

GOVERNMENT OF THE DISTRICT OF COLUMBIA



OANC LEGAL REVIEW OF MARCH 4, 2025, EMAIL SENT TO ALL COMMISSIONERS

DATE: 4/2/25

This is in response to the March 4, 2025, e-mail sent to all ANC Commissioners by a single Commissioner contemplating how ANC Commissioners should hypothetically respond if the authority and funding for ANCs were eliminated or suspended by the federal government. In his e-mail, the Commissioner encouraged ANCs to save their records, a website backup, and constituent e-mail lists on non-District servers in such a hypothetical, and hopefully unlikely, scenario. In response to concerns and requests for clarification the OANC conducted a legal review of the email.

The expressed concern was to prepare in the event that D.C. Home Rule was abolished and access to this information was lost. It failed to recognize that these actions would violate District policies, laws, and regulations which the Commissioners, in their oath, swore to uphold. While oaths of office in the District vary depending upon the office, board, or commission the member is joining, they all include language that the public official “will faithfully execute the laws of the United States and the District of Columbia.” The email by the Commissioner violates both the spirit and letter of this oath.

Furthermore, if Home Rule were to somehow be eliminated, the laws and regulations of the District of Columbia would not simultaneously be voided. If District laws and regulations were totally merged back into federal law, prosecution for violations would be the same as before Home Rule was created. There would also be a custodian of the District’s records assigned to a successor agency.

ANCs were created to “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. . .”¹ Should Home Rule be overturned, not only would ANCs be dissolved but the existing governmental structure, including the Council and the Mayor, would also be dissolved and the statutory purpose for ANCs would cease to exist. It is unclear for what purpose Commissioners would need continued access to the records of a Commission, especially the personal contact

¹ D.C. Official Code § 1-309.10(a).

information of constituents who gave their information to a government entity for a particular purpose. Once out of office, whether by dissolution of Home Rule or losing an election, a Commissioner is no longer entitled to access this information. The recommended actions amount to a privatization of public records using a mechanism not allowed by law. Furthermore, once out of office, Commissioners would also still remain free to organize and advocate as any citizen. They are not entitled to government support or government property and resources to do so.

ANCs are subject to a number of regulations and policies. The Code of Conduct is applied to ANCs even though Commissioners are not “government employees.”² ANC emails, Office 365, and Zoom accounts are all purchased through OCTO and are subject to OCTO’s policies for their use. Commissions and Commissioners are also subject to the Public Records Act³ and ANC records, including email and website content, belong to the District of Columbia.⁴

The OANC is also concerned that the email itself and the recommendations contained therein violate District laws and policies. The email from the Commissioner was sent to all Commissioners, a total number of whom exceeded 300, and contained the recommendations designed to create a backup system should Home Rule be abolished and, with it, the ANCs.

In short, it advocated for the creation of shadow commissions in a very public way—an action that the federal administration could claim to be seditious and use as the very justification needed to abolish Home Rule.

Following is the evaluation of the email itself and each part of the email:

1. The Email blast violates the Office of the Chief Technology Officer (OCTO) Email use policy.

Commissioners are supplied with email addresses by OCTO, with a license provided by OCTO, and on an email platform supplied by OCTO. As such, they are subject to the OCTO’s use policies, which apply to “any District agency/District/entity who receive enterprise services from OCTO.”⁵ The Email Use Policy limits distribution of Interagency and external broadcast email to 100 recipients or fewer.⁶ The email from the Commissioner contravenes the policy by recommending actions that violate District laws, policies or regulations.⁷

² D.C. Official Code §1-1162.01a

³ D.C. Official Code § 2-1714(a) (“The requirements and provisions of this chapter shall apply to and be binding upon the executive branch the operating departments and agencies, including independent agencies of the District, Advisory Neighborhood Commissions. . .”).

⁴ D.C. Official Code § 2-1706(a)(1) (“Any record created or received by the District in the course of official business is the property of the District and ... shall not be destroyed sold, transferred, or disposed of in any manner.”).

⁵ *Email Use Policy*, paragraph 3, 2/22/2021, found at <https://octo.dc.gov/node/707082>.

⁶ *Email Use Policy*, paragraph 5.2.6, 2/22/2021, found at <https://octo.dc.gov/node/707082>.

⁷ *Id.* at 5.3.1 (“Prohibited uses include [a]ny purpose that violates a federal or DC government law, code, or policy, standard or procedure.”).

2. **Recommendation that “[w]e would need some way of communicating with each other. We are therefore setting up such a contingent system just in case”**

The OANC had no issues with this recommendation.

3. **Recommendation that “ANCs would be wise to back up their contact information, their website, and documents to computers that are not funded by the District. It would be safest if you DID THIS NOW.” This recommendation specifically included:**

- a. **Email or contact information for constituents.**
- b. **The content of ANC websites.**
- c. **The documents produced by the ANC**

All of these items are considered public records and they “shall not be . . . transferred. . . in any manner.”⁸ Additionally, OCTO’s *Acceptable Use Policy*, at 4.3.20, prohibits storing District government files on personal devices.⁹ The transfer of all this data would create a private repository of government information, without agreement or compensation, for unrestricted personal use.

It was raised in response to the OANC’s objection that all of this is public information that is otherwise available to the public. Some of it may be public information that is either publicly available or may be obtained using the Freedom of Information Act. By directly downloading the materials, individuals would be bypassing the safeguards put in place for FOIA and public record requests. This email also potentially complicates the FOIA process. A Superior Court trial judge has ruled that when an ANC Commissioner conducts ANC business on their personal email, it is subject to FOIA.¹⁰ In making that determination, the court looked at whether the documents were “prepared, owned, used, in the possession of, or retained by a public body.”¹¹ The court determined that if the Commissioner was acting in her capacity as a Commissioner, “then communications made or received by her would be communications of the ANC, irrespective of whether such communications were associated with her personal email account.”¹² Analogous to this would be if an ANC Commissioner were storing Commission records on a personal device, that device would be subject to FOIA. By sending this email from his official ANC account, the Commissioner has created the appearance that official records may be stored on personal devices by Commissioners, leaving all Commissioners now at risk of having their personal devices FOIA’ed.

However, much of what is recommended to be downloaded is information that would not be made available to the public. There is personal information of constituents, internal ANC deliberative documents, and certain financial records – especially things containing account numbers. More importantly, the information belongs to the Commission and the District Government, not the individual Commissioners.

⁸ D.C. Official Code § 2-1706 (a)(1).

⁹ *Acceptable Use Policy*, paragraph 4.3.20, prohibits the “[s]toring official District Government files and data on personal devices.” Found at <https://octo.dc.gov/node/1523626>.

¹⁰ *Vining v. D.C.*, 2013 CA 8189B, (D.C. July 9, 2014).

¹¹ *Id.* at 4.

¹² *Id.* at 4-5.

Each category of information suggested to be downloaded on non-government devices has unique characteristics that will be addressed separately.

a. Email or contact information of constituents.

Email or contact information gathered from individuals by a District Government entity or individual for one purpose cannot be used for another purpose. It is a violation of District policy and potentially a violation of federal privacy laws. The District’s privacy policy states “[y]our individual identifying information will not be shared, sold, or transferred to any third party without your prior consent, or unless it is required by law.”¹³ Similarly, the privacy policy of the D.C. Council states “[w]e will not use your email address unless you choose to receive updates and other information from the Council.”¹⁴ These policies embrace the spirit of the Federal Trade Commission rules on the use of email collected for a specific purpose. “It is an unfair or deceptive trade practice to use information collected in a context where an individual reasonably expects that such information will remain confidential (“Confidential Context”) for any purpose not explicitly requested by the individual unless the individual first provides affirmative express consent for such use.”¹⁵ This is considered an unlawful misuse of information under Section 5(a)(1) of the Federal Trade Commissioner Act.¹⁶

b. The content of ANC websites.

ANC websites are paid for with public dollars allocated to the ANCs. At the moment, all ANC websites are on non-OCTO servers. The OANC has committed to building out individual ANC websites beginning in 2025. Websites are considered public records¹⁷ for purposes of the Public Records Act. “Any record created or received by the District in the course of official business is the property of the District and ... shall not be destroyed, sold, transferred, or disposed of in any manner.”¹⁸ The fact that a website is not on a non-government server does not change the fact that it is a public record.¹⁹ A website, by nature, contains both records that any member of the public can view and data that is not publicly accessible. A Commissioner would be able to copy only the public-facing portions of the website unless there was a business purpose such as data migration. Absent such a purpose, downloading the website or a copy of the website would be prohibited and possibly violate some inherent copyrights if it were to be used again in a non-government setting.

c. The documents produced by the ANC

All documents produced and maintained by a Commission clearly fall within the Public Records Act as outlined above. Not all documents maintained by a Commission are required to be released to the public by a Commission and records such as personnel, legal, and financial

¹³ <https://dc.gov/page/privacy-and-security>.

¹⁴ <https://dccouncil.gov/privacy-policy/>.

¹⁵ FTC, *Notice of Penalty Offenses Concerning Misuse of Information Collected in Confidential Contexts*, September 18, 2023, found at <https://www.ftc.gov/enforcement/notices-penalty-offenses/penalty-offenses-concerning-confidential-contexts>

¹⁶ 15 U.S.C. 45(a).

¹⁷ See, D.C. Official Code § 2-1701(13).

¹⁸ D.C. Official Code § 2-1706(a)(1).

¹⁹ D.C. Official Code § 2-1701(13) (“The medium upon which such information is recorded shall have no bearing on the determination of whether the record is a public record.”).

records as well as some constituent correspondence have protections from release.²⁰ Wholesale downloading and transferring of those records violates the Public Records Act²¹ and breaches the protections provided by statute. As such, they may be subject to civil enforcement.²²

4. Code of Conduct

ANC Commissioners are subject to the District of Columbia Ethics Act and the Code of Conduct.²³ The Code of Conduct specifically requires that “[e]mployees shall protect and conserve government property and shall not use it for other than authorized activities.”²⁴ It also requires that “Employees shall adhere to all federal, state, and local laws and regulations.”²⁵ Finally, it requires that Commissioners “shall not take actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.”²⁶ The totality of the actions proposed in the email violate various District of Columbia statutes, regulations, and policies. Even where the actions do not violate laws, they do create the appearance of ethical violations. The email, in its essence, advocates copying and downloading records for the purpose of carrying on a shadow government should the current framework of the District Government be dismantled.

CONCLUSION

It is the position of the OANC that many of the actions proposed by the Commissioner run afoul of an ANC Commissioner’s duty to preserve and maintain their records according to law and policy. It specifically notes that the downloading of contact information of constituents violates policies of the District of Columbia and violates the privacy rights of constituents. Commissioners who take said actions could be subject to civil penalties.

Finally, we note that the Commissioner’s email clearly stated that “we have not involved the OANC staff in these discussions. . .,” which intentionally sidesteps the OANC’s statutory authority to serve “as the primary source of advice for Commissioners with respect to their official statutory responsibilities.”²⁷ This responsibility resides with the OANC, specifically to address many of the issues inherent in the email sent by the Commissioner and to advise thereto *before* a Commissioner errs so publicly. It is therefore highly recommended, indeed essential, that Commissioners seek such advice from the OANC in the future before sending out any ANC-wide e-mails on such potentially weighty subjects.

²⁰ See D.C. Official Code §§ 1-309.11(g) and 2-534(1) and (2).

²¹ See D.C. Official Code § 2-1701(13).

²² D.C. Official Code § 2-1713.

²³ D.C. Official Code § 1-1162.01a (“[T]he Code of Conduct shall apply to all employees and **public officials** serving the District of Columbia (emphasis added).”) See also BEGA *Advisory Opinion #1009-15 Ethics Applicability to ANC Commissioners*, p. 2, 11/02/2013 found at https://bega.dc.gov/sites/bega/files/publication/attachments/1009-015%20-%20Advisory%20Opinion%20-%20Ethics%20Applicability%20to%20ANC%20Commissioners_0.pdf.

²⁴ District Personnel Manual 1800.3(i) found at <https://edpm.dc.gov/chapter/18/#contentshttps://edpm.dc.gov/chapter/18/#contents>.

²⁵ District Personnel Manual 1800.3(m) found at <https://edpm.dc.gov/chapter/18/#contentshttps://edpm.dc.gov/chapter/18/#contents>.

²⁶ District Personnel Manual 1800.3(n) found at <https://edpm.dc.gov/chapter/18/#contentshttps://edpm.dc.gov/chapter/18/#contents>.

²⁷ D.C. Official Code § 1-309.15(c)(11).