

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



Office of Government Ethics

February 28, 2013

VIA EMAIL TO:

Adrian T. Jordan
Analyst
Office of Councilmember Kenyan R. McDuffie, Ward 5
AJordan@dccouncil.us

Dear Mr. Jordan:

This responds to your request for advice concerning whether there are any ethical conflicts between working on the Council and serving as an Advisory Neighborhood Commission (“ANC”) Commissioner.

You state that you currently serve as a Commissioner for ANC 5A, elected to represent Single Member District 5A03. This is a non-partisan office. You are also a staff member for Councilman Kenyan R. McDuffie, who represents Ward 5. As of Council Period 20, your office has been assigned the Committee on Government Operations, which has the Office of Advisory Neighborhood Commissions (“OANC”) under its purview. As a mitigation step, the Committee on Government Operations drafted special committee procedures that address this issue.

I have reviewed the memorandum you sent as an attachment to your request for an advisory opinion. The memorandum, titled *Committee Procedures re: Advisory Neighborhood Commissions*, is the proposed screening methodology to avoid conflicts for Councilmembers, committee employees, and personal Council staff who wish to run for or serve as an ANC Commissioner for a single-member District.

The Committee Procedures memorandum provides that the following procedures must be followed when any matter relating to oversight of the ANCs comes before a Council committee:

1. Only committee or personal staff who are not Advisory Neighborhood Commissioners will be assigned any duties related to oversight of the ANCs.

2. Any staff member assigned duties related to ANCs may not discuss the matter with committee or personal staff who are elected Commissioners¹.
3. The ANC master file will be kept in my personal office away from the master files for the other agencies under our purview.
4. Matters regarding ANC oversight will not be discussed at staff meetings with any staff member who is a Commissioner present.
5. Copies of the memorandum regarding the 'Propriety of a Council employee serving as an ANC Commissioner' from the General Counsel's Office, dated August 15, 2012 will be redistributed to all committee and personal staff.

The Council Code of Official Conduct (the "Code") provides that, "No employee shall engage in outside employment or private activity that conflicts or would appear to conflict with the fair, impartial, and objective performance of the employee's official duties and responsibilities or with the efficient operation of the Council." (Code, Section II(a)(1)). Although your proposed activity technically is not private insofar as a Commissioner is a government official, Section II(a)(1) nonetheless is applicable because serving as an ANC Commissioner is outside the scope of your duties and responsibilities as a Council staff member. Moreover, simply because both functions – ANC Commissioner and Council employee – are governmental does not mean that conflicts are automatically avoided. Indeed, this is somewhat akin to attorneys who move successively from government practice to other employment and, as a result, are disqualified from matters concerning their previous government employer. The attorney ethics rules make clear that for conflicts purposes the successive employer need not be private, but could also be governmental.² This is consistent with more general conflict of interest government ethics principles that recognize the potential for conflicts even within the government, especially where, as here, one governmental entity has oversight responsibilities over another. The remedy in the case of an attorney is the same as you suggest here -- screening of the employee. In fact, the need for screening is even more compelling under your circumstances because, unlike the example of *successive* employment, the activities here are *concurrent*. Therefore, you must ensure that you abide by the guidelines set forth in the Committee Procedures Memorandum dated January 16, 2013 (attached hereto).

Based on the information provided in the memorandum, the proposed screening methodology seems adequate to avoid conflicts of interest that may arise while serving as both a Council staff member and an ANC Commissioner. The memorandum allows for Council staff to recuse themselves from any oversight matters that may directly conflict with their duties as ANC Commissioners. This is an appropriate remedy unless such recusal becomes necessary so frequently that it interferes with your ability to perform your duties as a Council staff member or requires so many of those duties to be performed by other staff that you are, effectively, no longer satisfying the requirements of

¹ "In cases where exercising proper due diligence in the oversight of ANCs requires discussing the issue with a Commissioner who is a member of the Committee or Personal staff those conversations will be documented and recorded in the form of minutes, and those minutes will be kept with the ANCs file." (Committee Procedures Memorandum dated January 16, 2012).

² District of Columbia Rules of Professional Conduct, Rule 1.11 ("Successive Government and Private or Other Employment"), Comment [10].

your position and/or creating an undue burden for others. In that situation, recusal no longer will be the appropriate remedy and another, more suitable remedy, will have to be found.

You specifically mention that Councilmember McDuffie, as the Chair of the Committee on Government Operations, now has oversight of OANC. Because the Committee on Government Operations has numerous agencies under its purview, recusing yourself from matters involving one agency, OANC, does not appear likely to unreasonably interfere with your District government duties because you may be assigned to matters relating to any or all of the other agencies. This will enable you to fulfill your duties as a staff member, without placing an undue burden on others.

The Code also states that, "The information used by an employee engaging in outside employment or activities shall not draw on official data or ideas that are not public information, unless the employee has written authorization from the employee's supervisor to use such information." (Code, Section II(b)(2)). While serving in dual roles, you are prohibited from using non-public information procured in one role for the benefit of the other, unless expressly authorized.

As a Council staff member, you also must ensure that you do not disclose, divulge, or use confidential information, obtained during the course of your duties as a Council staff member, for activities performed while serving as an ANC Commissioner,³ and vice versa. You are prohibited from engaging in ANC-related activities using Council time.⁴ In addition, you are not permitted to use Council resources for your ANC activities, nor direct other Council employees to perform ANC-related activities during regular working hours.⁵ Finally, as a reminder, you are not permitted to use Council resources to further your candidacy for ANC Commissioner or to support or oppose any initiative, referendum, recall measure, or candidate for elected office.⁶

Please note that this advisory opinion is predicated on the facts that you have provided. If you find that serving as an ANC Commissioner does, in fact, present conflicts in the future, you must immediately seek additional guidance from the Board of Ethics and Government Accountability (BEGA).

Please be advised that this advice is provided to you pursuant to section 219 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 § 1-1161.01 *et seq.*, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in

³ See, Code, Section VII(1).

⁴ See, Code Section VI(a)(1).

⁵ Id. at Section VI(a)(1); See also, Code Section VI(a)(2).

⁶ See, Code Section VI(a)(4).

writing, should you wish to do so. We note that in the letter you consent to disclosure of your identity with regard to the publication of the advisory opinion in the D.C. Register and we will publish this opinion accordingly.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Darrin P. Sobin", written over a horizontal line.

DARRIN P. SOBIN

Director of Government Ethics

Board of Ethics and Government Accountability

Attachment: Committee Procedures Memorandum dated January 16, 2013

**Council of the District of Columbia
COMMITTEE ON GOVERNMENT OPERATIONS**

MEMORANDUM

1350 Pennsylvania Avenue, NW, Washington, DC 20004

To: Councilmember Kenyan R. McDuffie
From: Ronan Gulstone, Committee Director
Date: January 16, 2012
Re: Committee Procedures re: Advisory Neighborhood Commissions

Pursuant to your request I have developed the following procedures to be followed when any matter relating to oversight of the Advisory Neighborhood Commissions (ANCs) comes before the Committee.

1. Only committee or personal staff who are not Advisory Neighborhood Commissioners will be assigned any duties related to oversight of the ANCs¹.
2. Any staff member assigned duties related to ANCs may not discuss the matter with committee or personal staff who are elected Commissioners².
3. The ANCs master file will be kept in my personal office away from the master files for the other agencies under our purview.
4. Matters regarding ANCs oversight will not be discussed at staff meetings with any staff member who is a Commissioner present.
5. Copies of the memorandum regarding the "Propriety of a Council employee serving as an ANC Commissioner" from the General Counsel's Office, dated August 15, 2012 will be redistributed to all committee and personal staff.

Cc: Jeannette Mobley, Chief of Staff
Timothy Clark
Adrian Jordan
Stephanie Liotta Atkinson
Barbara Mack
Kate Mitchell
Darrell Jackson
Jon Mandel
Christine Bellfield

¹ For practical purposes this means that only Barbara Mack, Kate Mitchell, or myself will ever work on an ANCs related matter.

² In cases where exercising proper due diligence in the oversight of ANCs requires discussing the issue with a Commissioner who is a member of the Committee or Personal staff those conversations will be documented and recorded in the form of minutes, and those minutes will be kept with the ANCs file.