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

Office of Government Ethics

August 29, 2013

Advisory Opinion

Constituent Services by Elected District of Columbia Government Officials

This Advisory Opinion addresses questions received by the Board of Ethics and Government Accountability ("BEGA") regarding the ethical limits of constituent services performed by District government elected officials.[1]

I. Introduction

A. Overview

Providing services to constituents is a legitimate and necessary function of elected office. Whether the action taken on behalf of a constituent comes by requesting information from an agency, arranging an appointment with an agency worker, commenting during a proposed rulemaking process, introducing tax relief legislation, or falling somewhere in between, the official's assistance fulfills the fundamental responsibility of meeting his or her constituent's right to petition the government and, at the same time, serves to foster better governance.

Describing the various types of services that elected officials can provide to their constituents is one thing. Defining the ethical limits of providing those services is quite another, much more difficult matter, if only because each instance of constituent service is based on its own facts.

Another difficulty is to summarize in this Overview some relevant conclusions so as to forecast the general direction this Opinion will take. Nevertheless, to provide some bearing, this much appears to be clear: constituent services afford as much, if not more, opportunity for abuse as any other function of public office, perhaps because there are no bright lines for elected officials to follow. Clearly, though, there must be limits, and, to the extent possible, those limits should not be so strict as to prevent officials from doing the work they were elected to do.

This Opinion, then, will provide fact-specific scenarios of the more prevalent ways that elected officials provide constituent services. There will be preliminary discussions of the specific

[1] For purposes of this Opinion, the term "elected officials" is used to include the Mayor and employees of the Executive Office of the Mayor, as well as all members of the Council and their respective staffs. To that extent, the term is not intended to be synonymous with "public official," as that term is defined in section 101(47) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1161.01(47) (2012 Supp.). The latter term is broader, encompassing, among others, District government officials and employees who do not generally provide constituent services.

District ethics laws and regulations that govern the provision of those services, other relevant District and federal laws, and several general service-related considerations that also apply. In short, the effort will be to offer the scenarios as guidance to elected officials on what is ethically permitted – and what is not – in terms of providing services to their constituents.

What this Opinion will not do is attempt to redefine the District government or the roles of elected officials within it. As discussed below, ethics regulation is a means to better government. Such regulation and this Opinion, then, should not be seen as altering the system of checks and balances that operates when elected officials provide constituent services.

B. Analytical Context

The concept that public office is a public trust has roots stretching back to ancient Rome.[2] In the founding days of this country, the Framers invoked the concept in drafting the Constitution,[3] and it continues to find modern day expression. *See, e.g., Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967) ("It is a living tenet of our society and not mere rhetoric that a public office is a public trust.").[4]

The Council was no doubt mindful of the public trust concept when it passed the Ethics Act. The committee report accompanying the legislation noted that "the term 'ethics'…refers to the regulation of those behaviors which the government may seek to impose upon itself and its employees by rule of law to prevent government corruption and waste, avoid conflicts of interest, and ultimately to *preserve and increase the public trust and with it the legitimacy of the government*."[5] In other words, in passing the Ethics Act, the Council clearly considered ethics regulation as a means not only to counter individual government employee misconduct, but, more fundamentally, as a way to uphold the public's trust in the government itself.

The Council's two-fold view of ethics regulation lends itself to the purposes of this Opinion. As one journal author has noted:

> The work of the public in any city of more than minor size is carried out by dozens, hundreds, or even thousands of persons. Some are elected, some appointed, some employed. Even if those

[2] *See* Marcus Tillius Cicero, *On Moral Obligation* 69 (John Higginbotham trans., University of California Press 1967) ("The guardianship of the state is a kind of trusteeship.").

[3] *See* Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 Cornell L. Rev. 845, 874 (2013) ("[T]he Federalist Papers repeatedly characterizes public officials, including legislators, as trustees, and the U.S. Constitution refers to 'public Trust' and describes public offices as being of 'Trust.'").

[4] *See also Providence Tool Co. v. Norris*, 69 U.S. 45, 55 (1864) (stating that public offices "are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee").

[5] Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, at 3 (Council of the District of Columbia, December 5, 2011) ("Ethics Act Committee Report") (emphasis added).

> individuals are all persons of good character, the failure to provide clear guidance as to what standards of conduct must be observed with respect to such issues as conflict of interest, use of city property, acceptance of gifts, and other important matters will invite confusion, varying practices, and the appearance of impropriety – all of which are harmful to good government.[6]

What, then, is "good" government? Any answer to the question here must reflect the respective roles of the Mayor and the Council as they have been established in the District of Columbia Home Rule Act ("Home Rule Act"), adopted December 24, 1973, 87 Stat. 777, Pub. L. 93-198, D.C. Official Code § 1-201.01 *et seq.* (2006 Repl. & 2012 Supp.).

The District's executive authority is vested in the Mayor. *See* section 422 of the Home Rule Act (D.C. Official Code § 1-204.22). In exercising that authority, the Mayor has the power, for example, to administer personnel functions covering the employees in the subordinate agencies, D.C. Official Code § 1-204.22(3), and to supervise and direct the work of those agencies through the agency heads. D.C. Official Code § 1-204.22(4). The Mayor also has the power to prepare and submit an annual budget to the Council. Section 442(a) of the Home Rule Act (D.C. Official Code § 1-204.42(a)).

Legislative authority is vested in the Council. *See* section 404(a) of the Home Rule Act (D.C. Official Code § 1-204.04(a)). Among other things, the Council is responsible for conducting oversight of District agencies, as an offshoot of its power to create and abolish the agencies and to define their powers and duties. D.C. Official Code § 1-204.04(b). The Council also adopts the District's annual budget. Section 446 of the Home Rule Act (D.C. Official Code § 1-204.46). Notwithstanding these responsibilities, the Council has somewhat limited authority over executive branch personnel and functions. It can refuse to confirm or re-confirm mayoral nominees, but it does not have the power to hire or fire executive branch employees, including agency heads. It can defund agencies or programs within them, but it otherwise has no direct control over the day-to-day delivery of services by the agencies.

Recognizing this division of powers helps inform this discussion because the real or implied threat of retaliation or of granting favorable treatment by elected officials often lies at the heart of their providing constituent services. The ethical limits on their providing those services, then, should be measured accordingly. *Cf.* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 10 (1996) ("[T]he [ethical] checks and balances implications of congressional intervention in agency proceedings must…be weighed in terms of the competitive relationship between the legislative and executive branches."); *Id.* at 58 (ethical limits on constituent services "should be evaluated from the standpoint of whether they enhance or impede democratic processes.") (citing Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* 7, 170 (1995)).

To sum up, guidance on the ethical limits of providing constituent services must take into account the structure of the District government, presuppose that the dynamic – and sometimes

[6] Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 Seton Hall L. Rev. 715, 727 (2006).

conflicting – forces at play within that structure can work to the public good, and, accordingly, avoid penalizing legitimate activity by elected officials. Such an approach is in keeping with the Council's view, noted above, that ethics is regulation of those behaviors which the government may seek to impose upon itself and its employees "by rule of law."[7]

C. Constituent Services

Another preliminary matter needs to be addressed before proceeding any further: what are constituent services? Broadly speaking, such services can refer to all actions that elected officials take on behalf of their constituents. However, for purposes of this Opinion, the term "constituent services" is used to mean those official actions taken by elected officials when interacting with District government agencies, boards, and commissions on behalf of their constituents and, for members of the Council specifically, when promoting constituent interests directly through legislation.[8] Further, as discussed in the first section of Part II, immediately below, this definition can be taken to lend meaning to the phrase "usual and customary constituent services," as contained in Rule VI(c)(2) of the Council's Code of Official Conduct.

In fairness, one may question the need for this Opinion with respect to the provision of constituent services by the Mayor, the Council Chairman, and the four at-large Councilmembers. Those officials, after all, are elected on a city-wide basis and, to that extent, have no specific constituency. Where, then, does one draw the line between those officials' "constituent" service and general "public" service?

This Opinion draws the line at the point where public service involves interaction with the agencies. Up to that point, the public services provided by the Mayor, the Council Chairman, and the four at-large Councilmembers are to be governed generally by the Code of Conduct,[9] as is the case with respect to all elected officials and other employees of the District government. Beyond that point, however, even for the Mayor, who, as the "chief executive officer of the District government,"[10] supervises and directs the agencies through the agency heads,[11] agency involvement can potentially entail the same constituent-specific and rule of law considerations as apply to the Councilmembers who represent the several wards. As such, certain specific provisions of the Code of Conduct, as well as certain provisions in other relevant District and federal laws, apply with particular force. The balance of this Opinion, then, will focus on those provisions and their application.

---

[7] *See also* Johnson, 38 Seton Hall L. Rev. at 722-23 (stating that a "key assumption animating American debates about ethics in government is that law is a proper tool for ensuring good behavior").

[8] It is beyond the scope of this Opinion to offer a general critique of constituent services or of any particular type of such services. For such a discussion, see, for example, Levin, 95 Mich. L. Rev. at 19-31. Further, this Opinion does not address the constituent-service programs or the funds used to finance those programs, as authorized by section 338 of the Ethics Act (D.C. Official Code § 1-1163.38).

[9] *See* section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.01(7) (defining "Code of Conduct")).

[10] Home Rule Act section 422 (D.C. Official Code § 1-204.22).

[11] *See* Home Rule Act section 422(4) (D.C. Official Code § 1-204.22(4)).

II. Discussion

A. Provisions of the Code of Conduct

The Council expressly wedded itself to public trust principles when it first adopted its own Code of Official Conduct. See Resolution 18-248, the Council Code of Official Conduct Rules Amendment Resolution of 2009, effective September 22, 2009, 56 DCR 7804, the long title of which states that the Council's intent in adopting the Code of Official Conduct was "to ensure the full public confidence that representative government requires and recognize [sic] that public office is a public trust, to commit the Council to the highest standards of ethics, honesty, openness, and integrity, and to consistent adherence to these values."[12]

For purposes of this Opinion, Rule VI(c) of the Council's Code is particularly relevant. The Rule provides as follows:

> (c)(1) PRESTIGE OF OFFICE. An employee may not knowingly use the prestige of office or public position for that employee's private gain or that of another.
>
> (2) The performance of usual and customary constituent services, without additional compensation, is not prohibited under paragraph (1) of this subsection.

Although the Rule does not define the phrase "usual and customary constituent services," there is nothing in the Rule itself – nor, for that matter, nothing elsewhere in the Council's Code – that reasonably suggests that the phrase is at odds with the definition of "constituent services" as discussed above. Indeed, interacting with executive agencies on behalf of constituents is a "usual and customary" function of elected legislative officials. *See* Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 Wash. U. L. Rev. 291, 329 n.153 (2012) ("Casework [as some sources describe the provision of constituent services] can also be regarded as a form of legislative oversight of the administration, thus grouping it with hearings, appropriations and the legislative veto."); *see also* Paul H. Douglas, *Ethics in Government* 86-87 (1952) ("The truth is that legislation and administration should not be kept in air-tight and separate compartments…There is, then, a sound ethical basis for legislators to represent the interests of constituents and other citizens in their dealings with administrative officials and bodies.").

The Council's Code of Official Conduct is, of course, part of the Ethics Act Code of Conduct,[13] but, from a perspective relevant to constituent services, the public trust concept was reflected in various District statutes and regulations well before the Ethics Act. The Act itself functioned, in

---

[12] The Council incorporated a Code of Official Conduct into its Rules of Organization and Procedure for Council Period 19 and, currently, for Council Period 20. *See* Rule 202(c), Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 20 ("Councilmembers and staff shall specifically adhere to the Code of Official Conduct of the Council of the District of Columbia.").

[13] *See* section 101(7)(A) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(A)).

part, to include "all applicable ethics laws" within the Code of Conduct. *See* Ethics Act Committee Report at 2. Significant among these laws, is section 1801(a) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("CMPA"), effective March 3, 1979, D.C. Law 2-139, D.C. Official Code § 1-618.01(a) (2012 Supp.),[14] which provides as follows:

> (a) 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.

Certain regulations promulgated pursuant to the CMPA, specifically, those contained in Chapter 18 of Title 6B of the District of Columbia Municipal Regulations,[15] also mirror public trust principles. For example, 6B DCMR § 1803.1(a) provides that:

> (a) An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of the following:
>
> (1) Using public office for private gain;
> (2) Giving preferential treatment to any person;
> (3) Impeding government efficiency or economy;
> (4) Losing complete independence or impartiality;
> (5) Making a government decision outside official channels; or
> (6) Affecting adversely the confidence of the public in the integrity of government.[16]

Last, but certain, mention here must be made of section 223 of the Ethics Act itself (D.C. Official Code § 1-1162.23). That section, which captures the prestige of office notion reflected in the Council's Rule of Official Conduct VI(c), provides as follows:

> No employee shall use his or her official position or title, or personally and substantially participate, through decision,

---

[14] CMPA section 1801(a) is part of the Code of Conduct by virtue of section 101(7)(B) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(B)).

[15] These regulations are part of the Code of Conduct by virtue of section 101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)).

[16] *See also* 6B DCMR § 1800.2 ("The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of government business and the maintenance of confidence by citizens in their government. The avoidance of misconduct and conflicts of interest on the part of employees is indispensable to the maintenance of these standards.").

> approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

In sum, a number of District ethics laws and regulations incorporated into the Code of Conduct are very relevant to the provision of constituent services by elected officials. However, no ethics code operates in a vacuum. There are District laws of general application, as well as applicable federal laws, that bear on the subject and, accordingly, warrant discussion.

B. Other Relevant Non-Code of Conduct Provisions

An elected official's obligations are to all of his or her constituents equally. No local law of general application comes quicker to mind, therefore, than the Human Rights Act of 1977, effective December 13, 1977, D.C. Law 2-38, D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl. & 2012 Supp.).[17] The Act prohibits discrimination in the District for any reason, including political affiliation, other than that of individual merit.[18]

Section 1804(a) of the CMPA[19] prohibits nepotism, providing specifically that a "public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which he or she is serving or over which he or she exercises jurisdiction or control, any individual who is a relative[20] of the public official." This provision would clearly prevent an elected official from taking a wide range of government employment-related actions on behalf of a constituent who has family connections to the official.

The District of Columbia Administrative Procedure Act ("APA"), effective October 21, 1968, 82 Stat. 1204, D.C. Official Code § 2–501 *et seq.* (2011 Repl. & 2012 Supp.), supplements all other provisions of law establishing procedures to be observed by the Mayor and agencies of the District government in the application of laws administered by them. The APA will be noted

---

[17] *See* Johnson, 36 Seton Hall L. Rev. at 742 (arguing that "because a city should observe the highest ethical standards in the performance of official duties, an anti-discrimination provision should [even] be included in a city ethics code").

[18] *Cf.* Advisory Opinion No. 1, House Comm. on Standards of Official Conduct, 116 Cong. Rec. 1077, 1078 (1970) ("Advisory Opinion No. 1) ("A Member's responsibility…is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations."). Also, see the discussion below about considerations related to campaign contributions.

[19] As added March 12, 2012, D.C. Law 19-115, D.C. Official Code § 1-618.04(a).

[20] The term "relative" is defined by CMPA section 1804(d)(2) (D.C. Official Code § 1-618.04(d)(2)).

below in connection with *ex parte* communications and the involvement of elected officials on behalf of constituents in formal adjudication and rulemaking proceedings.

Quite a number of federal laws can impact constituent services provided by elected officials, so even a brief discussion of each would unnecessarily extended the length of this Opinion. However, the following list of some of the more relevant statutes (their relevance indicated by explanatory parentheticals) will suffice for present purposes:

5 U.S.C. § 3110 (nepotism);
18 U.S.C. § 2 (aiding and abetting);
18 U.S.C. § 201 (bribes and illegal gratuities);
18 U.S.C. § 208 (financial conflicts of interest);
18 U.S.C. § 216 (civil & criminal penalties); and
18 U.S.C. § 602 (solicitation of political contributions).

C. General Considerations

Each instance of constituent service is unique on its facts. However, there are a number of general service-related considerations, some gleaned from House of Representatives and Senate ethics materials, which elected officials should weigh when faced with any constituent's request for assistance.

First and foremost is the public interest. As stated in Advisory Opinion No. 1, "[t]he overall public interest…is primary to any individual [constituent service] matter and should be so considered."[21] Self-interest, which is prohibited by the conflict of interest laws, is the flip side of this same coin and should, therefore, be factored out by elected officials whenever considering providing any constituent service.[22]

Second, elected officials should only present facts that they know to be true. As noted in the *House Ethics Manual*, "[i]n seeking relief, a constituent will naturally state his or her case in the most favorable terms....Thus, a Member should exercise care before adopting a constituent's factual assertions."[23] In communications, then, elected officials would be well advised to attribute factual contentions to their constituents, unless they have personal knowledge of the underlying relevant facts themselves.

Third, a related consideration is the advisability of elected officials documenting their constituents' requests for services and the action taken in response. If there was ever a question or dispute later, an official could protect himself or herself by reference back to a written record. A similar practice could be adopted when it comes to contact between the officials and

[21] 116 Cong. Rec. at 1078.

[22] *See* Levin, 95 Mich. L. Rev. at 10 ("Ethics regulation is a logical tool for counteracting the temptations stemming from the self-interest aspects of constituent service.").

[23] House Comm. on Standards of Official Conduct, *House Ethics Manual*, 110th Cong., 2nd Sess., at 307.

the agencies.[24] In fact, elected officials may well consider making that contact only by email or letter to prevent possible misunderstandings.[25]

Fourth, elected officials should follow constituent service practices in a consistent manner when dealing with the agencies.[26] Those practices should, ideally, be written, and, in any event, staff should be trained to follow them uniformly. As illustrated in a scenario below, an official's failure to act in his or her usual or customary way could, for example, be viewed as an attempt to influence the outcome in a given agency interaction.

Fifth, there should be power parity in agency interactions. The perceived authority that comes with being an elected official is significant, and, in even permissible agency interactions, that perception of authority can affect an agency employee's decision making process. Therefore, elected officials should encourage their staff members to deal with lower level agency personnel, so as to reduce the potential for intimidation, and should reserve to themselves those cases in which to engage upper level employees, such as agency heads or general counsels.

Sixth, favoritism and reprisal should be avoided when engaging in any form of constituent services. The *House Ethics Manual*, in particular, makes this point very clear, stating that "[a] Member should *not* directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official."[27]

Last, elected officials should strive to avoid any conduct which, according to the *Senate Ethics Manual*, "may create the appearance that, because of party affiliations, campaign contributions, or prior employment, a [constituent] will receive or is entitled to either special treatment or special access, or be denied access."[28] Realistically, such an effort cannot ignore, for example, the realities of financing a political campaign,[29] and the *Senate Ethics Manual* does provide guidance for when a constituent is a known contributor. In such a case, an elected official should consider, among other things, "the history of donations by a contributor and the proximity of

---

[24] *See* Levin, 95 Mich. L. Rev. at 62-67 (discussing arguments for and against congressional contacts with agencies and exploring implementation issues).

[25] *See House Ethics Manual* at 307 ("In order to avoid any inference on the part of agency personnel that a Member is asking for action in a particular matter that is inappropriate under agency guidelines, the Member should consider expressly assuring administrators that no effort is being made to exert improper influence. For example, a letter could ask for 'full and fair consideration consistent with applicable law, rules, and regulations.'").

[26] *See, e.g.,* Senate Select Comm. on Ethics, *Senate Ethics Manual*, 108th Cong., 1st Sess., at 178 (recommending that, prior to providing a constituent service, a Senator consider "the extent to which the proposed action or pattern of action deviates from normal office practice").

[27] *House Ethics Manual* at 306 (emphasis in original).

[28] *Senate Ethics Manual* at 178. *See also House Ethics Manual* at 300 ("[C]onsiderations such as political support, party affiliation, or one's status as a campaign contributor should not affect either the decision of a Member to provide assistance or the quality of help that is given to a constituent."

[29] *See* Levin, 95 Mich. L. Rev. at 79-80 ("[E]thics rules…must take account of candidates' legitimate interest in raising money for reelection campaigns.").

money and action, *i.e.*, how close in time the [official's] action would be to his or her knowledge of or receipt of contribution(s)"[30] before deciding whether to assist the constituent. The official, in other words, should avoid taking any action that can be seen as a conflict of interest or be used to establish a connection between soliciting or accepting a campaign contribution and providing a constituent service.[31]

III. Illustrative Scenarios

Members of Congress have received ethical guidance on providing constituent services at least since 1970, when the House Committee on Standards of Official Conduct adopted Advisory Opinion No. 1. In 1992, the Senate adopted S. Res. 273, which incorporates, as part of the Code of Official Conduct, Senate Rule 43, governing the provision of constituent services.

Advisory Opinion No. 1 and Senate Rule 43 are substantively similar in listing a number of permissible ways in which congressional members and their staffs may interact with the executive branch on behalf of constituents, and, to that extent, they can serve as the basis for the following scenarios:[32]

A. Requesting Information or Status Reports

> **Example 1**: Constituent X is waiting to hear back from the Zoning Commission about a variance. After several unsuccessful attempts to get a status report from the Commission, X explains his situation to Councilmember Y and asks for assistance. The Councilmember directs a staff member to contact the Commission for a status report.

This is a permissible constituent service. By having a staff member contact the Commission on a routine matter, the Councilmember avoids creating the impression that Constituent's variance deserves special attention and also avoids appearing to exert any influence over the decision on the variance itself.

---

[30] *Senate Ethics Manual* at 178.

[31] *See, e.g., McCormick v. United States*, 500 U.S. 257 (1991) (holding that a *quid pro quo* is necessary for conviction under Hobbs Act (18 U.S.C. § 1951) when official receives campaign contribution, regardless of whether contribution is legitimate).

[32] These examples are meant to demonstrate, in the first instance, "best practices." Best practices are behaviors that have consistently shown results superior to, or more effective than, those obtained in other ways. They represent an ideal standard. As such, failure to strictly adhere to certain of these recommendations may not in every case rise to the level of a Code of Conduct violation. Nonetheless, it is highly advisable that elected officials follow these practices in order to avoid allegations of ethical misconduct and potential sanctions where best practices standards do, in fact, intersect with minimal ethical standards. In case of doubt about which way to proceed, the best practice would be to seek advice from BEGA. The examples herein are hypothetical. Only with specific, actual facts can BEGA provide "safe-harbor" advice (advice that, if followed, protects the inquirer from sanctions) under the Ethics Act.

> **Example 2**: In the same circumstances as Example 1, Councilmember Y contacts the Commission herself for a status report.

If it is customary for the Councilmember to contact the Commission on routine matters, then her doing so in this example can be presumed to be appropriate conduct. However, if her usual office practice is to have staff members handle routine constituent matters, then her personal contact with the Commission creates at least an appearance of impropriety. By departing from customary office practice, the Councilmember could suggest to the Commission that Constituent's variance is somehow different from other variance requests and, therefore, warrants special attention, or it could even be viewed as an attempt to influence the final outcome. The Councilmember should refrain from making the personal contact.

> **Example 3**: In the same circumstances as Example 1, a staff member updates Councilmember Y after getting a status report, but the Councilmember calls the Commission later in the day to request the same information.

For the reasons stated in Example 2 of why the Councilmember should refrain from making personal contact with the Commission, she should also refrain from making the call.

B. Urging Prompt Consideration of a Matter

> **Example 1**: Constituent A has waited for what she considers to be too long a time to have the liquor license for her restaurant renewed. Alcohol sales are a significant part of her revenue, and any delay in license renewal would pose a significant financial burden. Constituent contacts Councilmember B and asks that he contact the Alcoholic Beverage Control Board. He does so by calling the Board chairperson, explaining Constituent's concern, and demanding a decision on the renewal as soon as possible.

While it is appropriate for the Councilmember to engage another upper level official, his call to the chairperson is not a permissible constituent service. The demand carries with it, at least, an implied threat of reprisal, and, in any event, Constituent's license renewal should not be advanced ahead of other pending renewal requests simply because the Councilmember calls about it. An acceptable response to Constituent's request, rather, would have been to ask the Board, through the chairperson, to give the license renewal due and timely consideration under applicable regulations.[33]

---

[33] Congressional guidance on the permissibility of urging prompt agency action is somewhat more liberal. For example, the *House Ethics Manual* states that "[c]ourts have historically refused to intervene when Members attempted to expedite an administrative process rather than urging a particular outcome. In the words of one court, 'where the Congressional involvement is directed not at the agency's decision on the merits but at accelerating the disposition and enforcement of the pertinent regulations, it has been held that such legislative conduct does not affect the fairness of the agency's proceedings and does not warrant setting aside its order.'" *Id.* at 305 (citation omitted).

> **Example 2**: Through staff, Councilmember D becomes aware of a homeless mother with a young child in need of immediate medical care. The overnight forecast is for cold, but not sub-freezing temperatures. The Councilmember nevertheless wants the pair to receive shelter and other assistance as soon as possible and calls the Director of the Department of Human Services, asking for expedited attention to their case.

The Director is able to accommodate the Councilmember's request, preferably by following a policy that the Department has adopted to deal with emergency situations. However, even if such a policy is not in place, the Director can reasonably consider the circumstances here as calling for an expedited response. A workable test for such a situation is suggested by the standard for emergency rulemaking set out in section 6(c) of the APA (D.C. Official Code § 2-505(c)), that is, "the *immediate preservation* of the public peace, health, safety, welfare, or morals." (Emphasis added.) The standard reflects a recognition that the need to address certain urgent conditions can trump the normal rulemaking process, which otherwise requires notice to the public and the opportunity for public comment on any proposed rules prior to final adoption. So too, such emergency circumstances could also apply to the type of Councilmember intervention and agency action described in this example.

C. Arranging Meetings and Interviews

> **Example 1**: Constituent S wishes to voice her concerns about a current DCRA permitting policy. After several unsuccessful attempts to arrange a meeting with a DCRA employee, she relates her concerns to Councilmember T and asks him to try setting up a meeting for her. The Councilmember calls DCRA's General Counsel and arranges a meeting, stating only that Constituent wants to air concerns about the policy.

This is a permissible constituent service. The Councilmember obviates concerns about exerting undue influence by engaging another upper level official and by not relating any concerns he may have about the policy himself.

> **Example 2**: Councilmember sits on the Committee on Workforce and Community Affairs, which has oversight jurisdiction over the Office on Aging. She contacts the Director of the Office to request that he meet with a constituent private entity that wants to discuss "a great idea" for a grant under the Older Americans Act.

While it is appropriate that the Councilmember contacts the head of an agency with grant making authority, the facts that she sits on the oversight committee and characterizes the grant as being "a great idea" combine to create at least an appearance of undue influence. The message to the Director, in other words, is that the Councilmember will not be pleased if the grant application is denied and that, as a consequence, there may be some form of reprisal against him or the Office.

Alternatively, the Councilmember should have one of her staff call the Director's scheduling assistant to set up the meeting and, in doing so, explain only that the constituent wants to discuss a possible grant application. Such an approach would reduce the potential for any pressure the Director may otherwise feel if the Councilmember called directly and would also reduce the chance that the Councilmember's opinion would unduly influence any action taken on an eventual grant application.

D. Employment Matters

> **Example 1**: Councilmember F calls the hiring official at the Department of Public Works and says that his nephew, who lives in the District, was late in filing his application for the Summer Youth Program. The Councilmember asks that the nephew be given a job for the summer anyway, but makes it clear that he does not want the nephew to be employed for any longer than he would have worked in the Program or to be paid on any different basis than other Program participants.

This is not a permissible constituent service, even though the nephew may otherwise qualify for the Summer Youth Program or may not be treated any differently than actual Program participants. Any considerations of undue influence aside,[34] the Councilmember's request operates as advocating for his nephew's employment, in violation of section 1804(a) of the CMPA, discussed above,[35] and, as such, would cause other late-filing applicants to be treated unfairly.

> **Example 2**: Constituent A, a former staff member, asks Councilmember E to send a letter of recommendation to the Department of the Environment in support of his application for a career service position. The Councilmember sends the letter on her official letterhead, including in it information about Constituent's duties, abilities, and character.

Assuming the Councilmember has personal knowledge of the subjects covered in her letter, this is a permissible constituent service,[36] and the Department's hiring officials may consider the letter in evaluating Constituent's application.

> **Example 3**: Constituent B, a social acquaintance, asks Councilmember E to send a letter of recommendation to XYZ

[34] The Councilmember's actions create at least an appearance of undue influence, and this would be true even if the late-filing youth were a non-relative. *Cf.* Rule VI(d) of the Council's Rules of Official Conduct (setting out special rules for letters of recommendation).

[35] The Councilmember's request also violates the federal nepotism statute, 5 U.S.C. § 3110, which applies to District government employees.

[36] *See* Rule VI(d) of the Council's Rules of Official Conduct.

> Bank in support of his application for a teller position. The Councilmember sends the letter on her official letterhead.

This is not a permissible constituent service. Unlike Constituent A, in Example 2, Constituent B has not worked with the Councilmember in an official capacity. Using official letterhead for the letter violates Rule X(e)(4) of the Council's Rules of Official Conduct, which prohibits using "official mail for transmission of matter that is purely personal to the sender and is unrelated to the official duties, activities, and business of the member."[37]

The Councilmember may write the letter for Constituent B, but she must use personal stationery and postage, and should also be cautious to avoid even the appearance of exerting undue influence on the private sector bank.

E. Involvement in Agency Matters[38]

> **Example 1**: After taking testimony in a contested case, but before making a final decision, an Administrative Law Judge receives a call from Councilmember M, who says that one of the parties in the proceeding is a constituent and that he (the Councilmember) wants the constituent to prevail.

The Councilmember's action is unacceptable. First, his call to the ALJ is an off-the-record *ex parte* communication. While the APA does not contain an express prohibition against *ex parte* communications in contested cases, which are quasi-judicial administrative proceedings, the Court of Appeals has made it clear that such communications are not consistent with APA section 10(c) (D.C. Official Code § 2-509(c)), which provides, in pertinent part, that "[t]he testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in the evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision" and that "[n]o sanction shall be imposed or rule or order or decision be issued except upon consideration of such exclusive record." *See, e.g., Fair Care Found. v. District of Columbia Dep't of Ins. & Sec. Regulation*, 716 A.2d 987, 996 (D.C. 1998) ("It is basic to the notion of fairness in administrative proceedings that the mind of the decider should not be swayed by evidence which is not communicated to both parties and which they are not given an opportunity to controvert.")

---

[37] Elected officials in the executive branch should note the substantively similar section 7(d) of the Official Correspondence Regulations, effective April 7, 1977, D.C. Law 1-118, D.C. Official Code § 2-706(d) (2012 Supp.), which is part of the Code of Conduct by virtue of section 101(7)(C) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(C)). *Cf.* Memorandum from Robert I. Cusick, Dir., U.S. Office of Government Ethics, to Designated Agency Ethics Officials on "Misuse of Federal Position to Help Another Person Get a Job" (07v11; Aug. 1, 2007).

[38] Involvement in agency matters may not be the subject of ethical constraints *per se*. As noted in the *House Ethics Manual*, "certain federal court opinions discourage inordinate pressure on officials charged by law with responsibility for making administrative decisions. While such pressure may not violate any standard of conduct overseen by this Committee, Members should be aware that a *court's* perception that a Member has overstepped may lead it to invalidate the very determination that the Member was seeking." *Id.* at 303 (emphasis in original). Nevertheless, to the extent that agency involvement can so often have constituent service implications, the following examples are offered to provide guidance in this area.

(internal quotations and citation omitted)); *see also Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 256-57 (D.C. 1995) ("*[E]x parte* contacts with BZA members [who are quasi-judicial administrative officials] can result in the absence of an impartial hearing.").[39]

Second, the Councilmember's call, clearly calculated to pressure the ALJ to rule in his constituent's favor, may well be cause for the ALJ to recuse himself, *see Gladden*, 659 A.2d at 256, or can even prove to be fatal to the whole proceeding. *See D. C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971) ("With regard to judicial decisionmaking [sic], whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality."); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983) ("Under [the *D. C. Federation*] standard, pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision.").

> **Example 2**: Constituent calls Councilmember to express concerns about the enforcement provisions in regulations contained in a notice of proposed rulemaking that the District Department of the Environment has published in the *D.C. Register* and asks that Councilmember convey those concerns to the Department. Councilmember does so, in a strongly worded letter addressed to the Department official designated in the notice to receive comments.

This is a permissible constituent service. Indeed, as one journal author has noted, the courts have been "distinctly sympathetic toward congressional participation in the administrative process. This support has been particularly evident in the context of agency rulemaking."[40]

> **Example 3**: Following on the circumstances in Example 2, DDOE later fines Constituent for violating substantively similar regulations promulgated pursuant to a final notice of rulemaking. Councilmember chairs the Committee on Transportation and the Environment, which has oversight jurisdiction over DDOE, and, at an oversight hearing, expresses the same concerns about the Department's enforcement policy and asks some questions about it, but does not mention Constituent's case.

---

[39] *Cf. United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 541 (D.C. Cir. 1978) ("It is the obligation of the agency, consistent with its duty to afford a hearing and its responsibility to provide a record for judicial review, to guard against [*ex parte*] contacts.") (construing federal Administrative Procedure Act)).

[40] Levin, 95 Mich. L. Rev. at 46 (discussing *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), where environmental groups complained that Senator Robert Byrd had "strongly" expressed certain concerns to the Environmental Protection Agency during its development of regulations that would profoundly affect the coal mining industry); *see also House Ethics Manual* at 301 ("Agencies often ask for public comment on proposed regulations. Representatives, like other members of the public, may clearly contribute their opinions.").

This is a permissible constituent service. By not singling out Constituent's case or threatening some form of reprisal, Councilmember is not exerting undue influence over the administrative process.[41]

> **Example 4**: Councilmember calls Agency Director to ask if he can use a particular facility for a weekend community-wide event, when the facility would not otherwise be open for public use. Director refuses the request, citing the overtime expense of having to pay Agency employees to be present and clean the facility after the event. Councilmember, who chairs the committee with oversight jurisdiction over the Agency, writes Director the following week to demand Agency overtime expense data for the past several years.

While Councilmember may have had the same right as any member of the public to request the weekend use of the facility, subject to any applicable restrictions, his demand for Agency overtime data creates an appearance, at least, of reprisal. This is especially true because his letter followed so closely the Director's refusal of his request and not in the usual course of oversight activities.

> **Example 5**: Constituent A is denied a liquor license renewal for her restaurant, even though she has had her license renewed every time in the past. Constituent as no idea why the license was denied this time, so she asks Councilmember P, whom she knows, to request a reconsideration by the Alcoholic Beverage Control Board. The Councilmember contacts the Board's chairperson by email, which he asks to be copied and made part of the record in the renewal matter, and requests a reconsideration under established Board procedures.

This is a permissible constituent service. The Councilmember obviates concerns about exerting undue influence by engaging another upper level official and by looking to the Board to do nothing more than Constituent could have requested by herself. Further, by asking that his email be made part of the record, he avoids *ex parte* communication concerns.

> **Example 6**: Constituent LMN Company calls Councilmember and asserts that one of its competitors, a supplier doing business with the District, is violating a local law that regulates both businesses. Councilmember writes Agency's Enforcement Division and requests an investigation. The Division issues a subpoena to the competitor, requesting certain documents. The competitor moves to quash the subpoena in court, contending that the investigation stems from political pressure instigated by LMN Company.

[41] *See, e.g., Monieson v. Commodity Futures Trading Comm'n*, 996 F.2d 852, 865 (7th Cir. 1993) (noting that, by not taking an interest in a particular case "above all others" and by asking the agency only "to respond to some general questions," senator's letter to agency was "legitimate oversight, not overreaching").

But for the possibility that a District government supplier may be violating the law, there is no other apparent justification for Councilmember's request for an investigation. This example is, on its face, born of the forces at play between two private companies in the marketplace. As such, there is nothing readily in the public interest to justify Councilmember's involvement, and he would be well advised to heed the guidance in the *House Ethics Manual* that "intervening in private matters requires the exercise of particular caution."[42] One of the first things he should ask himself, therefore, is whether taking action on LMN Company's behalf could reasonably appear to operate in his constituent's economic favor. If so, then Rule VI(c)(1) of the Council's Rules of Official Conduct, which prohibits the knowing use of a Councilmember's prestige of office or public position for the private gain of another, would dictate his not getting involved.

Councilmember should also consider how his involvement would play out in court. In *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (*en banc*), for example, the court refused to enforce a subpoena issued by the SEC in an investigation requested by a senator, but remanded on the question of whether the investigation itself had been prompted by legitimate concerns and not merely by the senator's pressure.[43]

F. Introducing and Supporting Legislation

> **Example 1**: Constituent X asks the Mayor to introduce, through the Council Chairman, and support legislation that would operate to benefit Constituent's business. The Mayor knows that Constituent made a one-time contribution in support of an earlier reelection campaign.

Given the separation of time between the contribution and the performance of any legislative functions, as well as the lack of any regular contributions by Constituent, the Mayor can act on the request.

> **Example 2**: Constituent X asks Councilmember Y to introduce and support legislation that would operate to benefit Constituent's business. The Councilmember knows that Constituent has been a regular contributor to his reelection campaigns.

The Councilmember may be able to act on Constituent's request. However, before making a decision to do so, the Councilmember should consider such factors as the amount of money that Constituent has contributed over time, the extent to which taking legislative action requested by

---

[42] *House Ethics Manual* at 313.

[43] *See also U.S. v. American Target Advertising,* 257 F.3d 348 (4th Cir. 2001) (Postal Service subpoena, allegedly issued as the result of pressure by a senator, upheld in the absence of a showing of bad faith by Postal Service); *House Ethics Manual* at 304-305 ("An administrative decision in [the agency investigations] context need not be completely immune from congressional pressure, *provided that the agency has an independent basis for its conclusion.*") (emphasis added)); Levin, 95 Mich. L. Rev. at 51 ("Even where intervention as such is not deemed improper, legislators should be particularly careful in [agency interaction] cases to make sure they have checked out the facts and are not making untoward threats.").

an individual constituent would deviate from the Councilmember's normal practice, and the proximity in time between Constituent's last contribution and the performance of any legislative functions. This is a very sensitive area, and the Councilmember may well decide to refuse the request, especially if to do otherwise would raise some conflict of interest[44] or, worse, the specter of a *quid pro quo* arrangement.

IV. Conclusion

This Opinion does not address all the ways in which elected officials can provide constituent services or the ethical issues that can arise even in those types of services that are covered. Rather, the Opinion is intended to provide general guidance that elected officials can use in gauging the ethical limits of assisting their constituents, especially in agency interactions, or in deciding when not to get involved at all.

To the extent that this Opinion is not exhaustive, elected officials are strongly encouraged to seek advice from BEGA, so that, in any given situation, they can strike the proper balance between their right to provide constituent services and their responsibility to uphold the public trust.

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

1079-001

[44] *See* Levin, 95 Mich. L. Rev. at 73 ("[M]ost legislative ethics regulation is addressed to conflicts of interest between a member's self-interest and her legislative duties, and the manner in which constituent service can be used to promote one's reelection prospects would certainly fit that description.").