

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



**ATTORNEY GENERAL
KARL A. RACINE**

Legal Counsel Division

July 1, 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:

You have asked us to follow up on a letter we recently wrote¹ about section 16(p) of the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”),² which guarantees each Commissioner in an ANC “equal access to the Commission office and its records.” We previously advised that emails from a Commissioner’s (or officer’s) private email account do not fall under this provision. You have asked us whether the answer would be different for government emails (with attached documents) by Commissioners in a context where the Commissioners represented the Commission.

As you describe it, your ANC is preparing to vote on recommendations considering proposed actions by a District government agency. Your ANC previously adopted resolutions urging the agency to study these matters, and those resolutions identified certain Commissioners as the ANC’s representatives in those matters. You maintain that there have been email conversations, at least some of which have involved official ANC email accounts, between those Commissioners and the agency, and that there may be pertinent material in the emails themselves or in documents attached to those emails. You want to know whether section 16(p) of the ANC Act guarantees you, and your fellow Commissioners, “equal access” to those emails and any attached documents. We conclude that it does.

Analysis

As before, we start with the provision you have asked us to interpret: section 16(p) of the ANC Act (D.C. Official Code § 1-309.13(p)), which states that:

¹ See Letter to Ed Hanlon, June 29, 2020, available at <https://oag.dc.gov/sites/default/files/2020-06/ANC-2B-Access-to-Private-Emails.pdf> (all websites last visited June 30, 2020).

² Effective Mar. 26, 1976 (D.C. Law 1-58; D.C. Official Code § 1-309.13(p)).

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.

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).

For our purposes, the key phrase in section 16(p) is “its records,” a phrase the Council added to section 16(p) in 2001 (along with the language guaranteeing public access to public records of the Commission).³ We start by answering a preliminary question that our last letter did not need to answer: when the statute grants equal access to “the Commission office and *its* records,” to which “it” does the phrase “*its* records” phrase refer – the office, or the Commission? In our view, the answer is straightforward: the Commission. This reading makes sense grammatically since “its” is a possessive pronoun. *See, e.g., Cheyenne & Arapaho Tribes v. First Bank & Trust Co.*, 560 Fed. Appx. 699, 707 (10th Cir. 2014). The ANC office may contain records, but it does not possess them in any normal sense. The Commission does. Our reading also heeds the fundamental rule that no part of a statute should be treated as superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009). As we noted in a 2001 letter, the guarantee of equal access to the office already guarantees equal access to records contained in the office.⁴ Accordingly, reading “its records” to merely mean “records in the office” would render that phrase superfluous. Reading that phrase to refer broadly to records belonging to the Commission, on the other hand, assures Commissioners equal access to records that belong to the Commission they each serve.

Official ANC email accounts, like private email accounts, do not belong to the Commission. There is no question that, under controlling precedent, emails contained within these accounts are public records under FOIA. *See, e.g., Kane v. Dist. of Columbia*, 180 A.3d 1073 (D.C. 2018). That differentiates them from the private email accounts we considered in our last letter. But the two types of accounts are similar in an important respect: neither type of account is created or controlled by the ANC on which the Commission serves. An ANC has no power to regulate a Commissioner’s email account. Rather, as the D.C. Court of Appeals has observed, official ANC email accounts are controlled by the Office of the Chief Technology Officer

³ *See* Comm. on Local and Regional Affairs, “Report on Bill 13-468, the ‘Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000,’” Jan. 11, 2000.

⁴ *See* Letter to Deborah K. Nichols, Feb. 26, 2001, at 3, *available at* <http://app.occ.dc.gov/documents/2001/feb/20010226.pdf>.

(“OCTO”). *See id.* at 1076.⁵ Ordinarily, therefore, emails sent from an official ANC account or received by one do not fall under section 16(p)’s equal access guarantee.

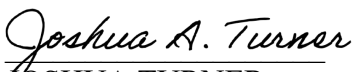
Our answer is different, however, in the context you describe: when a Commissioner who the ANC has, by vote, designated as its representative on a particular matter⁶ sends or receives emails on the Commissioner’s official account in that representative capacity. Those emails are not just public records. They are, in effect, communications to or from the ANC itself. *See Lux Art Van Serv, Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965) (noting that, within the scope of an agent’s express authority, “the act of the agent is the act of the principal”). Such communications, we conclude, belong to the ANC. This makes practical sense. When a Commissioner’s power to act as the ANC’s representative on a matter is conferred by vote of his or her fellow Commissioners, it would be counterintuitive to believe that those same Commissioners could not ascertain, except through a FOIA request, what that representative is saying, doing, or receiving on the ANC’s behalf. We therefore conclude that these communications fall under the “equal access” language in section 16(p) of the ANC Act.

This reasoning also leads us to cabin our prior letter in one important way. An ANC’s power to decide what may be said or done on the ANC’s behalf is categorical. A Commissioner who has not been authorized to speak on behalf of the ANC may not do so by any means, including by private email. Likewise, when a Commissioner uses a private email account to communicate as a representative of his or her ANC, that communication amounts to a communication from the ANC itself. And when a Commissioner receives a private email message in the Commissioner’s capacity as a representative of the ANC, that message amounts to a communication to the ANC. Section 16(p) of the ANC Act grants Commissioners equal access to these communications.

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,

KARL A. RACINE
Attorney General for the District of Columbia

By: 
JOSHUA TURNER
Assistant Attorney General
Legal Counsel Division

(AL-20-469 B)

⁵ Our understanding is that OCTO has delegated some of its control to the Office of Advisory Neighborhood Commissions, an agency of the legislative branch. *See* Letter to Gottlieb Simon, Sept. 26, 2017, *available at* <https://oag.dc.gov/sites/default/files/2019-05/OANC-September-26-17-Financial-Authority.pdf>.

⁶ *See* D.C. Official Code § 1-309.11(e)(1A)(E) (“The views or recommendations of each Commission shall be presented only by its officers, Commissioners, or representatives appointed by the Commission at a public meeting to represent the Commission’s views on a particular issue or proposed action”).