

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of the Attorney General



ATTORNEY GENERAL  
KARL A. RACINE



Legal Counsel Division

~~PRIVILEGED AND CONFIDENTIAL~~  
~~ATTORNEY-CLIENT COMMUNICATION~~

MEMORANDUM

**TO:** Elizabeth Wilkins  
Senior Counsel to the Attorney General

**FROM:** Janet M. Robins *JMR*  
Deputy Attorney General  
Legal Counsel Division

**DATE:** September 21, 2016

**SUBJECT:** Legal Analysis – OAG Responsibility to Advise ANCs  
(AL-16-497)

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This memorandum responds to your request that this office analyze OAG's statutory obligation to offer legal advice to Advisory Neighborhood Commissions ("ANCs"). After reviewing the statute and considering OAG's previous advice letters on ANC matters, we conclude that OAG's statutory obligation is to advise ANCs and their Commissioners about statutes and issues that relate to the functions and operations of ANCs. Of course, nothing prevents OAG from offering advice to ANCs on other issues unless doing so would conflict with OAG's responsibilities to other clients.

**I. The Statute**

Section 15(d)(3) of the Advisory Neighborhood Commissions Act of 1975<sup>1</sup> states that the Mayor "shall provide assistance to the Commissions" in three ways. One of those ways is:

Legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions. These interpretations are to be

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<sup>1</sup> Effective March 26, 1976 (D.C. Law 1-58; D.C. Official Code § 1-309.12(d)(3) (2012 Repl.)).

obtained from the Corporation Counsel and may be requested directly by any Commission.<sup>2</sup>

## II. OAG's Historic Interpretation of the Statute

A 1995 letter from Corporation Counsel Charles F.C. Ruff summarizes this office's consistent approach to the statute:

[The statute] does not require this office to render advice to ANCs as to statutes or issues that do not directly relate to the functions and operations of ANCs. And, as a matter of general policy, this Office confines its legal advice to ANCs to questions that relate to such functions and operations.<sup>3</sup>

That same year, this office echoed that point in a memorandum to all Advisory Neighborhood Commissions:

[I]f any Commission or any individual ANC commissioner needs advice as to the proper interpretation of any statutory provision that deals with ANCs, the ANC or commissioner may contact this Office.<sup>4</sup>

Applying this reasoning, we have often declined to offer advice on questions that did not "directly relate to the functions and operations of ANCs."<sup>5</sup> For example, in a 2004 letter to Commissioner Absalom Jordan, this office refused to answer "five separate questions" about the "Metropolitan Police Department (MPD) and its authority to promulgate rules, regulations, policies and procedures" because those questions did not appear to involve any "direct impact upon an ANC."<sup>6</sup> Likewise, in a 2006 letter to Commissioner Ramon Estrada, we concluded that OAG's statutory responsibility did not extend to opining on an application on the "individual rights of a church located in [Commissioner Estrada's] Commission."<sup>7</sup>

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<sup>2</sup> D.C. Official Code § 1-309.12(d)(3)(A) (2012 Repl.).

<sup>3</sup> Letter from Charles F.C. Ruff, Corp. Counsel, to Henry L. Fernandez, Chairperson, ANC 2B, Oct. 4, 1995, at 1, available at <http://app.occ.dc.gov/documents/1995/oct/19951004.pdf> (last visited Sept. 8, 2016).

<sup>4</sup> Memorandum from Leo N. Gorman, Assistant Corp. Counsel, to All Advisory Neighborhood Comm'ns, Mar. 11, 1995, at 1, available at <http://app.occ.dc.gov/documents/1995/mar/19950311.pdf> (last visited Sept. 8, 2016); see Memorandum from Karen K. Cooper, Director, Office of Legal Counsel, to All Advisory Neighborhood Comm'ns, Feb. 22, 1997, at 1, available at <http://app.occ.dc.gov/documents/1997/feb/19970222.pdf> (last visited Sept. 8, 2016) (same); Advisory Neighborhood Comm'rs Workbook, Appendix: Corp. Counsel Explanatory Provisions, Feb. 1999 (on file with LCD) ("Any ANC Commission or any individual ANC Commissioner may request advice from the Office of the Corporation Counsel as to the proper interpretation of any statutory provision that deals with ANCs").

<sup>5</sup> See Letter from Charles F.C. Ruff, Corp. Counsel, to Henry L. Fernandez, Chairperson, ANC 2B, Oct. 4, 1995, at 1, available at <http://app.occ.dc.gov/documents/1995/oct/19951004.pdf> (last visited Sept. 8, 2016).

<sup>6</sup> Letter from Robert J. Spagnoletti, Attorney Gen., to ANC 8D Comm'r Absalom Jordan, Aug. 16, 2004, at 6, available at <http://app.occ.dc.gov/documents/2004/20040816.pdf> (last visited Sept. 9, 2016).

<sup>7</sup> Letter from Sheila Kaplan, Assistant Attorney Gen., to Ramon Estrada, Chairperson, ANC 2B, Dec. 27, 2007, at 1, available at <http://app.occ.dc.gov/documents/2007/20071227.pdf> (last visited Sept. 9, 2016).

Our prior letters note two additional limits on our advisory function. First, our responsibility to advise ANC's is tempered by our duty to faithfully advise and represent Executive agencies, boards, and commissions. For example, in 1994, ANC 2F Chairperson Jim Brandon asked this office whether he could sue the Board of Zoning Adjustment as a private citizen. We explained, however, that this was "not a matter upon which this office could appropriately render advice, given the fact that this Office serves as the attorney for the Board of Zoning Adjustment."<sup>8</sup> Second, our advisory function does not involve independent fact-finding; this office "does not conduct investigations of fact or ferret out the facts."<sup>9</sup> We offer legal advice based on the facts that the requester presents to us, and where Commissioners disagree about the relevant facts, we do not seek to resolve that disagreement.<sup>10</sup>

We have offered inconsistent guidance, however, on one important aspect of our responsibilities: whether we are bound to offer advice to individual Commissioners who are not speaking on behalf of the ANC. Sometimes, we have said that we are not. For example, in the August 2004 letter to Commissioner Jordan that was cited earlier in this memo, we advised that "requests for statutory interpretation should come from the Commission as a whole, rather than from a single Commissioner, unless of course the Commissioner is acting on behalf of the Commission."<sup>11</sup> We also advised that "while we do not always treat this as a hard and fast requirement, limited resources and a marked increase in the number of requests for interpretation may cause us to do so in the future,"<sup>12</sup> implying that the statute would permit such a requirement. More often, however, we have maintained that the statute directs us to advise individual Commissioners, not just whole Commissions, about ANC matters.<sup>13</sup>

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<sup>8</sup> Letter from Garland Pinkston, Jr., Deputy Corp. Counsel, to Jim Brandon, Chairperson, ANC 2F, Feb. 16, 1994, at 2, available at <http://app.occ.dc.gov/documents/1994/feb/19940216a.pdf> (last visited Sept. 9, 2016). We note that, although this letter did not raise the issue, we ordinarily do not advise ANC Commissioners about their rights or obligations as private citizens.

<sup>9</sup> Letter from Darryl G. Gorman, Senior Deputy Corp. Counsel for Gov't Ops., to Paul E. Montague, Jan. 17, 2003, at 1, available at <http://app.occ.dc.gov/documents/2003/jan/20030117a.pdf> (last visited Sept. 9, 2016).

<sup>10</sup> See, e.g., Letter from Leo N. Gorman, Assistant Corp. Counsel, to Jonathan Heller, May 7, 1997, at 1, available at <http://app.occ.dc.gov/documents/1997/may/19970507b.pdf> (last visited Sept. 9, 2016) ("It does not appear from the facts stated in your letter that the grant in question involved a violation of either of these conflict of interest standards") (emphasis added); Letter from Nancy L. Alper, Assistant Corp. Counsel, to Louis Lieb, Comm'r, ANC 4B, at 2, available at <http://app.occ.dc.gov/documents/2003/mar/20030307c.pdf> (last visited Sept. 9, 2016) ("Relying upon the facts as you set forth in your October 16, 2002, e-mail it appears that TTAP's use of grant monies in its efforts to revitalize the Takoma Theatre in "general meets the statutory requirement of providing a public benefit in making grant awards") (emphasis added; internal quotation mark in original).

<sup>11</sup> Letter to ANC 8D Comm'r Absalom Jordan, *supra* n.6, at 7.

<sup>12</sup> *Id.* at 7 n.6.

<sup>13</sup> See, e.g., Memorandum from Leo N. Gorman, Assistant Corp. Counsel, to All Advisory Neighborhood Comm'ns, Mar. 11, 1995, at 1, available at <http://app.occ.dc.gov/documents/1995/mar/19950311.pdf> (last visited Sept. 8, 2016) (by statute, "if any Commission or any individual ANC commissioner needs advice as to the proper interpretation of any statutory provision that deals with ANC's, the Commission or the individual commissioner may request such advice from the Corporation Counsel"); Memorandum from Karen K. Cooper, Director, Office of Legal Counsel, to All Advisory Neighborhood Commissions, Feb. 22, 1997, at 1, available at <http://app.occ.dc.gov/documents/1997/feb/19970222.pdf> (last visited Sept. 8, 2016) (same).

### III. Analysis

We took a fresh look at the controlling language of the statute and the limited legislative history available to us to determine whether the language is consistent with OAG's historic interpretation of the statute. We conclude that it is. The statute obligates OAG to offer ANC's and their Commissioners legal advice about ANC duties and responsibilities. While OAG is not required to do so, it may also offer legal advice on other issues. However, because OAG often represents District agencies, offering advice on the merits of an ANC's proposed comments to an agency that OAG would normally represent might conflict with OAG's statutory duty to advise and represent that agency.

#### A. Principles of Statutory Interpretation

To interpret the controlling language of the statute, we first apply the "one cardinal canon" that applies "before all others": we "must presume that a legislature says in a statute what it means and means . . . what it says there."<sup>14</sup> Accordingly, to the extent that the statute's language is clear, we apply the text "according to its terms."<sup>15</sup> To the extent that the statute's language is ambiguous, we examine that language in its context to determine which possible meaning of the language is correct.<sup>16</sup> This means considering what the text itself fairly implies,<sup>17</sup> examining any informative legislative history,<sup>18</sup> and analyzing the language against the backdrop of other applicable law.<sup>19</sup>

#### B. Analyzing the Plain Language

The statute requires the Office of the Attorney General to: "assist[] . . . the Commissions" by supplying:

Legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions. These interpretations are to be

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<sup>14</sup> *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

<sup>15</sup> *United States v. Ron Pairs Enter.*, 489 U.S. 235, 241 (1989); *see W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991) (superseded by statute on other grounds) (when the statutory text "contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process").

<sup>16</sup> *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

<sup>17</sup> *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002) ("we will not presume that the statute means what it neither says nor fairly implies"); *Ohio v. DOJ*, 880 F.2d 423, 464 (D.C. Cir. 1989) (resting partially on what the Superfund's statute implies).

<sup>18</sup> *See Exxon Mobil Corp. v. Allapattah*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms"); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) ("appeals to statutory history are well taken only to resolve statutory ambiguity").

<sup>19</sup> *See Branch v. Smith*, 538 U.S. 254, 281 (2003) ("courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part"); *In Re L.H.*, 634 A.2d 1230, 1231 (D.C. 1993) ("a statutory provision is to be read, whenever possible, in harmony with other provisions to which it naturally relates").

obtained from the Corporation Counsel and may be requested directly by any Commission.<sup>20</sup>

This statutory duty to supply “legal interpretations” (often through “legal opinions”) means that OAG is responsible for offering legal advice to ANC’s about “statutes,” “issues,” and “concerns” that “affect[] the Commissions.”<sup>21</sup> For example, OAG is responsible for advising (and frequently *does* advise) ANC’s about whether proposed ANC grants are lawful,<sup>22</sup> whether an ANC meeting was properly noticed,<sup>23</sup> what information an ANC is required to disclose to a requesting party,<sup>24</sup> and whether an ANC’s recommendations are entitled to great weight.<sup>25</sup>

OAG’s responsibility to advise ANC’s must, however, be interpreted against the backdrop of OAG’s long-standing responsibility to advise and represent Executive agencies.<sup>26</sup> Nothing in the language or history of the statute suggests that the Council intended to curtail that responsibility, so we conclude that OAG is not *required* to offer advice to an ANC or its Commissioners if doing so would conflict with our duties to Executive agencies.

### C. Addressing Two Ambiguities

The statute’s language is ambiguous in two important respects. First, the language does not specify whether OAG’s responsibility to offer advice on “issues or concerns affecting the Commissions” includes advising an ANC or a Commissioner about the soundness of legal arguments that an ANC wishes to present to a District agency. Second, as OAG’s conflicting prior guidance reflects, the language does not specify whether OAG’s statutory duty to supply legal advice to a “Commission” requires OAG to advise an individual Commissioner who does not speak on his or her Commission’s behalf.

#### 1. Advising ANC’s on Proposed Comments to Agencies or the Council

It is not clear from the statutory language whether OAG’s duty to supply “legal interpretations . . . of issues or concerns affecting the Commissions” requires OAG to advise ANC’s or their Commissioners about the soundness of any legal arguments an ANC wishes to present to a District agency. We conclude, however, that it does not.

We recognize that there is a reasonable argument for a contrary interpretation. Each ANC has the statutory authority to offer recommendations on proposed government actions that will affect

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<sup>20</sup> D.C. Official Code § 1-309.12(d)(3)(A) (2012 Repl.).

<sup>21</sup> *Id.* § 1-309.12(d)(3)(A).

<sup>22</sup> *See id.* § 1-309.13(m) (requirements for ANC grants).

<sup>23</sup> *See id.* § 1-309.11(c) (notice requirement for ANC meetings).

<sup>24</sup> *See id.* § 1-309.11(g) (making certain “categories of information . . . available to the public”).

<sup>25</sup> *See id.* § 1-309.10 (describing the great weight requirement).

<sup>26</sup> *See, e.g., id.* § 1-301.81(a)(1) (2012 Repl.) (“The Attorney General shall have the power to control litigation and appeals”) and (2) (“The Attorney General shall furnish opinions in writing to the Mayor and the Council whenever requested to do so”); Reorganization Order No. 50, Part II(A)(a) (the Corporation Counsel “[f]urnishes legal advice” to “the several departments and agencies of the District of Columbia”) (in D.C. Official Code, 1973 ed.).

its neighborhood area,<sup>27</sup> which suggests that our responsibility to offer “legal interpretations” of “issue or concerns affecting the Commissions” includes offering legal analysis of an ANC’s proposed comments on these proposed government actions.

Nonetheless, when the text is placed in the context of its legislative history and of the surrounding law, the better view is that OAG’s duty to offer legal advice on “issues or concerns affecting *the Commissions*” is not that we must advise ANCs about anything that might affect their Commission *areas*, but rather that we must offer advice on issues or concerns that would affect the Commissions *themselves* by affecting their operations and functions. Our specific role is to advise ANCs and their Commissioners on what the law requires them to do, allows them to do, or forbids them from doing. As the letters cited above make clear, this is the view that OAG has historically held and the approach it has practiced both before and after this statute was adopted.

The legislative history of this statute sheds light on the limited obligations that this statute was meant to confer. As the Office of the Corporation Counsel<sup>28</sup> explained in a 1992 letter to ANC 3C Chairperson Patricia Wamsley:

This language was added to Bill 8-626, the Advisory Neighborhood Commission Act of 1990, by an amendment offered by Councilmember Lightfoot at the second reading of the bill on December 4, 1990. In support of this amendment Councilmember Lightfoot stated that “the [C]orporation Counsel gives the ANC legal advice,” and “this amendment would codify this existing practice.” Councilmember Rolark then asked Mr. Lightfoot: “Legal opinions on what?” Mr. Lightfoot responded: “The Mayor, at this time through the [C]orporation Counsel, provides legal opinions [to ANCs] about their activities and that would continue.”<sup>29</sup>

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<sup>27</sup> See D.C. Official Code § 1-207.38 (2012 Repl.) (“In the manner provided by act of the Council, in addition to any other notice required by law, timely notice shall be given to each Advisory Neighborhood Commission of requested or proposed zoning changes, variances, public improvements, licenses, or permits of significance to neighborhood planning and development within its neighborhood commission area for its review, comment, and recommendation”); *id.* § 1-309.10(a) (“Each Advisory Neighborhood Commission (“Commission”) may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to all proposed matters of District government policy”).

<sup>28</sup> The Office of the Corporation Counsel (“OCC”) was redesignated the Office of the Attorney General in 2004 and assumed OCC’s responsibilities, including its responsibility to advise ANCs. See Mayor’s Order 2004-92, dated May 26, 2004, Part I (“The Office of the Corporation Counsel of the District of Columbia is redesignated as the Office of the Attorney General for the District of Columbia.”); D.C. Official Code § 1-301.81(a)(1) (2012 Repl.) (“The Attorney General for the District of Columbia (“Attorney General”) shall have charge and conduct of all law business of the said District and all suits instituted by and against the government thereof, and shall possess all powers afforded the Attorney General by the common and statutory law of the District and shall be responsible for upholding the public interest”).

<sup>29</sup> Letter from Vanessa Ruiz, Deputy Corp. Counsel, to Patricia Wamsley, Chairperson, ANC 3C, Mar. 10, 2002, at 2, available at <http://app.occ.dc.gov/documents/1992/mar/19920310.pdf> (last visited Aug. 22, 2016) (internal citations omitted; emphasis in original). This secondhand legislative history is, unfortunately, the only history we have been able to locate. While a copy of the transcript cited in this letter would ordinarily be stored in the District government’s archives, archive staff were unable to find it.

This emphasis on advising ANC's "about their activities," rather than about the merits of their views on government policy, implies that OAG's intended function was to advise an ANC and its Commissioners about what an ANC or its Commissioners must, may, and may not do, not about whether the ANC's or Commissioner's proposed advice to a District agency is sound.

We draw the same inference from the background of law against which OAG's duty to ANC's operates. OAG has long-standing responsibilities to advise and represent Executive agencies.<sup>30</sup> If OAG were required to advise ANC's about the merits of their comments to client agencies, our duties to ANC's would likely collide with those long-standing responsibilities. For example, if an ANC wished to comment on the lawfulness of a client agency's action in a specific case, advising the ANC about whether the agency's action was lawful could conflict with OAG's responsibility to advise that agency and defend the agency in the event of a legal challenge.

## **2. Advising Individual Commissioners**

As OAG's conflicting prior guidance reflects, the statutory language does not specify whether OAG's duty to advise "Commissions" includes advising individual Commissioners who do not speak on behalf of their ANC's. We conclude, however, that the text fairly implies this requirement. Offering advice to individual Commissioners is an extension of our responsibility to advise the ANC's themselves because the advice we offer to individual Commissioners functions as advice to the ANC. For example, if an individual Commissioner is concerned that an ANC action proposed by a majority of his or her fellow Commissioner might run afoul of governing law, we have offered legal advice to the Commissioner about his or her concern because offering that advice helps ensure that the ANC follows the law. This is similar to the role we play in advising multi-member boards or commissions. We advise those boards and commissions as a whole, and as part of that service, we have advised individual board or commission members about what their board or commission may do, or about their duties and powers as members.

If you have any questions, please contact Assistant Attorney General Joshua Turner at 442-9834, or me at 724-5524.

JMR/jat

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<sup>30</sup> See, e.g., Dist. of Columbia R. of Prof. Conduct 1.7 and 1.8 (conflicts of interest).