

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



**ATTORNEY GENERAL
KARL A. RACINE**

Legal Counsel Division

May 17, 2022

Ulysses E. Campbell
Commissioner, ANC 4C
1427 Upshur Street, N.W.
Washington, D.C. 20011

Re: Proposed Policies on Commissioner Speech and ANC Public Engagement

Commissioner Campbell:

You have asked us to comment on two policies your Advisory Neighborhood Commission (“ANC”) has been asked to consider. One involves Commissioner speech. Your ANC has been asked to consider new bylaw measures that would regulate the comments and social media posts a Commissioner may make. These new measures would supplement non-bylaw Standards of Decorum and conduct that your ANC previously adopted, so you have asked us to comment both on the draft bylaw measures and on these existing Standards. The other policy your ANC has been asked to consider is about public engagement. Moreover, in our discussion of the proposal concerning Commissioner speech, you have asked us whether any of the limits on the ANC’s authority to act in that area also raise concerns about your ANC’s existing Standards of Decorum and Conduct.

Any regulation of Commissioners’ comments and social media posts must be limited to what a Commissioner does either in an ANC proceeding or with ANC property. The ANC must also make sure any regulation it adopts is both clear and consistent with the First Amendment. All of this would be true of your Standards of Decorum and Conduct as well if your ANC wishes to make those Standards binding. As for public engagement, your ANC has considerable flexibility as a matter of law even if its options may be somewhat more limited as a practical matter. The documents you have supplied may provide the starting point for a policy, but it is not clear how they might translate to the ANC context.

We take each proposal in turn.

I. Regulating Commissioner Speech

Your ANC previously adopted Standards of Decorum and conduct your ANC to “provide[] guidance and a standard for ethical and respectful conduct among Commissioners and other

officials as well as between the Commission and its constituency.”¹ This draft policy would supplement these Standards. It would add language to your ANC’s bylaws saying that no Commissioner shall, at any time:

- (1) “Make disparaging comments about members of the public or other Commissioners”;
- (2) “Use their personal or any other social media platforms to make direct or indirect disparaging comments about members of the public or other Commissioners”; or
- (3) “Use their personal or any other social media platforms to make comments regarding the race, gender, or social economic status [sic] of any member of the public or Commissioner.”

Each of these prohibitions would be too broad. In order to be permissible, they would need to be revised to meet two criteria. First, they would need to be limited so that they do not apply when a Commissioner is acting outside of ANC proceedings and not using ANC property (such as an ANC cell phone or a computer in the ANC office). Second, they would need to be defined in clear terms that abide by the First Amendment. If your Standards of Conduct and Decorum are intended to be binding, they would need to be modified along similar lines.

A. The policies must apply only when a Commissioner acts during ANC proceedings or using ANC property

Under the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”),² an ANC does not have the power to regulate Commissioners except during ANC proceedings or when they are using ANC property. As the D.C. Court of Appeals put it in the context of another District government commission, an ANC is a “creature of statute and has only those powers given to it by statute.” *Chesapeake & Potomac Tel. Co. v. Public Service Comm’n*, 378 A.2d 1085, 1089 (D.C. 1977); *see AFGE Nat’l Office v. Public Emp. Relations Bd.*, 237 A.3d 81, 86 (D.C. 2020). An ANC’s statutory powers include broad authority to regulate the operations of its meetings and the use of ANC resources. Under the ANC Act, each ANC may (indeed, must) adopt bylaws “governing its operation and internal structure.”³ These bylaws may specify how ANC meetings will be conducted, how officers will be elected, and how resources belonging to the ANC (which belong to the District)⁴ will be distributed and used.⁵ So, for example, an ANC may prohibit

¹ Advisory Neighborhood Commission 4C Standards of Decorum and Conduct (“Standards”), Art. 1.0. Each provision of the Standards that we quote from this point onward will be from Article 2.0.

² Effective Oct. 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.*).

³ D.C. Official Code § 1-309.11(d).

⁴ *See id.* § 1-309.13(r) (“any equipment purchased by, or on behalf of, a Commission, is the property of the District, and not the property of any Commissioner or other individual”).

⁵ *See, e.g., id.* § 1-309.11(d)(1)(C), (E) and (H) (three of the things bylaws must govern are “[v]oting procedures,” the “manner of selection of chairpersons and other officers,” and “[t]he use of the Commission office and supplies”).

disorderly conduct in its meetings and has a degree of authority to enforce that prohibition.⁶ But nothing in the ANC Act authorizes an ANC to control what a Commissioner does outside ANC proceedings with the Commissioner's own resources.

This makes sense because of the statutory relationship between ANCs and Commissioners. ANCs are not regulatory bodies. Unlike the Board of Ethics and Government Accountability, for example, they have no general authority to prescribe and enforce codes of ethics. As the D.C. Court of Appeals put it, "the role of the ANCs is 'advisory,' as their very name suggests; they do not have an enforcement responsibility – or authority." *Kopff v. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376 (D.C. 1977). And Commissioners are not employees of the ANC, subject to its direction and control; they are independently elected officials accountable to the voters of their respective single-member districts.⁷ So, for example, as we recently advised, an ANC generally has no power to regulate a Commissioner's private emails.⁸ Private emails, we said, "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."⁹ The ANC "does not own or control those emails": it "does not create them, does not house them on its systems or servers, and has no power to review or delete them."¹⁰

Just as an ANC generally has no authority over a Commissioner's private emails, it generally has no authority over a Commissioner's private social media accounts, and no authority to supervise what a Commissioner says outside ANC meetings. If the ANC wants to restrict social media activity, or a Commissioner's statements more broadly, it needs to make sure those restrictions only apply in ANC proceedings or when the Commissioner is using ANC property (e.g., accessing their personal social media on an ANC-funded cell phone).

The same boundaries would apply to your ANC's Standards of Decorum and Conduct. Currently, those standards are not bylaws, nor do your bylaws require that they be adhered to. Accordingly, the Standards are advisory rather than binding.¹¹ But they also appear designed to apply to every facet of a Commissioner's conduct, whether in an ANC proceeding or not and whether using ANC property or not. For example, Section 2(e)(ii)(1) of the Standards prohibits (among other things) "verbal or written attacks upon the character or motives of fellow Commissioners, either privately or publicly." And section 2(a)(ii), among other things, requires

⁶ See Letter to Comm'r Henderson, Dec. 15, 2017; Letter to Comm'r Jackson, Apr. 14, 1999. Each letter we cite in this letter is available from our Office's website, at <https://oag.dc.gov/about-oag/laws-and-legal-opinions/legal-advice-ancs> (last visited May 16, 2022).

⁷ See D.C. Official Code § 1-309.06.

⁸ Letter to Comm'r Hanlon, June 29, 2020.

⁹ *Id.* at 2.

¹⁰ *Id.* at 2-3 (footnote omitted). The sole exception we have identified is that, when a Commissioner sends or receives emails in the Commissioner's capacity as the ANC's representative in a particular matter, those emails are, in effect, sent or received by the ANC itself. See Letter to Comm'r Hanlon, July 1, 2020, at 3.

¹¹ See Letter to Comm'r Goodman, Aug. 5, 2021, at 2 (the ANC statute "prevents an ANC from governing its internal operations and governing structure through means other than bylaws").

Commissioners to “exercise a reasonable degree of judgment.” Provisions like these will need to be fine-tuned if your ANC wants to make them binding.¹²

B. The policies need to be defined clearly and in a manner consistent with the First Amendment

Even if an ANC tailors its policies to ANC proceedings and ANC property, those policies must also be clear about what is prohibited, and they cannot prohibit expression that the First Amendment protects.

The ANC must be clear about what it is prohibiting. As the Supreme Court put it in *FCC v. Fox TV Stations, Inc.*, “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” 567 U.S. 239, 253 (2012). “This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.” *Id.*; see *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). It is not clear, for example, what a prohibition on “direct or indirect disparaging comments” would reach.

A clarified policy also cannot prohibit speech protected by the First Amendment, since the freedom of speech protects public officials and employees just as it does private citizens. See, e.g., *Houston Comm. College Sys. v. Wilson*, 212 L. Ed. 2d 303 (2022); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For example, although the First Amendment leaves an ANC with some authority to censure a Commissioner for speech that a majority finds repugnant,¹³ it does not allow an ANC to prohibit a Commissioner’s private speech merely because it dislikes or disagrees with what the Commissioner wishes to say. As the Supreme Court recently put it, “[t]he government may not discriminate against speech based on the ideas or opinions it conveys.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Accordingly, although the First Amendment allows an ANC to prohibit (for instance) speech against community members that is libelous or obscene,¹⁴ the ANC cannot prohibit speech solely because the ANC deems that speech offensive or inappropriate – just as speech cannot be limited merely because the government finds it “immoral,” “scandalous,” or “disparaging.” See *id.* at 2297 (ruling in the context of trademarks).

Your Standards of Decorum and Conduct, were they to be made binding, would likewise need to be fine-tuned. Some of these Standards are too vague. For example, section 2(a)(i)(2) of the Standards prohibits Commissioners from acting in a way that is “improper or unethical,” without elaborating on what is meant to be covered. Section 2(b)(ii) prohibits Commissioners from “tak[ing] irrelevant matters or circumstances into consideration when making decisions.” And as

¹² Section 2(a)(ii), as written, could be problematic even in the context of a meeting, to the extent it constricts the basis on which a Commissioner may vote or against something. Although the ANC Act gives an ANC broad power to govern ANC meetings, nothing in the ANC Act authorizes an ANC to control how Commissioners vote or on what basis.

¹³ See *Houston Comm. College Sys.*, 212 L. Ed. at 314 (censure for a college board member’s speech that “spoke to the conduct of official business” did not violate the First Amendment).

¹⁴ See *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (“Laws punishing libel and obscenity are not thought to violate ‘the freedom of speech’ to which the First Amendment refers because such laws existed in 1791 and have been in place ever since”).

discussed earlier, section 2(a)(ii) tells Commissioners to “exercise a reasonable degree of judgment.” Other provisions in the Standards would need to be narrowed to be consistent with the First Amendment, such as the previously mentioned ban on “verbal or written attacks upon the character or motives of fellow Commissioners, either publicly or privately.”¹⁵

II. Public Engagement

The ANC Act, which requires each ANC to take account of the views of neighborhood residents, also leaves an ANC considerable room to formalize how it will receive and take account of public views. You have asked us to analyze two documents that have been proposed as benchmarks for this policy: a 2-page document describing a formal community input process, and an 81-page manual written by the federal Environmental Protection Agency (“EPA”) for public engagement concerning certain environmental permits.

The 2-page document is generally unproblematic. It proposes that the ANC acquaint itself with the community in which it sits and then establish a process for responding to community feedback. This does not raise legal concerns; the ANC is free to design a process that will account for community feedback in ways that are consistent with the ANC’s practical needs. The document also proposes that ANC committees, in selecting their membership, refrain from discriminating on the basis of characteristics such as race, socioeconomic status, or political and religious beliefs, which we interpret to mean that these committees must be broadly open to the community without regard to these characteristics. Such a proposal closely resembles the requirements of the District’s Human Rights Act, which prohibits an ANC from discriminating on grounds such as these.¹⁶ It also aligns with the ANC Act itself, which says that chairmanship of any ANC committee must be “open to any resident of the Commission area,”¹⁷ and overlaps with constitutional equal-protection requirements to which an ANC must conform.¹⁸

The other document is an 81-page manual that the EPA drafted to guide public participation related to the federal Resource Conservation and Recovery Act (“RCRA”),¹⁹ a complex federal law that involves environmental protection, cleanup, and conservation.²⁰ The manual was written to guide “public participation activities throughout the RCRA permitting and corrective action processes.”²¹ Given that context, it would not be possible to merely transplant the manual’s extensive recommendations onto ANC soil. Instead, the recommendations in the manual would need to be practically adapted to an ANC’s quite different responsibilities and capabilities. If your ANC wishes to pursue this, and has particular legal questions along the way, we would be happy to review and advise on them as appropriate.

¹⁵ Standards Art. 2.0, Sec. 2(e)(ii)(1).

¹⁶ See D.C. Official Code § 2-1402.73.

¹⁷ *Id.* § 1-309.11(f).

¹⁸ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁹ See EPA, Resource Conservation and Recovery Act Public Participation Manual (2016 ed., available at https://www.epa.gov/sites/default/files/2019-09/documents/final_rcra_ppm_updated.pdf (last visited May 16, 2022)).

²⁰ See *id.* at V.

²¹ *Id.*

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 A. Turner
JOSHUA TURNER
Assistant Attorney General
Legal Counsel Division

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