GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

June 29, 2020

Ed Hanlon
Commissioner, ANC 2B09
1523 Swann St., N.W.
Washington, D.C. 20009

Re: Access to Private Commissioner Emails Concerning Commission Business

Commissioner Hanlon:

In a June 22, 2020 letter, you asked us two questions about access to Commission records under section 16(p) of the Advisory Neighborhood Commissions Act of 1975 ("ANC Act"):[1]

(1) Was it lawful for the Chair to require fellow Commissioners to obtain Commission records – specifically, emails between the Commissioner's personal email account and the District Department of Transportation on a matter pending before the ANC – through the Freedom of Information Act ("FOIA")[2] rather than simply supplying those records to the Commissioners?

(2) When an Advisory Neighborhood Commission ("ANC") officer acting in the officer's official capacity sends or receives emails on matters pending before his or her ANC, are those emails records of the ANC regardless of whether the officer uses an official ANC email address or the officer's own personal email?

Our answer to the second question also resolves the first question. A Commissioner's (or officer's) private emails are not Commission records under section 16(p) of the ANC Act. Consequently, it was lawful for the Chair to require Commissioners seeking the Chair's emails to do so via FOIA.[3]

[1] Effective Mar. 26, 1976 (D.C. Law 1-58; D.C. Official Code § 1-309.13(p)).

[2] Effective Mar. 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.).

[3] None of this is to say that Commission business should be conducted, wholly or partially, by private email. As we have indicated before, it should not.

Analysis

Section 16(p) of the ANC Act (D.C. Official Code § 1-309.13(p)), the provision you asked us about, states that:

> Any Commissioner within an individual Commission shall have equal access to the Commission office and its records in order to carry out Commission duties and responsibilities. Moreover, any person has a right to inspect, and at his or her discretion, to copy any public record of the Commission, except as otherwise expressly provided [in FOIA exemptions], in accordance with reasonable procedures that shall be issued by the Commission after notice and comment concerning the time and place of access.

Your question is about the first sentence, which guarantees Commissioners "equal access" to the "Commission office and its records." In keeping with ordinary principles of statutory construction, we interpret this language "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, No. 17-1618 (S. Ct. June 15, 2020) (slip op. at 4); *see also Intel. Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020); *SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). To do this, we consider the plain meaning of section 16(p), as well as the broader context of the Act's language and history, since the "words of a statute must be read in their context and with a view to their place in the statutory scheme." *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989); *see In Re Edmonds*, 96 A.3d 683, 687 (D.C. 2014) (same).

We have, in the past, analyzed the phrase "equal access to the Commission office."[4] But we have never analyzed the language guaranteeing each Commissioner access to "its records." The closest we have come is a single statement, in a 2001 letter to Commissioner Edward W. Harris, that he was entitled to "access to ANC files, including minutes and resolutions," that had been locked in a file cabinet in the ANC office.[5]

At the outset, there is an interesting question whether the right of equal access "to the Commission office and *its* records" is a right to all records of the Commission, or whether it only applies to records physically or electronically housed in the office. This is because the phrase "its records" could plausibly be read either as "the Commission's records" or, more narrowly, as "the office's records." On either reading, however, the phrase "its records" refers at most to the Commission's own records. It does not refer to records that are not the Commission's. And private emails are not, in any ordinary sense, the Commission's records – not even when those emails relate to Commission business, or when they are sent by an ANC officer. The Commission does not own or control those emails. It does not create them, does not house them

[4] *See, e.g.,* Letter to Deborah K. Nichols, Feb. 26, 2001; Letter to Stephen W. Coleman, Jan. 14, 1994; Letter to Rev. Edward W. Harris, Aug. 2, 2001; Letter to Carolyn Johns-Gray, Mar. 27, 1991. All four letters are available from the ANC letters database at https://anc.dc.gov. The Letter to Commissioner Coleman was one of two issued on that date; it was entitled "May an ANC Commissioner be denied a key to the ANC's office?".

[5] Letter to Edward W. Harris, Aug. 2, 2001, at 2.

on its systems or servers,[6] and has no power to review or delete them. Consequently, the equal access provision in section 16(p) does not guarantee Commissioners access to those emails.

This reading of section 16(p) heeds the important principle that a statute should be read to avoid unnecessarily absurd results. *See Milavetz, Gallop & Milatvetz, P.A. v. United States*, 559 U.S. 229, 252 (2010) (rejecting a "view of the statute that is contrary to its plain meaning and would produce an absurd result"). A reading of that language that guaranteed equal access to private emails would give each Commissioner *carte blanche* access to private emails of his or her fellow Commissioners if those emails had any connection to Commission business. What is more, because section 16(p) speaks of *equal* access, such a reading would require every Commissioner to ensure that every private email relating to official business (and every reply to such an email) is fully available to every fellow Commissioner. Otherwise, the Commissioner to whom the emails belonged would enjoy greater access to those emails than his or her fellow Commissioners would enjoy. What is more, any reading that applied section 16(p)'s equal access guarantee to email correspondence would similarly have to apply to a Commissioner's written correspondence (particularly since the "its records" language was added to section 16(p) two decades ago). To our knowledge, no Commission has sought to apply section 16(p) in this manner.

Our reading also heeds another, related principle: that a legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). We presume that the Council did not, merely by adding the phrase "its records," intend to give Commissioners an unprecedented new right to access their fellow Commissioners' private correspondence. Nor did the Council appear to have anticipated any such consequence. Before 2000, section 16(p) simply guaranteed all Commissioners equal access to the Commission office.[7] The Council added the phrase "its records" as part of an omnibus package of ANC amendments known as the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000.[8] The addition of this succinct phrase appears to have attracted virtually no discussion. The 2000 act's committee report,[9] for example, does not even mention the change. The only change it discusses to section 16(p) is the other addition the 2000 act made: guaranteeing members of the public a right to access public records of the Commission.[10]

Your letter also asked us to consider judicial precedent on FOIA and its applicability to private emails. That precedent does not affect our conclusion. Even under FOIA – a different statute that applies different criteria – it remains unsettled whether a Commissioner's private emails are public records. No decision from the D.C. Court of Appeals has held that they do, and as the D.C. Court of Appeals noted in *Vining v. District of Columbia*, analogous federal precedent (dealing with the federal FOIA) supplies at least a "colorable basis in law" for concluding that

[6] We need not, and therefore do not, address whether the result would be different for emails that either were sent from Commission computers or contained documents that were drawn from the Commission's own records.

[7] *See, e.g.,* Letter to Stephen W. Coleman, Jan. 14, 1994.

[8] Effective June 27, 2000 (D.C. Law 13-135; 47 DCR 2741).

[9] Comm. on Local and Regional Affairs, "Report on Bill 13-468, the 'Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000,'" Jan. 11, 2000.

[10] *See id.* at 12.

such emails are not public records. 198 A.3d 738, 748 n.9 (D.C. 2018). FOIA precedent therefore supplies no basis for concluding that the phrase "its records" in section 16(p) applies to a Commissioner's private emails.

In sum, ordinary principles of statutory construction make clear that section 16(p) of the ANC Act does not grant Commissioners equal access to one another's private emails. To the extent such emails may be obtained, they must be obtained through FOIA. The Chair therefore did not act unlawfully in requiring that path.

If you have any questions, please contact Josh Turner, Assistant Attorney General, at 442-9834, or Brian K. Flowers, Deputy Attorney General, Legal Counsel Division, at 724-5524.

Sincerely,

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