United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Solicitor
1015 Half Street, SE
Washington, DC 20570

September 29, 2020

The Honorable Robert C. Scott
Chairman
House Committee on Education & Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott:

As Solicitor of the National Labor Relations Board, I am chief legal advisor to the full Board. In that capacity, I am writing in response to the Committee's September 15 subpoena, which seeks public disclosure of internal, pre-decisional staff communications in *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020) ("*Joint Employer Rulemaking*"), and *McDonald's USA, LLC*, Cases 02-CA-093893, *et al*. ("*McDonald's*"). This letter explains the Board's strong deliberative interests precluding public release of these pre-decisional documents, even, respectfully, in response to the Committee's subpoena. The Board has significant concerns that public release of these documents would, as the Supreme Court has recognized, cause "injury to the quality of agency decisions."[1]

1. The Committee has legitimate oversight interests in the Board's ethics program and the Board's use of two temporary paralegals to code public comments in the *Joint Employer Rulemaking*. To that end, it is my understanding that the Board has provided a significant number of responsive documents to the Committee's requests for information about these subjects.

First, in response to queries about the Board's ethics program since 2018, the Board has given the Committee internal directives to the General Counsel in several cases pending in the courts of appeals; Board Members' client lists prior to their appointments; a listing of closed Board cases addressing recusal issues; and a 17-page privilege log of matters in which the Board's Designated Agency Ethics Official ("DAEO") prepared written ethics advice for a Board Member or a Board Member sought DAEO guidance. Similarly, since March 2019, in response to the Committee's requests for documents concerning the temporary paralegals' contract work and functions, the Board has provided the statement of work; bid materials;

[1] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

responsive emails and documents regarding the contracting process; the NLRB contracting officer's determination that the paralegals would not perform an inherently governmental function; and the awarded contract.

In furtherance of its oversight, the Committee has also sought deliberative pre-decisional materials, primarily memos from the NLRB's DAEO to Board Members providing advice on motions to recuse in specific cases. It is also my understanding that the Board and the Committee have successfully accommodated most of the Committee's requests to review these deliberative pre-decisional materials. Specifically, in December 2018 and November 2019, the Board provided Committee staff with *in camera* review of 3 opinions in Board decisions, an internal attorney-client directive from the Board to the General Counsel, and 4 confidential DAEO memoranda. In the November 2019 meeting, the Board also provided *in camera* review of 43 additional DAEO memoranda in closed cases (previously listed on the privilege log). Another *in camera* review of these documents was scheduled for December 12, 2019, but that session was cancelled at the Committee's request. In October and December 2018, the Board arranged in-person briefings with the NLRB's DAEO for Committee staff to discuss ethics matters of concern. Finally, in June 2019, Committee staff reviewed *in camera* legal advice I provided to the Board regarding the hiring of contract paralegals.

After these efforts, the Committee and the Board only remain apart on three documents: a memo from the DAEO providing pre-decisional ethics advice to the Board on the *Joint Employer Rulemaking*; a memo from the DAEO providing pre-decisional ethics advice to Chairman Ring and Member Emanuel regarding motions to recuse in *McDonald's*; and the categories Board staff developed to sort, summarize, and analyze the approximately 29,000 public comments received in the *Joint Employer Rulemaking.* The Board's Office of Congressional and Public Affairs has informed me that, consistent with prior successful accommodations, it has offered *in camera* review of the two DAEO memos and is willing to explore other avenues for addressing the Committee's underlying interests in verifying that the paralegals performed no inherently governmental function.

2. The Board respects the Committee's serious decision to issue a subpoena for the three documents and understands the gravity of that decision. Even in response to a subpoena, however, unrestricted release to the Committee of these pre-decisional documents would undermine the Board's legitimate interest in a confidential deliberative process.

As my predecessor informed the Committee in 2011,[2] the Board holds pre-decisional materials in the strictest of confidence. It hews to this approach out of necessity, not out of choice. The Board's process for deciding cases and promulgating rules is complex. The Board is fortunate to have a dedicated and talented staff of labor law and subject matter experts to assist in review of the matters before it, and it relies on their unadulterated opinions and analyses to effectively administer the National Labor Relations Act. Board staff attorneys prepare extensive materials to assist with Members' consideration of cases and rules. These materials include, as

[2] Letter from William B. Cowen, Solicitor, National Labor Relations Board, to Chairman John Kline, Committee on Education and the Workforce, U.S. House of Representatives at 7-8 (May 25, 2011) ("Cowen Letter"), available at https://www.nlrb.gov/sites/default/files/attachments/pages/node-212/cowen-memo.pdf.

the Board's Solicitor informed the Committee in 2011, legal memoranda from staff attorneys to Board Members, communications related to the drafting of those memoranda, research memoranda related to the factual or legal issues in a matter, and drafts of decisions or regulations.[3] They also include, as the Board has explained, tools to evaluate public comments submitted in response to notices of proposed rulemaking, such as categories for analysis, summaries of comments, legal analyses of comments, and draft proposed and final rules. Finally, the Board may receive guidance, including legal analysis, on ethics and other administrative issues, from the DAEO or other staff.

The only valuable advice, of course, is candid advice. The Board, relying on well-settled judicial precedent, strongly believes that protecting its internal deliberative materials from disclosure is indispensable to receiving candid legal advice. As the D.C. Circuit has explained, protecting deliberative documents from disclosure "assure[s] that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism."[4] The basis for preventing disclosure of deliberative materials

> is the free and uninhibited exchange and communication of opinions, ideas, and points of view—a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.[5]

The Board's interests in protecting its pre-decisional advice from public disclosure are critical to "encourag[ing] the free exchange of ideas during the process of deliberation and policy making."[6]

The District Court for the District of Columbia has recognized Executive Branch agencies' interest in protecting the deliberative process from disclosure, even against Congressional oversight. Borrowing from principles developed under the Freedom of Information Act, the court explained that protecting internal agency deliberations from disclosure to Congressional Committees "encourage[s] 'the frank discussion of legal and policy issues' by ensuring that agencies are not 'forced to operate in a fishbowl.'"[7]

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[3] Cowen Letter at 7-8.
[4] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).
[5] *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (discussing FOIA's deliberative process privilege).
[6] *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (Bazelon, C.J.).
[7] *Committee on Oversight and Government Reform, U.S. House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 111 (D.D.C. 2016) (quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993)).

3. The foregoing principles apply with force to the Board's deliberative interests in the pre-decisional documents sought by the subpoena.

As the Committee is well-aware, federal ethics law, President Trump's Ethics Pledge, and the Standards of Conduct establish numerous complementary standards to evaluate a Board Member's ethical responsibilities. Board Members routinely call upon, and invariably rely upon, the DAEO to provide guidance on the application of mandatory recusal requirements and appearance questions under government ethics law and bias and prejudgment questions under the Due Process clause. These conflict-of-interest questions not only implicate law and regulation, but also may involve consideration of highly sensitive personal and financial information.[8] When parties file motions for recusal in particular cases or in regulatory proceedings, the DAEO's substantive expertise and blunt advice are indispensable to the Board's deliberations and ultimate decision. Given the importance of getting conflict-of-interest questions right, the Board has a powerful interest in making sure that the DAEO provides candid and unfiltered legal guidance, undeterred by the need to write for a public audience. Courts have recognized this interest as well, finding advice from an ethics officer privileged from disclosure.[9]

Release of the categories that framed the Board's review and analysis of public comments in the *Joint Employer Rulemaking* also would discourage the Board's ability to obtain candid legal analysis and advice. Materials summarizing and compiling administrative records and similar documents have long been recognized to implicate deliberative interests worthy of protection.[10] "The work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process as is the later milling by running the grist through the mind of the administrator."[11] The categories Board staff utilized to conduct their initial sort and analysis of the public comments in the *Joint Employer Rulemaking* are part and parcel of the deliberative process.[12]

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[8] Indeed, the Office of Government Ethics' Government-wide Privacy Act notice makes clear that "information necessary for the rendering of ethics counseling, advice or formal advisory opinions, or the resolution of complaints; the actual opinions issued" should be not be disclosed under the Privacy Act, and makes no exception for Congressional investigations. OGE/GOVT-1, Executive Branch Personnel Public Financial Disclosure Reports and Other Name-Retrieved Ethics Program Records, 68 Fed. Reg. 3097 (Jan. 22, 2003); correction published, 68 Fed. Reg. 24,722 (May 8, 2003); correction published, 77 Fed. Reg. 45,353 (Jul. 31, 2012); correction published, 78 Fed. Reg. 73,863 (Dec. 9, 2013).

[9] *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 18-22 (D.D.C. 2004); *Wilson v. U.S. Air Force*, No. CIV.A.5:08CV324JMH, 2009 WL 4782120, at *4–5 (E.D. Ky. Dec. 9, 2009).

[10] *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1535 (D.C. Cir. 1993); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 84-85 (2d Cir. 1979); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 67-71 (D.C. Cir. 1974); *Leopold v. Cent. Intelligence Agency*, 89 F. Supp. 3d 12, 15–25 (D.D.C. 2015).

[11] *Montrose Chemical*, 491 F.2d at 71.

[12] *Id.* (holding that an agency's interest in keeping pre-decisional documents confidential "protect[s] not simply deliberative material, but also the deliberative process of agencies"). To briefly address the Committee's underlying interest in confirming that the paralegals did not perform an inherently governmental function in coding public comments, it is important to note that the Federal Acquisition Regulations ("FAR") sets forth the presumption that "[s]ervices that involve or relate to the development of regulations" are generally not considered to be an inherently governmental function. 48 C.F.R. § 7.503(d)(4). Services in support of the development of regulations may "approach being" inherently governmental. 48 C.F.R. § 7.503(d) (emphasis added). But that occurs only if "the nature of the function, the manner in which the contractor performs the contract, or the manner in which the

Finally, I understand that the Committee has expressed frustration over the Board's unwillingness to share deliberative information, even *in camera*, while the *Joint Employer Rulemaking* and *McDonald's* matters were pending. The Board's position was well-founded, however, given well-settled judicial precedent recognizing that Congressional oversight into pending administrative matters can deny parties the due process to which they are constitutionally entitled. As the Board explained to the Committee 9 years ago, "the courts have recognized that independent agencies conducting adjudications have a constitutional and statutory obligation to resist Congressional influence [in pending matters] in order to protect the due process rights of the litigants."[13] In both adjudication[14] and rulemaking,[15] the courts have recognized the danger of Congressional intrusion in an ongoing proceeding and have struck down agency action upon undue interference. To protect the integrity of its proceedings, the Board has an obligation to the public to avoid undue Congressional influence, or the appearance of influence, on objective administrative decision-making. A core justification for avoiding premature disclosure of proposed policies before they are adopted, to Congress or any other source, is to prevent undue pressure from outside influences that would deny parties their right to fair consideration.[16] The Constitution and the Administrative Procedure Act require administrative agencies to base their decisions on the administrative record and nothing else.

Government administers contractor performance," *id*., "restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products," 48 C.F.R. § 7.503(e). The paralegals played a limited role in the Joint Employer Rulemaking comment review. It is my understanding that Board staff has previously conveyed that the paralegals worked under the direction of an NLRB attorney, did not write summaries of the comments, performed no substantive analysis of the comments, and made no direct recommendations to Board Members. They merely checked off category columns on a spreadsheet. Every relevant public comment received individual review from an NLRB attorney. These tasks were consistent with the contracting officer's March 8, 2019 Determination and Findings that the services sought to be contracted are not inherently governmental under FAR § 7.503. Board staff is willing to continue working with the Committee to address its concerns regarding the contract paralegals' job functions.

[13] Cowen Letter at 8 (citing *Gulf Oil Corporation v. FPC,* 563 F.2d 588, 610-12 (3d Cir. 1977) (court found that Congressional intervention into the administrative process did not influence the agency because the agency did not accede to Congressional requests); *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118, 1980 WL 8157, at *10 (3d Cir. 1981) (table) (ruling that the court would not enforce an administrative subpoena if the agency did nothing to prevent the abuse of its process by congressional influence); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (administrative decision can only be compromised by congressional intervention if "extraneous factors intruded into the calculus of consideration of the individual decisionmaker"); *ATX, Inc. v. U.S. Department of Transportation,* 41 F.3d 1522, 1527 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention)).

[14] *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966) ("When an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.").

[15] *Peter Kiewit Sons'*, 714 F.2d at 170; *D.C. Fed'n of Civic Associations v. Volpe*, 459 F.2d 1231, 1246-48 (D.C. Cir. 1971).

[16] *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Now that the *Joint Employer Rulemaking* and *McDonald's* have closed, the risk of Congressional intrusion on the administrative process is no longer present. Accordingly, as previously mentioned, both DAEO memoranda are now available for the Committee's *in camera* review, consistent with prior successful accommodation efforts.[17]

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For these reasons, the Board has a strong interest in preventing disclosure of deliberative, pre-decisional legal advice, despite its deep respect for the Committee's oversight and subpoena. Guarding its deliberations from public release is essential to sound decision making. Notwithstanding these interests, however, my understanding is that the Board intends to continue working with the Committee to accommodate its legitimate oversight interests.

If you or your staff have any further questions or concerns, please do not hesitate to contact me or Edwin Egee in the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,

Fred B. Jacob
Solicitor

cc: The Honorable Virginia Foxx

[17] The Board believes *in camera* review of deliberative documents is necessary even for closed cases. It is well-settled that an agency's interest in protecting pre-decisional materials does not necessarily cease when a matter is final. The chilling effect of disclosure on subordinates' comfort in providing unvarnished advice to their superiors is real, regardless of whether disclosure occurs before or after a final decision. Subordinates will think twice before putting pen to paper if they believe that their recommendations and analysis could be subject to wide public dissemination. *City of Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247, 1252–53 (4th Cir. 1993) (noting the chilling effect disclosure would have on agency employees "judged not on the basis of their final decisions, but for matters they considered before making up their minds"). Moreover, public release of pre-decisional documents even after a decision becomes final has significant potential to create confusion if initial judgments change during the course of the deliberative process, undermining public confidence in agency decision-making. *Coastal States Gas Corp.*, 617 F.2d at 866.