

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

JUDICIARY SQUARE

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WASHINGTON, D. C. 20001



IN REPLY REFER TO:

Prepared by:LCD:ABE
(AL-99-446)

August 18, 1999

Commissioner Regina M. James
Advisory Neighborhood Commission 58
1363 Adams Street, N.E.
Washington, D.C. 20018

Dear Ms. James:

This responds to your phone call of August 9, 1999 regarding your access to documents as an Advisory Neighborhood Commissioner for Advisory Neighborhood Commission ("ANC") 58. You also dropped off a packet of information which reveals that sometime prior to April 1999, Angelia Richardson, a resident of ANC 58, contacted Mr. George 80yd, Chairman of ANC 58, with a request for assistance regarding Cheeks Industries, a company located in her single member district. You state that Ms. Richardson gave the Chairman several letters, which purportedly are copies of letters that she had written to other government agencies. The Chairman indicated to you that these letters would be available in the ANC office for viewing by Commissioners. The Chairman subsequently contacted the Department of Consumer and Regulatory Affairs, the Office of Planning, and the Department of Housing and Community Development on behalf of ANC 58, seeking information about Ms. Richardson's complaints. In July, you contacted Diane Smith, Office Manager for ANC 58, and requested copies of information pertaining to Cheeks Industry. You specifically requested copies of the letters Ms. Richardson had provided to the Chairman. Ms. Smith responded that she had spoken to the Chairman and he instructed her that the letters Ms. Richardson had given to the Chairman were not public records and could not be sent out of the office without Ms. Richardson's permission. Subsequently, you received a memo from the Chairman which stated that the "information was sent directly to me as a result of communications between Ms. Richardson and myself" and that Ms. Richardson "does not wish that it go any further than to me." He further stated that the "subject information is considered to be in my personal possession at this point and not public information per Ms. Richardson's request" and that "the intent of this information was not to be made public, but to solicit personal help from me." At the same time, you were not provided with any written confirmation from Ms. Richardson that she wished to reserve control over the letters given to the Chairman and objected to their being shared

with others. Additionally, I infer that the letters contain no markings to the effect that they remain Ms. Richardson's property.

Generally ANC Commissioners are entitled to access to all records of the ANC. The first issue to be addressed is whether the letters at issue are public records of the ANC. If they are, then you are entitled to review them. While I do not have sufficient facts to state with certainty whether the letters in this case are public, I can advise you as to what factors are relevant in making the determination that a document is a public record. Several facts are relevant to whether the letters are public records: (1) the Chairman's initial declaration that the documents would be available for viewing in the office, (2) the Chairman's statement of Ms. Richardson's request for confidentiality, (3) the absence of any other confirmation by Ms. Richardson that she wished such confidentiality, (4) the absence of any markings on the face of the letters noting that they are Ms. Richardson's property, (5) the actual presence of the letters in the ANC office, and (6) Ms. Richardson's apparent disclosure of the letters to others without any reservation of control.

With regard to the fact of possession of the letters by the ANC, in determining whether documents are agency records under the federal Freedom of Information Act - on which the District of Columbia Freedom of Information Act, effective October 21, 1968, Pub. L. 90-614, D.C. Code § 1-1521 *et seq.* (1999) is patterned - federal courts have adopted a standard of control, rather than possession. See, *e.g.*, Ryan v. Department of Justice, 617 F.2d 781, 785 (D.C. Cir. 1980). The courts ask Whether, under all the facts of the case, the document has "become property subject to the free disposition of the agency with which the document resides." Goland v. Central Intelligence Agency, 607 F.2d 339, 347 (D.C. Cir. 1978). In determining whether the document is a public record, the court looks at the circumstances under which the document was generated and the person's intent in transferring the document to the agency. If the facts show that the agency received the document for internal reference only, and that it in no meaningful sense possesses the document as its own property, the document is not considered a public record. In other words, you must examine the circumstances surrounding the transfer of the letters to the Chairman. If Ms. Richardson's intent at the time of the transfer of the letters was for them to be kept confidential, as reinforced by her marking them PROPERTY OF ANGELIA RICHARDSON, then she maintained control over their use and they are not public records. Ms. Richardson's desire to protect the confidentiality of the letters must have been made clear at the time they were given to the Chairman. If there was no clear request for the letters to be kept confidential at the time of transfer to the Chairman, then they are public records and you are entitled to examine them as a member of the general public (as well as in your capacity as a Commissioner). Here, nothing in the facts you described to us shows that such a request was made. Bearing in mind the statutory public policy of construing the Freedom of Information Act with a view toward the expansion of public access, the circumstances you have described and the reasonable inferences that can be drawn from them lead me to conclude that - on balance - the letters likely are public records unless they were marked as non-government property at the time they were given to the Chairman.

Even if the records are not public records, you might still be entitled to have access to them as a Commissioner of ANC 5B if they are considered ANC 5B records. From the facts as you describe them, the Chairman initially stated that the letters would be available to you as an ANC Commissioner at the office for viewing. This is evidence of an understanding by the Chairman of Ms. Richardson's intent that the letters were turned over to the control of ANC 5B, with or without a confidentiality restriction as to the general public, and not to the Chairman as an individual. If, in fact, Ms. Richardson turned over the letters to ANC 5B -- even while intending to keep them confidential from the public -- you would be entitled to view them as a member of ANC 58. Assuming all the facts you have described are true, the same circumstances underlying my conclusion regarding the "public records" status of these letters, also lead me to conclude that they probably are at least subject to disclosure among the members of ANC 5B, including you.

Based on the foregoing, if the Chairman continues to refuse to release the documents to you, in order to obtain copies from him you have the option of either petitioning the Mayor to review the matter or filing a complaint in Superior Court. See D.C. Code § 1-1527. I can also recommend a third alternative, which is obtaining the documents from another source. Since you are aware that the letters in question are copies of letters submitted to District government agencies, you may submit a freedom of information request directly to the agencies, requesting copies of correspondence from Ms. Richardson for the time frame and particular topic of interest. Since there is no indication that the agencies view her correspondence as confidential, the letters should be made available to you within 10 days, pursuant to D.C. Code § 1-1522. Your access to the letters via another source, however, has no bearing on the Chairman's responsibilities as discussed above.

If you have any further questions about this issue, please contact Annette Elseth at 724-5537.

Sincerely,



Wayne B. Witkowski
Deputy Corporation Counsel
Legal Counsel Division

cc: George Boyd
Chairman
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