

M

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:

LCD:L&O:TFB:pmc
(85-12)

April 16, 1985

OPINION OF THE CORPORATION COUNSEL

SUBJECT: The Authority of the District of Columbia Auditor to Review the Operations of the Public Service Commission.

Ms. Gladys Mack
Director
Office of Policy and Program
Evaluation
1350 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Dear Ms. Mack:

This is in response to your memorandum dated January 10, 1985, requesting an opinion on the authority of the District of Columbia Auditor to review the activities of the Public Service Commission ("the Commission") and what action the Mayor should take in response to the Auditor's letter dated October 5, 1984, in which the Auditor requests that the Mayor, inter alia, "enforce the... Auditor's authority... and direct the Public Service Commission to cooperate with the Auditor in his review of PSC deliberations with respect to [PSC] Order No. 7924." (The Commission entered P.S.C. Order No. 7924 in Formal Case No. 798, a Chesapeake and Potomac Telephone Company rate proceeding, on November 10, 1983.)

Shortly after the Commission entered PSC Order No. 7924, the Auditor wrote to the chairperson of the Commission, asking:

1. Does the Public Service Commission of the District of Columbia (Commission) follow a standard procedure for evaluating, voting on and awarding rate increases applied for by utility companies? Please describe the process by which rate increases are reviewed.

2. Are all utility rate increase applications handled by this procedure?
3. Please provide Commission minutes, staff analysis, and memoranda that support the November 10 decision.
4. What are the rules and regulations adopted by the Commission?
5. What "laws" authorize the Commission's current existence, [sic] and deliberative processes?

I have concluded that the Auditor's authority extends to questions 1, 2, 4, and 5 posed to the Commission; but that the Auditor's authority does not extend to the subject matter of question 3, the deliberations by which the Commission decides a contested case. I have further concluded that it would be inappropriate for the Mayor to "direct the Public Service Commission to cooperate with the Auditor in his review of PSC deliberations with respect to [PSC] Order No. 924."

To begin with, section 455 of the District of Columbia Self-Government Government and Governmental Reform Act, Pub. L. 93-198, 87 Stat. 803 (1973), D.C. Code § 47-117 (1981), gives the Auditor authority to conduct an "audit of the accounts and operations of the government of the District." Sec. 455 (c) further provides:

The District of Columbia Auditor shall have access to all books, accounts, records, reports, findings and all other papers, things, or property belonging to or in use by any department, agency, or other instrumentality of the District government and necessary to facilitate the audit.

Sec. 455 of the Self-Government Act clearly gives the Auditor authority to examine any records or papers of the Commission "necessary to facilitate the audit." (Cf. Opinion of the Corporation Counsel, dated December 23, 1983, affirming the Auditor's authority to audit the operations of and funds managed by the District of Columbia Retirement Board.) In order to determine what records or papers of the Commission are "necessary to facilitate the audit," it is necessary to consider the intended scope of the audit as set forth in the legislative history of the Self-Government Act. 1/

1/ See House Committee on the District of Columbia, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, 93d Cong., 2d Sess. (Comm. Print (1974)(cited hereafter as "Legislative History").

Both the House District Committee and the Conference Committee reporting out the Self-Government Act stated that the purpose of the audit is to assure "the proper and legal control and expenditure of District funds." Legislative History 1470, 3037. Both Committees also stated that the "Auditor/Council relationship is modeled after the GAO/Congress relationship." Ibid. The statutory authorities of the Auditor and the General Accounting Office are set forth in slightly different terms. While the Auditor is directed to audit "the accounts and operations of the government," GAO is directed to "investigate all matters related to the receipt, disbursement, and use of public money." 31 U.S.C.A. § 712(1)(1983). It appears that the House District Committee defined the Auditor's authority in terms of "accounts and operations" (in preference to "financial transactions") at the suggestion of GAO, in order to "clarify that such audit will cover the performance and outputs as well as financial transactions of government programs." Legislative History 1061. This suggestion is consistent with the final report language, supra, that the purpose of the audit is to assure "the proper and legal control and expenditure of District Funds."

Questions 1, 2, 4, and 5, posed by the Auditor, ask the Commission to describe its procedures and legal authority. Thus, they all appear to be within the intended scope of the Auditor's authority to assure the proper and legal control and expenditure of District funds. Question 3, however, asks the Commission to divulge the deliberations by which it decided a particular contested case. This question is not directly related to the Commission's control and expenditure of public funds or to any measurement of the Commission's performance and output.

The confidential nature of such deliberations was recognized by Congress when it exempted from the requirements of the Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (1976), 5 U.S.C.A. § 552b (e)(10)(1980): "disposition by an agency of a particular case of formal agency adjudication... or ... a determination on the record after an opportunity for hearing." When it had earlier adopted a similar open meeting requirement for District agencies, Congress did not include such an explicit exemption. See section 742 of the Self-Government Act, D.C. Code § 1-1504. However, the District of Columbia Court of Appeals has implied such an exemption, strongly stating the need for the confidentiality of deliberations in contested cases:

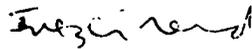
The regular activities of an agency and those which are quasi-judicial are altogether different.... The result of depriving an administrative body of free deliberation among themselves, just as a regular judicial body or jury may do, is to shut off the free flow of discussion among them and an exchange of ideas and an open discussion of differing views to the end that a fair and just result may be

reached by the body based upon the evidence and arguments at the hearing.

Jordan v. District of Columbia, 362 A.2d 114, 119 (D.C. 1976), quoting dissent in Canney v. Board of Public Instruction, 278 So. 2d 260, 264 (Fla. 1973). See also Dupont Circle Citizens Ass'n v. D.C. Board of Zoning Adjustment, 364 A.2d 610 (D.C. 1976).

The need for confidentiality of such deliberations, in my view, outweighs the Auditor's interest in their disclosure, particularly in light of the remoteness of such deliberations from the statutory purposes of an audit.

Sincerely,



Inez Smith Reid
Corporation Counsel, D.C.