal that decision to DC Superior Court. Thank you.

LaVita Anthony
Executive Assistant for
Andrew T. "Chip" Richardson, General Counsel
Executive Office of the Mayor
Office of the General Counsel
1350 Pennsylvania Ave., NW – Suite 300
Washington, DC 20004
Phone: 202-724-7681
Fax: 202-724-7743
Lavita.anthony@dc.gov

From: Elaine Mittleman <elainemittleman@msn.com>
To: Anthony, Lavita (EOM)
Cc: Levine, Alan (OCFO)
Sent: Tue Feb 09 15:07:22 2010
Subject: RE: E. Mittleman Final Decision

I am requesting reconsideration of the decision concerning my FOIA appeal. In letters dated October 22, 2009, and January 21, 2010, the decision was based on a "pending litigation" exception to FOIA.

There is no such thing as a "pending litigation" exception. In the letter dated October 22, 2009, the case cited to support that exception was *Ehringhaus v. F.T.C.*, 525 F.Supp. 2d 21 (D.D.C. 1980). The letter stated in its citation that this was a D.C. Circuit case. That is not correct. This is a district court case.

Further, the letter refers to "exception," but the correct terminology under the Freedom of Information Act is exemption.

The *Ehringhaus* case held that documents prepared as part of a Federal Trade Commission investigation into advertising practices of cigarette manufacturers qualified as a law enforcement purpose under Exemption 7 of FOIA. The documents in that case were withheld under

Exemption 7(A), which involves investigatory records compiled for law enforcement purposes.

The letter dated October 22, 2009, found that the Office of Tax and Revenue had not submitted any evidence that it is a law-enforcement agency or that it was acting in such capacity when the requested records were created. Thus, the records were not compiled for law enforcement purposes. The OTR records cannot be withheld based exemption 3 of the DC FOIA, which concerns investigatory records compiled for law enforcement purposes. Exemption 3 of the DC FOIA tracks Exemption 7(A) of FOIA.

Because the October 22, 2009, letter stated that the OTR records were not compiled for law enforcement purposes, there is no basis on which the OTR records can be withheld.

As explained above, there is no "pending litigation" exception to FOIA. The discussion about pending proceedings and discovery concerns matters involving law enforcement proceedings. There is no broad exception based on the mere existence of any type of litigation.

I respectfully request that the decision to withhold the OTR records be reconsidered. The decision is not based on any provision of the DC FOIA.

Elaine Mittleman

Elaine Mittleman, Esq.
Law Office of Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482
elainemittleman@msn.com

The information contained in this message may include sensitive or attorney work product information. If you received this message in error, please notify the sender immediately.

> Subject: E. Mittleman Final Decision
> Date: Thu, 21 Jan 2010 12:23:59 -0500
> From: lavita.anthony@dc.gov
> To: elainemittleman@msn.com
> CC: alan.levine@dc.gov
>
> Good afternoon Ms. Mittleman,
>
> Please see the attached decision regarding your appeal.

- >
- > Thanks again for your patience.
- >
- > Regards,
- >
- > LaVita Anthony
- > Executive Assistant for
- > Andrew T. "Chip" Richardson, General Counsel
- > Executive Office of the Mayor
- > Office of the General Counsel
- > 1350 Pennsylvania Ave., NW - Suite 300
- > Washington, DC 20004
- > Phone: 202-724-7681
- > Fax: 202-724-7743
- > Lavita.anthony@dc.gov
- >

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

January 21, 2010

BY U.S. MAIL

Elaine J. Mittleman
Attorney at Law
2040 Arch Drive
Falls Church, VA 22043

Re: Freedom of Information Act Appeal

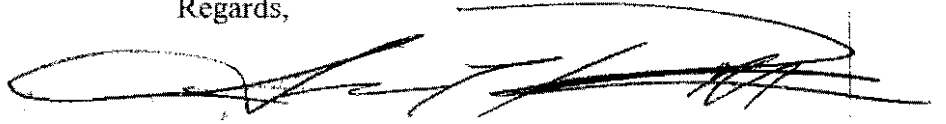
Dear Ms. Mittleman:

As you know, we previously responded to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. § 2-531 *et seq.* (the "DC FOIA"), dated September 12, 2009 (the "Appeal"). As part of that initial process, the District of Columbia Office of Tax and Revenue ("OTR") responded to the Appeal in a letter dated October 6, 2009 ("OTR Response"). In our preliminary decision, dated October 22, 2009, we requested OTR provide us with further explanation as to why there is a strong likelihood the appellate court will remand the Appeal back to the trial court with further discovery. We made that request to determine whether OTR could properly continue to withhold records based on the existence of pending litigation, as explained in our October 22 decision. In a letter dated December 8, 2009, OTR responded, explaining why there is a likelihood the matter will be remanded back to the trial court ("OTR Supplement") (see Attached).

According to the OTR Supplement, OTR conferred with the District of Columbia Office of the Attorney General ("OAG") regarding *Rumber v. District of Columbia*, 598 F.Supp.2d 97 (D.D.C. 2009), appeal docketed, No. 09-7035 (D.C. Cir. March 30, 2009). Based on representations made by the OAG, which is handling the *Rumber* litigation, it is likely the case will be remanded to the trial court. Additionally, OAG informed OTR there are two additional cases currently pending in the Superior Court of the District of Columbia that are related to Appellant's FOIA Request. These cases are *District of Columbia v. DeSilva*, 2005 CA 005336 E(RP) and *District of Columbia v. Oh*, 2005 CA 005323 E(RP). The information you seek relates to the subject matter of all of the aforementioned cases. And, the existence of these pending cases would support OTR's decision to continue to withhold the requested records. Accordingly, we find OTR has met its burden and we UPHOLD OTR's decision and hereby DISMISS your Appeal.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Regards,

A handwritten signature in black ink, appearing to read "Andrew T. Richardson, III", with a large, sweeping flourish extending to the right.

Andrew T. "Chip" Richardson, III, Esq.
General Counsel to the Mayor

cc: Alan C. Levin, OTR

Enclosure

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Office of the Chief Financial Officer
Office of Tax and Revenue



December 8, 2009

Andrew T. "Chip" Richardson, III, Esq.
General Counsel to the Mayor
Executive Office of the Mayor
1350 Pennsylvania Ave., NW
Suite 300
Washington, DC 20004

Re: FOIA Appeal MLC2009-51

Dear Mr. Richardson:

The following letter responds to your letter of October 22, 2009 which remanded the appeal in the above-referenced matter to the Office of Tax and Revenue (OTR). As a basis for nondisclosure, OTR has relied on the pendency of an appeal in the Rumber case, which relates to the subject matter of Ms. Mittelman's FOIA request. Your letter indicates that the "pending litigation" exception to disclosure may only apply to litigation at the trial level, and that this exception may not apply to cases on appeal. In your letter, you asked that OTR show whether there is a strong likelihood that the court of appeals will remand the Rumber litigation to the trial court.

OTR points out, as an initial matter, that case law construing the Federal FOIA has treated a pending appeal as part of an ongoing legal proceeding which justifies nondisclosure. James v. U.S. Secret Service, 2007 US Dist. LEXIS 52554 at *12 (D.D.C. 2007); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007); Kansi v. Department of Justice, 11 F. Supp. 2d 42, 44 (D.D.C. 1998). Accordingly, the pendency of an appeal is itself a sufficient basis for asserting the "pending litigation" exception to the District's FOIA. Under the Federal FOIA, information is protected from disclosure during the entire course of legal proceedings, and not simply at the trial stage, and the protection exists until the legal proceedings, including all appeals, have been completely concluded. A similar rule should be applied here.

There are strong reasons for applying the "pending litigation" exception for the duration of legal proceedings relating to the subject of a FOIA request. The courts have developed very detailed rules governing discovery in cases under their jurisdiction, and the courts supervise discovery conducted under these rules. These rules impose limits on the time during which discovery may be conducted, the procedures that are to be followed in

Andrew T. "Chip" Richardson, III, Esq.
December 8, 2009
Page 2 of 2

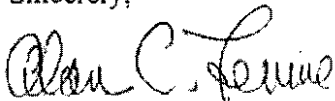
seeking information and other rules designed to prevent discovery from being burdensome or vexatious to the other parties in the case. A party in litigation with the government should not be able to use FOIA requests to engage in conduct that would be precluded under the discovery rules, such as seeking information from the government after the discovery cutoff date. This would encourage persons suing the government to forego normal discovery in favor of making FOIA requests, thereby circumventing and undercutting the judicially established discovery procedures and court supervision of the discovery process. Moreover, these FOIA requests could also be made in a manner calculated to harass and impede the government both in defending itself and in carrying on its other responsibilities. Accordingly, OTR strongly believes that the "pending litigation" exception should continue to apply until the conclusion of all court proceedings involving the information sought under FOIA.

Nevertheless, OTR believes that it can make the showing concerning the expected remand of the Rumber litigation that was requested in your October 22, 2009 letter. We have conferred with the Office of the Attorney General, which is representing the District in this litigation, and have been informed that it is likely that the Rumber case referenced in our initial response to the appeal will be remanded to the trial court. We have been further informed that 2 other cases relating to the subject of Ms. Mittelman's FOIA request are currently in Superior Court. These cases are District of Columbia v. DeSilva, 2005 CA 005336 E(RP) and District of Columbia v. Oh, 2005 CA 005323 E(RP). We understand that the information she seeks under FOIA pertains to the subject matter of these cases, and disclosure would allow her to circumvent the discovery procedures and limitations otherwise applicable to these cases.

Accordingly, the request represents an attempt to circumvent the discovery rules provided for cases proceeding in the courts. The expected remand and the pendency of these additional cases furnish ample grounds for denying Ms. Mittelman's FOIA request under the "pending litigation" exception.

Please let me know if you need further information or would like to discuss this. I can be reached at (202) 442-6500.

Sincerely,



Alan C. Levine
Chief Counsel
Office of Tax and Revenue

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

October 22, 2009

BY U.S. MAIL

Elaine J. Mittleman
Attorney at Law
2040 Arch Drive
Falls Church, VA 22043

Re: Freedom of Information Act Appeal

Dear Ms. Mittleman:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. § 2-531 *et seq.* (the "DC FOIA"), dated September 12, 2009 (the "Appeal"). We forwarded the Appeal to the District of Columbia Office of Tax and Revenue ("OTR") with a request for a response. The OTR responded in a letter dated October 6, 2009 ("OTR Response").

In your FOIA Request dated April 28, 2009 and March 25, 2009, you sought the "records for Squares 5632 and 5633 in [OTR] from July 2005 until the present" ("FOIA Request"). OTR responded to your FOIA Request in a letter dated July 14, 2009, denying your request under D.C. Code § 2-534(a)(3)(A) and also based on the fact you have litigation pending against the District related to this FOIA Request.

Discussion

It is the public policy of the District government that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Code § 2-531 (2001 Ed.). In aid of that policy, the DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id.* at § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

Exemption 3 of the DC FOIA states "investigatory records compiled for law enforcement purposes" may be exempt from disclosure "but only to the extent that the production of such records would . . . interfere with enforcement proceedings. . . ." D.C. Code § 2-534(a)(3)(A). To rely on exemption 3 one must first establish the record has been compiled for law enforcement purpose(s). A record is considered to have been compiled for law enforcement purpose(s) if it was "created or acquired in the course of an investigation and the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient

to support at least a colorable claim of its rationality.” *Boyd v. Bureau Of Alcohol, Tobacco, Firearms, and Explosives*, 2006 WL 2844912 (D.C.) (citing *Quinon v. Fed. Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. 1996) (quoting *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. 1982)).

The threshold issue to be resolved is whether the records for squares 5632 and 5633 were “compiled for law-enforcement purposes.” Here, nothing in the record before us suggests the records were compiled for law-enforcement purposes. The records existed long before the events giving rise to this lawsuit occurred. OTR has not submitted any evidence that it is a law-enforcement agency or was acting in such capacity when the requested records were created. Therefore, the record does not support reliance on exemption 3 of the DC FOIA.

Turning to the “pending litigation” exception, it is more cumbersome. As you are aware, the pending litigation exception is a creature of caselaw, and is not found in the DC FOIA. Generally, it is invoked to ensure no one uses FOIA to enlarge their discovery rights. In *Ehringhaus v. F.T.C.*, the court determined that if a requester is seeking to use their FOIA request to acquire information that is part of an agency’s “investigatory record,” or the agency has a pending case or enforcement proceeding against the requester, the agency may not have to disclose the documents. 525 F.Supp. 21, 22-23 (D.C. Cir. 1980).

Here, OTR is relying on the “pending litigation” exception while the litigation is pending in an appellate court rather than a trial court. Because the underlying case is on appeal, it presents us with a unique situation. When a case is on appeal, it usually indicates the record below is complete. And the appellate court, in considering the appeal, will look to the four corners of the record and nothing more; there is no further discovery. In fact, our record indicates there was never any formal discovery at the trial level. See the Appeal. Accordingly, even though litigation is pending, there is no chance discovery rights will be enlarged if the documents are disclosed because there is no open discovery.

However, it is possible for an appellate court to remand a case back to the trial court where more discovery may be had. Although unlikely here given no previous discovery, the pending litigation exception may still apply if the case was remanded for further action, including discovery. However, OTR bears the very high burden to demonstrate there is a strong likelihood the appellate court will remand the case back to the trial court for additional discovery.

For this reason, this Appeal is REMANDED to OTR to provide within five (5) days further explanation as to why there is a strong likelihood the appellate court will remand the appeal back to the trial court with discovery. If OTR is unable to meet this burden, then OTR shall be directed to release the requested documents to Appellant.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Regards,



Andrew T. “Chip” Richardson, III, Esq.
General Counsel to the Mayor

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Chief Financial Officer
Office of Tax and Revenue



October 6, 2009

Executive Office of the Mayor
Office of the General Counsel
1350 Pennsylvania Ave., NW – Suite 300
Washington, DC 20004

Re: FOIA Appeal MLC2009-51

Dear Madam or Sir:

This is in response to above referenced Freedom of Information Act (“FOIA”) appeal of Elaine Mittleman, Esquire dated September 12, 2009. Ms. Mittleman appealed the Office of Tax and Revenue’s (“OTR”) FOIA denial dated July 14, 2009, in response to Ms. Mittleman’s FOIA email submissions (“FOIA request”) dated April 28, 2009 and March 25, 2009. In the FOIA request, Ms. Mittleman requested that OTR provide to her “the records for squares 5632 and 5633 in [OTR] from July 2005 until the present.”

OTR denied the FOIA request to produce the stated documents. OTR’s decision is based upon the exemption provision in D.C. Code § 2-534 (a)(3)(A). The law provides that investigatory records compiled for law-enforcement purposes may be exempt from disclosure under FOIA to the extent that the production of such records would interfere with enforcement proceedings. As a general matter, FOIA is not a means for averting the discovery rules and protections of a court. D.C. Code § 2-534 (a)(3)(A) has been interpreted by the Office of the General Counsel to preclude the use of FOIA when FOIA would otherwise circumvent the court’s rules of discovery.

The case styled *Rumber v. District of Columbia*, 598 F.Supp. 2d 97 (D.D.C. 2009), appeal docketed, No. 09-7035 (D.C. Cir. March 30, 2009), concerns eminent domain related litigation with respect to the properties which are the subject of the FOIA. Ms. Mittleman is the attorney of record for the plaintiffs in such on-going litigation, and the District of Columbia is a defendant. Thus, because there is on-going litigation relating the subject of the FOIA, Ms. Mittleman’s FOIA request was denied. The fact that discovery may or may not have been requested in the case does not obviate the fact that it is active litigation and information to be turned over by the District as a party to the litigation should be governed under the court’s rules of discovery; FOIA should not be an alternative to the court’s rules of discovery when the subject matter FOIA relates to the subject matter of the litigation.

941 North Capitol Street, NE, Suite 800, Washington, DC 20002

For the foregoing reasons, OTR prays that that its denial of the subject FOIA request be upheld.

Should you have any additional questions, please feel free to contact me at (202) 442-6513.

Sincerely,

A handwritten signature in black ink, appearing to read "R. McKeon", with a long horizontal flourish extending to the right.

Robert McKeon
Deputy Chief Counsel/OTR

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Chief Financial Officer
Office of Tax and Revenue



July 14, 2009

Elaine Mittleman, Esq.
Law Offices of Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043

Re: Freedom of Information Act Request

Dear Ms. Mittleman:

This is in response to your electronic Freedom of Information Act ("FOIA") submissions dated April 28, 2009 and March 25, 2009, submitted to the Office of the Chief Financial Officer, Office of the General Counsel. In the submissions, you request that the Office of Tax and Revenue ("OTR") provide to you "the records for squares 5632 and 5633 in [OTR] from July 2005 until the present."

Unfortunately, I must inform you that OTR has denied your request to produce the stated documents. Our decision is based upon the exemption provision in D.C. Code § 2-534 (a)(3)(A). The law provides that investigatory records compiled for law-enforcement purposes may be exempt from disclosure under FOIA to the extent that the production of such records would interfere with enforcement proceedings. As a general matter, FOIA is not a means for averting the discovery rules and protections of a court. D.C. Code § 2-534 (a)(3)(A) has been interpreted to preclude the use of FOIA when FOIA would otherwise circumvent the court's rules of discovery.

As you know, the case styled *Rumber v. District of Columbia*, 598 F.Supp. 2d 97 (D.D.C. 2009), *appeal docketed*, No. 09-7035 (D.C. Cir. March 30, 2009), concerns eminent domain related litigation with respect to the properties which are the subject of the FOIA. You are the attorney of record for the plaintiffs in such on-going litigation, and the District of Columbia is a defendant. Thus, because there is on-going litigation relating the subject of the FOIA, your FOIA must be denied.

You have the right to appeal this denial to the Mayor. D.C. Code § 2-537(a) provides: "[...] any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection."

Freedom of Information Act Request
July 14, 2009
Page 2

Should you have any additional questions, please feel free to contact me at (202) 442-6513.

Sincerely,

A handwritten signature in black ink, appearing to read "R. McKeon", with a long horizontal flourish extending to the right.

Robert McKeon
Deputy Chief Counsel/OTR



RLARC

Management Recommendation

Date: November 18, 2005
To: Board of Directors, RLA Revitalization Corporation
CC: Anthony C. Freeman, President and CEO, RLARC
From: Ted Risher, Senior Development Manager
Re: Acquisitions

Recommendation

Staff recommends that the Board of Directors of the RLARC approve the use of CDBG program income from the sale of the GPO site for the acquisition of all Skyland parcels, this includes all contract and appraised values (for condemnation purposes), as well as associated costs such as brokerage, legal and closing costs.

Analysis

In August 2004, RLARC received \$28.7 million in exchange for the GPO site. RLARC's Board has already approved the expenditure of a portion of these funds for use in the exercise of eminent domain at the Skyland Site, as approved by the City Council in 2004. Over the coming months, RLARC will enter into a number of private purchase and sale agreements with Skyland landowners for the acquisition of their sites and needs the approval of the RLARC Board to expend whatever GPO money is necessary to effect 100% site control at Skyland.

Development Proposal

There are currently six (6) owners under condemnation. Staff expects to gain title to these properties after receipt of funding from DHCD very shortly. Staff continues its negotiations with the remaining eight (8) owners and expects to execute contracts and close with all of them by the end of calendar year 2005. One private contract with the owner of the US Postal facility site is expected to be closed on Tuesday, November 22, 2005. Staff's goal is to assemble all the properties by the end of the year.

Timeline or Next Steps

Action Item	Timeline
RLARC staff converts existing condemnation complaints to quick-take actions and acquires title to 63% of Skyland.	Friday, November 18, 2005
RLARC staff closes on USPS site, conditioned upon RLARC Board approval.	Tuesday, November 22, 2005
RLARC Board approves use of GPO funds to make all acquisitions at Skyland.	Tuesday, November 22, 2005
RLARC staff acquires remainder of site through private purchases, as detailed in attached schedule.	Tuesday, November 22, 2005 – Friday, December 23, 2005 (anticipated)

CONFIDENTIAL

RLA REVITALIZATION CORPORATION

2025 M Street, N.W. ♦ Suite 600 ♦ Washington, DC 20036 ♦ Telephone (202) 530-5750 ♦ Fax (202) 530-5790 ♦ www.rlcrcdc.com

SKYLAND 13074

Management Request

RLARC's management hereby requests that the Board of Directors (1) authorize RLARC to spend up to \$28.7 Million Dollars for the acquisition of all Skyland parcels (including voluntary sales and eminent domain transactions) and (2) authorize RLARC to close on these acquisitions. (A list of these parcels is attached hereto).

Form of

RLARC Resolution

RESOLVED, The Chief Executive Officer and any other officer he may so designate of the Corporation be, and he hereby is, authorized, empowered and directed to spend up to \$28.7 million Dollars for the acquisition of all parcels necessary for the Skyland Shopping Center redevelopment and to execute, deliver and perform any documents (including closing documents) needed to effectuate these acquisitions with such changes, additions and modifications therein, if any, as he shall approve, such approval to be conclusively evidenced by his execution and delivery thereof.

RESOLVED, that the Chief Executive Officer of the Corporation (and any other officer he may designate) be, and each of them individually hereby is, authorized, empowered and directed to do and perform all such acts and things and to sign all such documents, directions, instruments and statements, to take all such other steps as such officer or officers shall determine to be necessary and advisable to effectuate the matters set forth in the foregoing resolution.

CONFIDENTIAL

SKYLAND 13075

Approval	
Briefing	X

**NATIONAL CAPITAL REVITALIZATION CORPORATION
BOARD OF DIRECTORS OR PROJECT COMMITTEE UPDATE MEMO**

Property Name: Skyland
Property Location: Ward 7, Good Hope Road and Alabama Avenue, SE
Regarding: Project Update
Date: December 7, 2005

ACQUISITION

1. HUD approved the use of \$28.7M in CDBG funds from the sale of the GPO site for use in the acquisition of the Skyland Shopping Center on October 30, 2005.
2. NCRC immediately deposited approximately \$8.4M into escrow with the Court and filed for quick-take actions. Court process for final acquisition of title is under way.
3. On November 29, 2005, RLARC completed the private acquisition of 2650 Naylor Road, SE and now holds title to the property. Contract value and associated costs were approximately \$2.5M.
4. RLARC has agreed to price with five owners and is finalizing purchase and sale agreements. Negotiations on price are ongoing for the remaining two properties.

FINANCING/PROGRAM DEVELOPMENT

1. Section 108 loan for remaining site assembly and preparation costs has not been approved by HUD as of current date.
2. NCRC continues to negotiate terms of private acquisition/site preparation financing as well as development financing.
3. Initial discussions and analyses are very positive, indicating high levels of interest from the private debt and equity markets.
4. NCRC has received a draft market report from Bolan Smart Associates indicating maximum product figures (type and quantity) the site could support. Final draft to be ordered soon.

NEXT STEPS

1. Finalize acquisition of 100% of the properties, anticipated late 2005, early 2006.
2. Stabilize property and begin normal property/asset management functions.
3. Draft and resubmit TIF legislation, either to repay RLARC loan, or to pay for garage construction (probable use) if private financing option is employed.
4. Renegotiate Development Agreement.
5. Initiate negotiations with Target or similar retail anchor.
6. Begin site planning/design process in preparation for PUD submission.
7. After execution of purchase and sale agreement with anchor, renegotiation of development agreement, finalization of program and financing structures, and successful PUD application, begin relocation, remediation and demolition activities. Anticipated timeframe for all predevelopment activities is 12 to 18 months.

POTENTIAL ISSUES

1. Lack of resolution to situation involving Attorney General's opinion will severely limit NCRC's financial flexibility with regard to the project.
2. Since NCRC has only had access to 15% of the leases on the property, cost to privately purchase or condemn advantageous leaseholds is unquantified.
3. NCRC's ability to acquire 100% of the property is directly linked to the judicial process related to the condemnations. Any delays in legally acquiring title will delay the predevelopment process significantly.

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SKYLAND 13076

**PUBLIC HEARING ON
“Skyland Project Retail Priority Area Approval Resolution
of 2007”**

**Before the
Committee on Finance and Revenue
Council of the District of Columbia**

The Honorable Jack Evans, Chairman

**March 14, 2007, 11:00 a.m.
Room 120, John A. Wilson Building**



**Testimony of
John Ross
Senior Advisor and Director of Economic Development Finance
Office of the Chief Financial Officer**

**Natwar M. Gandhi
Chief Financial Officer
Government of the District of Columbia**

Good morning, Chairman Evans and Members of the Committee on Finance and Revenue. My name is John Ross, Senior Advisor and Director of Economic Development Finance for the Office of the Chief Financial Officer (OCFO). I am here to testify for the Office of the Chief Financial Officer on the Skyland Project Retail Priority Area Approval Resolution of 2007.

The resolution would repeal the "Skyland Project Retail Priority Area Approval Resolution of 2004," which authorized the District to provide the National Capital Revitalization Corporation (NCRC) with two TIF notes in the aggregate amount of \$25.7 million. The first TIF note, which was authorized with a 10% interest rate, was for up to \$17.2 million, and the second TIF note was an interest-free note for \$8.5 million for unidentified projects in Wards 7 and 8.

The Skyland Project Retail Priority Area Approval Resolution of 2007 authorizes the District to issue a 25-year note to the National Capital Revitalization Corporation (NCRC) in an aggregate principal amount of \$40 million with an interest rate of not greater than 8%. The resolution stipulates that the annual debt service cannot exceed the available tax increment. The note would be repaid with tax increment revenue from the Skyland Retail Priority TIF Area. NCRC would use the note as security to fund an investment in the Skyland project.

Given the proposed development program, the OCFO currently estimates that the annual tax increment that will be generated by the future

development of the site will be approximately \$8.3 million on average, while the average annual debt service is estimated to be approximately \$4.5 million. This difference of \$3.8 million could be returned to the General Fund or could be used to more rapidly reduce the obligation to NCRC.

It will be critical for NCRC to obtain a commitment from a financial institution for a bond issuance or private placement given the expected debt service coverage levels. To minimize the District's exposure, we recommend that the District require signed commitments with private developers for the retail and residential square footage in the Skyland project as conditions for the release of the TIF funds.

It is important to note that the OCFO's analysis is contingent upon the proposed development program and financing plan. If the development program or financing plan are altered, the OCFO's analysis will need to be revised.

It is also important to note that the debt will be considered tax-supported debt.

Thank you for the opportunity to testify. This concludes my testimony and I am happy to answer any questions you have at this time.