GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

June 14, 2016

Beverly Perry
Senior Advisor to the Mayor, Office of Federal and Regional Affairs
1350 Pennsylvania Avenue, N.W., Suite 324
Washington, D.C. 20004

Betsy Cavendish
General Counsel, Executive Office of the Mayor
1350 Pennsylvania Avenue, N.W., Suite 327
Washington, D.C. 20004

Dear Ms. Perry and Ms. Cavendish:

This responds to your June 3, 2016 memorandum, attached hereto, in which you request an advisory opinion from the Board of Ethics and Government Accountability (Ethics Board) "on Hatch Act and ethics laws," in connection with "statehood-related activities" leading up to an advisory referendum to be held in November of this year.[1] While your request is addressed to the Ethics Board, I view it as invoking my authority as the Director of Government Ethics under section 219(a) of the Ethics Act.[2]

Based on the information in your memorandum, I conclude that the activities outlined in it would not violate section 1801 of the Merit Personnel Act,[3] 6B DCMR § 1808, or the Local Hatch Act,[4]

[1] Your memorandum, a copy of which is attached, also requests advice from the Office of Campaign Finance (OCF) and the Board of Elections (BOE) "on expenditures" related to these same activities.

[2] Section 219(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19(a)). The section provides that "[u]pon application made by an employee or public official subject to the Code of Conduct, the Director of Government Ethics shall, within a reasonable period of time, provide an advisory opinion as to whether a specific transaction or activity inquired of would constitute a violation of a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction."

[3] Section 1801 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-618.01) ("Section 618.01").

[4] The Prohibition on Government Employee Engagement in Political Activity Act of 2010, effective March 31, 2011 (D.C. Law 18-335; D.C. Official Code § 1-1171.01 *et seq.*).

all of which are elements of the Code of Conduct.[5] I also conclude that the activities would not violate any other relevant provision of the Code of Conduct.

Section 618.01 of the Merit Personnel Act

Section 618.01(a) of the Merit Personnel Act provides as follows:

> Each employee, member of a board or commission, or a public official of the District government must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.

On its face, section 618.01(a) sets a high bar – "a high level of ethical conduct" – for the wide range of individuals who are engaged in the various functions of the District government as they carry out their "official duties." In terms of those individuals whose conduct would be called into question for purposes of this opinion, I look to the members and employees of the Office of the Statehood Delegation,[6] the Statehood Delegation itself,[7] and the New Columbia Statehood Commission.[8] Also, inasmuch as the Mayor or her alternate is a voting member of the Commission,[9] I include here any employees who may be delegated her duties and responsibilities as a Commission member, as well as any Executive Branch employees whose official duties include those activities outlined in your memorandum or otherwise would directly support the Mayor's statehood policy agenda.

Section 618.01(a) also clearly envisions, as a consequence of the failure to adhere to a high standard of ethical conduct, the adverse effect on the public's confidence in the integrity of the government. What the section does not do, however, is attempt to list any of the many ways in which that failure can occur. Fortunately, there is interpretive guidance that I find particularly relevant here, in light of your request for advice from OCF and BOE on expenditures.

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[5] Respectively, *see* section 101(7)(B), (E), and (E-i) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(B), (E), and (E-i)).

[6] Established by section 21(a) of the District of Columbia Statehood Constitutional Convention Initiative of 1979 (Initiative), effective May 2, 2015 (D.C. Law 20-271; D.C. Official Code § 1-129.22(a)). The Office "provide[s] support to the Statehood Delegation in promoting statehood and voting rights for the citizens of the District of Columbia." *Id.* at section 21(b) (D.C. Official Code § 1-129.22(b)).

[7] *See* section 4 of the Initiative (D.C. Official Code § 1-123).

[8] Established by section 31(a) of the Initiative (D.C. Official Code § 1-129.31(a)). Among other things, the Commission is to "[e]ducate regarding, advocate for, promote, and advance the proposition of statehood and voting rights for the District of Columbia to District residents and citizens of the 50 states." *Id.* at section 31(b)(1) (D.C. Official Code § 1-129.31(b)(1)).

[9] *See* section 31(c)(1) of the Initiative (D.C. Official Code § 1-129.31(c)(1)).

In 2000, the Board of Elections and Ethics (BOEE) considered an appeal by then Mayor Anthony Williams from an OCF Order finding that the Mayor's use of District government resources in connection with a press conference in support of a Charter amendment created the appearance of adversely affecting the confidence of the public in the integrity of government, thereby violating a standard of conduct now codified in substantively similar form in section 618.01(a).[10] The BOEE affirmed the OCF Order, finding as follows:

> The Mayor is, of course, *permitted* and *encouraged* to express his views on any policies or programs that meet the needs of the citizenry. The Mayor may use the assistance of the Press Secretary or any other resources properly appropriated to assist the Mayor in his relationship with the media, and to ensure timely and accurate communication of the Mayor's views and position. The Mayor can also freely campaign for any candidate or ballot measure; however, he cannot, in this respect, use government resources…[H]e can only use government resources for authorized government business – which campaigning is not.[11]

The BOEE's conclusion is also worth noting:

> [W]e submit public officials may properly express their views on ballot measures placed before the electorate, engage in activities which encourage citizens to vote on ballot measures, and take steps to educate and inform the electorate of the proposed measures. Such public officials may use to this end *whatever government resources and employees are authorized by program and budget to assist with these activities*.[12]

In sum, based on the BOEE opinion, I conclude that the individuals identified in the discussion above may engage in the statehood-related activities outlined in your memorandum without violating section 618.01(a), as long as they do so by using funds and other District government resources that are authorized for that purpose. However, while the BOEE opinion supports this conclusion, I do note that the opinion is, nevertheless, to be distinguished in a very significant regard. The Charter amendment referendum central to the Williams case, conducted as it was pursuant to District Charter section 303 (codified at D.C. Official Code § 1-203.03), involved a very different type of vote – a binding, approval or rejection type of vote – than the advisory referendum here. As described more fully in the text below, the advisory referendum would be held pursuant to District Charter section 412(b) (codified at D.C. Official Code § 1-204.12(b)), and its nonbinding result would operate as nothing more than a public opinion poll. In short, I view the BOEE opinion as distinguishable on its facts, and, to that extent, it represents no

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[10] *See Williams v. D.C. Office of Campaign Finance*, Admin. Hearing No. 00-025, memo op. at 1 (Sept. 22, 2000).

[11] *Id.* at 7 (emphasis in original).

[12] *Id.* at 8 (emphasis added).

authority on which to prohibit the statehood-related activities leading up to the advisory referendum this November.

6B DCMR § 1808

A District government employee "has a duty to protect and conserve government property and shall not use such property, or allow its use, for other than authorized purposes."[13] Further, given the wide-ranging nature of the statehood-related activities, the definition of "government property" is equally as broad, covering everything from paperclips to intangible property interests.[14]

Therefore, considerations very similar to those discussed above in the context of CMPA section 618.01(a) lead me to the same conclusion of permissibility regarding participation in the statehood-related activities, when viewing the activities (along with associated resources) in light of 6B DCMR § 1808.[15]

The Local Hatch Act

The Local Hatch Act governs the political activities of District government employees. While the Mayor, among others, is exempt from the Act,[16] it is important to note that, generally, an employee is defined as "[a]ny individual paid by the District government from grant or appropriated funds for his or her services or holding office in the District of Columbia."[17] That definition would, then, capture most, if not all, of the individuals discussed above in the context of CMPA section 618.01(a). Also important, especially with regard to the activities leading up to the advisory referendum, is the definition of "political activity." The Local Hatch Act defines the term as "any activity that is regulated by the District *directed toward the success or failure* of

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[13] 6B DCMR § 1808.1. The term "authorized purposes" is defined by 6B DCMR § 1808.2(b) as meaning "those purposes for which government property is made available to members of the public or those purposes authorized by an agency head in accordance with law or regulation."

[14] *See* 6B DCMR § 1808.2(a) (defining "government property" as including "any form of real or personal property in which a federal, District, state, or local government agency or entity has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the government mails, automated data processing capabilities, printing and reproduction facilities, government records, and government vehicles.").

[15] On a related note, I see no issue here concerning the prohibition against using government resources or office for a private purpose or for private gain. The purpose of the statehood-related activities is entirely a public and governmental purpose, not a private one. Further, insofar as the Mayor is vested with the executive power of the District, there is nothing improper about her engaging in, or publically advocating for, such a governmental purpose. Indeed, under section 422(8) of the District Charter (codified at D.C. Official Code § 1-204.22(8)), the Mayor has express authority to "propose to the executive or legislative branch of the United States government legislation or other action dealing with any subject, whether or not falling within the authority of the District government."

[16] *See* section 2(3)(A) (D.C. Official Code § 1-1171.01(3)(A)).

[17] *Id.*

a political party, candidate for partisan political office, partisan political group, ballot initiative, or referendum."[18]

From the several references to the advisory referendum in your memorandum, it appears that you mean the type of vote authorized by section 412(b) of the District Charter, that is, a special election "called by resolution of the Council to present for an advisory referendum vote of the people any proposition upon which the Council desires to take action." Unfortunately, the legislative history of the Charter fails to shed any meaningful light on what Congress intended by the provision for an advisory referendum in section 412(b). What is clear, however, is that on at least one occasion since Home Rule, an advisory referendum was held in the District pursuant to section 412(b). In 2002, Advisory Referendum A was placed on the general election ballot "[t]o ask the voters … if the Home Rule Act should be amended to establish an Office of the District Attorney for the District of Columbia, headed by a locally elected, independent District Attorney."[19] That experience is quite consistent with the description of an advisory referendum in the secondary literature as "a government-administered advisory poll on a certain issue."[20]

Given the nonbinding nature of an advisory referendum, I view it as being very different from the type of referendum contemplated in the Local Hatch Act definition of "political activity." In other words, because an advisory referendum functions essentially as nothing more than a public survey or opinion poll, considerations of "success or failure" – the only possible results that can flow from, for example, an election for partisan political office or a referendum to suspend an act of the Council[21] – are absent.

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[18] Section 2(8)(A) (D.C. Official Code § 1-1171.01(8)(A)) (emphasis added). *See also* Report of the Committee on Government Operations and the Environment on Bill 18-460, the Prohibition on Government Employee Engagement in Political Activity Act of 2010, at 5-6 (Council of the District of Columbia, November 16, 2010) (discussing definitions in bill) ("Political activity means conduct whose goal is the success or failure of a partisan candidate or political group, ballot initiative, or referendum.").

[19] *See* section 2(b) of the Establishment of an Office of the District Attorney Advisory Referendum Approval Resolution of 2002, effective July 19, 2002 (Res. 14-494; 49 DCR 6722).

[20] Thomas E. Cronin, *Direct Democracy* 176 (1989); *see also* Nicholas R. Theodore, Comment, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 Mo. L. Rev. 1401, 1410 (2013) ("The results of [an advisory referendum] are non-binding on the legislature and serve only as a survey tool."). *Cf. Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (Rehnquist, Circuit Justice 1978) (rejecting contention that Nevada statute providing for advisory referendum for benefit of the legislature violates U.S. Const. art. V) (applicants' contention "is in my opinion not substantial because of the nonbinding character of the referendum").

[21] *See* section 2(b) of the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code § 1-204.101(b)) ("The term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection."). A substantively similar definition is contained in section 2(11) of the Initiative, Referendum and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.02(11)).

All this said, I conclude that the statehood-related activities leading up to the advisory referendum in November, as well as participation in the vote itself, are not forms of political activity as defined in the Local Hatch Act and are, therefore, permissible.

Because this advisory opinion is provided to you pursuant to section 219 of the Ethics Act, be advised that the opinion must be published in the *D.C. Register* within 30 days of its issuance, but your identity will not be disclosed unless you consent to such disclosure in writing.[22] We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

Please let me know if you have any questions or wish to discuss this matter. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

Attachment (1) June 3, 2016 memorandum

Copies to: Brian Moore, Chief of Staff to Council Chairman Phil Mendelson
Janet Robins, Deputy, Legal Counsel Division, Office of the Attorney General

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[22] *See* section 219(b) (D.C. Official Code § 1-1162.19(b)). Also, in terms of the safe harbor against enforcement of a violation of the Code of Conduct afforded by section 219(d) (D.C. Official Code § 1-1162.19(d)), be advised that this opinion is limited in scope to the statehood-related activities outlined in your memorandum and is intended to operate prospectively from June 14, 2016.

ATTACHMENT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

Office of the General Counsel to the Mayor

TO: Office of Campaign Finance
Board of Elections
Board of Ethics and Government Accountability

FROM: Beverly Perry, Senior Advisory to the Mayor,
Office of Federal and Regional Affairs

Betsy Cavendish, General Counsel
Executive Office of the Mayor

DATE: June 3, 2016

RE: Request for Expedited Formal Advisory Opinion from BEGA on Activities Relating to Advisory Ballot Referendum and Expedited Interpretive Opinion from OCF and BOE, on Activities Relating to Advisory Ballot Referendum

The Executive Office of the Mayor requests your guidance as we embark on statehood-related activities, so that we can assure compliance with law. From BEGA, we seek guidance on Hatch Act and ethics laws, and from OCF and BOE, we seek advice on expenditures.

Background:

The Mayor is co-chair of the New Columbia Statehood Commission, as added May 2, 2015, D.C. Law 20-271, §101(b), 62 DCR 1884, codified at D.C. Code §1-129.31 (2016), whose charter is to "educate regarding, advocate for, promote, and advance the proposition of statehood and voting rights for the District of Columbia to District residents and citizens of the 50 states." The enabling statute also authorizes the solicitation of financial and in-kind contributions, allocations from public and private sources and the use of pro bono services.

The Commission is re-invigorating efforts for statehood in the District of Columbia.

Activities include:

- Drafting a constitution
- Encouraging public comment and engagement around it
- Working with the Office of Planning to define the boundaries of a new state, while maintaining the seat of the federal government as an enclave apart from the state as provided in the U.S. Constitution

- Outlining the advantages of statehood and the injustices associated with lack of statehood and communicating those messages to constituents in all eight wards
- Conducting historical research regarding the process other jurisdictions followed on their paths towards becoming states
- Securing support from the Council for statehood and the draft constitution
- Building public support from around the country for statehood.

Based on its research, the Commission has determined that the most promising strategy for achieving statehood is through the Tennessee Plan.

Under the Tennessee Plan, as applied to the District of Columbia, what needs to happen is the following (as has previously been discussed with your offices):

Following a robust agenda of public engagement that has already begun, the Council plans to ask the Board of Elections in July to put four questions on the ballot this fall as part of an advisory referendum: Do the people agree to the borders of the proposed new state? Do the people agree to have a republican, representative form of government? Do the people approve this Constitution? Do the people desire to become a state? (As this is just a plan, we do not have exact language.)

If the advisory referendum is approved by the Board of Elections and conducted in November, and if the people indicate that they want statehood, preferably by a resounding margin, the Council would again meet and the next step would be to adopt legislation to send a petition to Congress, seeking to become a state. Thereafter, Congress would need to enact an Admissions Act granting the District statehood. Presumably, numerous other negotiations of a transition nature would also ensue, to work out aspects of statehood and the transition from the Home Rule Act, as amended, to the new Constitution. Obviously, there are many, many steps towards statehood, and the advisory referendum is just that, advisory to the Council as it considers whether to advance a statehood petition to Congress.

Questions:

We recognize that not every question involves the jurisdiction of each of your offices, but we seek confirmation that the Mayor's Office – assisted by counsel from the Attorney General's office – would not be in violation of the Hatch Act, ethics law, or elections expenditures law if we do the following:

A. Host public engagement events at local schools, recreation centers and other public venues, to make presentations on statehood and the draft constitution, and to take public comment on the draft constitution and statehood generally.
B. Host a constitutional convention on statehood with speeches from local and national notables, and at which public commenters (in favor or not) will have an equal time to speak, pursuant to rules established by the Commission. These first events would all be before Council sends any language to the Board of Elections for its consideration for an advisory referendum.
C. Send delegates to Cleveland and Philadelphia, to the two major political conventions, at which District employees and members of the public would educate delegates about the case for statehood and seek allies. These activities would take place at state delegation breakfasts or other workshops. The presentations would not be partisan. We assume that these events will be roughly contemporaneous with transmittal to BOE, but before it has ruled on putting the four-part question on the ballot in November.

D. Under the aegis of the statehood commission, which has authority to raise money, raise funds, pursuant to and consistent with the duly-established donations process, to advance statehood efforts generally, including educational efforts surrounding the advisory referendum's questions on statehood. These activities might take place both before and after the referendum is sent or certified by BOE, depending on your answers.
E. Relatedly, EOM's expenditure of District funds to advance its policy agenda, which includes statehood, but would not use "vote for" messages.
F. Compile lists of persons who have indicated they are interested in statehood and communicate to them, from government email servers, on upcoming community engagement fora and other events relating to statehood.
G. Produce doodads like pens, buttons, posters, and bumper stickers using phrases or taglines such as #AddaStar, #51st State, or, simply, Statehood. Could EOM employees use and wear such doodads while doing official work? Only before such questions have been referred to the Elections Commission, or afterwards, too?
H. Send administration representatives to ANC meetings, law school classes, law firm lunches or other civic meetings, upon invitation or *sua sponte*, to talk about statehood and the process for achieving it.
I. Post tweets or Facebook messages or use other social media from official accounts and administration officials' personal accounts during the work day supporting statehood generally, re-broadcasting articles about statehood, and building crowds for the community engagement forums.
J. Indicating support for statehood at work, or while on work assignments, as at community forums.
K. Encourage participation in the referendum at work, or while on work assignments, such as at community meetings, not using "vote for" messages.
L. We have assumed that – other than elected officials – employees cannot use public dollars or public equipment to transmit "vote for" messages for any advisory ballot referendum, but we would appreciate knowing if we are being too cautious in this regard.
M. While we do not intend to mobilize agency officials whose day to day responsibilities are remote from statehood, we do believe a number of persons at EOM are critical to working on the constitution and education efforts. Please let us know if there are restrictions on which EOM administration officials can conduct any of the above activities. We believe that the above activities are squarely within the province of those who work in the Office of Federal and Regional Affairs, the Office of Policy and Legislative Affairs, the Office of Communications, the Office of Community Relations and Services and other Office of Community Affairs Offices, the Office of General Counsel and the Mayor's Office of Legal Counsel.

We believe that the efforts to advance statehood are authorized by statute, and that the advisory ballot referendum is an integral and necessary part of advancing statehood effectively, but it is not an end in itself, in contrast to elections and binding referenda. This advisory referendum to us seems distinguishable from the political activities that are clearly prohibited: it's not a campaign for a particular person or a narrow initiative to change one element of the charter backed by the Mayor; rather, the advisory referendum is part of a comprehensive effort to advance the interests of the District, as recognized by Council in restructuring and reinvigorating the Statehood Commission. We are mindful of D.C. Code 1-1163.36 and are concerned about its applicability here. We have read the Board of Elections and Ethics Opinion in *Anthony Williams v. D.C. Office of Campaign Finance and Dorothy Brizill*, Administrative Hearing No 00-025 No. MUR-00-01(Sept. 22, 2000), and are uncertain as to whether it applies to an advisory referendum, when an advisory referendum is simply the Council and the Mayor's question to the citizens as to whether they wish to proceed with a matter. Taking a cautious approach as to this, we plan to ground our activities in the areas the Board said were proper for the Mayor to engage

in, namely, "express[ing] their views on ballot measures placed before the electorate; engag[ing] in activities which encourage citizens to vote on ballot measures, and take steps to educate and inform the electorate of the proposed measures," when of course such resources and employees are authorized by delegated authority from the Mayor, and program and budget authorizations to assist in such advocacy, education, legal analysis and drafting, and communications. We are concerned that statehood activities generally (which seem to be authorized expenditures under the Statehood Commission legislation and within the general authority of the Mayor's close staff) may be confused with activities connected with the anticipated advisory ballot referendum at some point in the process towards statehood.

Thank you for your advice. If you have further questions, feel free to call either one of us: Beverly Perry at 202.724.5391 or Betsy Cavendish at 202.727.8555.

Cc:
Brian Moore, Chief of Staff to Chairman Mendelson
Janet Robins, Legal Counsel Division, Office of the Attorney General