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Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 12, 2011

Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Dear Mr. Solomon:

As you are aware, the Committee on Oversight and Government Reform is investigating the decision by the National Labor Relations Board (NLRB) to file a Complaint against the Boeing Company (Boeing) for alleged unfair labor practices under the National Labor Relations Act (NLRA).[1] Pursuant to our investigation, on May 12, 2011, the Committee asked you to provide, among other things, documents relating to the Office of General Counsel's investigation of Boeing.[2] Committee staff have also met with your staff and reiterated our request. I appreciate the documents you produced on May 27, 2011, and June 29, 2011; however, production of the various motions filed in the case and hearing transcripts do not comply with the entirety of the request. Therefore, your responses are incomplete.

Your May 27, 2011, letter broadly claims, without support, that the documents requested are "confidential and privileged information, internal deliberative materials, attorney work product, and settlement communications."[3] However, it is the practice of the U.S. House of Representatives, grounded in Congress' constitutional power to investigate, to leave to the congressional committee to decide whether claims of privilege, deliberative process, and attorney work product will be accepted.[4] For the reasons outlined below, the Committee respectfully declines the claims of privilege. Further, your June 29, 2011, letter indicates that you believe a ruling that I made at the Committee's hearing on June 17, 2011, pertaining to questions that would be asked of

[1] *See* Letter from Reps. Darrell Issa, Dennis Ross, and Trey Gowdy to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).
[2] *Id.*
[3] Letter from Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board to Reps. Darell Issa, Dennis Ross, and Trey Gowdy (May 27, 2011).
[4] CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.

you at the hearing, should be extended to the Committee's document request.[5] The ruling you reference was specifically for the purposes of questioning at the hearing, and it does not extend to the document request.

I appreciate the seriousness you give to the due process rights of litigants. As I have previously expressed to you, I too respect these rights. However, it has been recognized that the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."[6] Moreover, there is no legal authority to support your position that the transmission of documents or information to this Committee violates these rights,[7] and your reliance on *ATX Inc. v. U.S. Department of Transportation*,[8] to stand for that proposition is misplaced. The facts of that case are not related to a document request by a congressional committee. Instead, the facts concern letters sent from Members of Congress to the Secretary of Transportation that asked the Secretary to deny an applicant's petition to operate an airline.[9] The facts also involve the testimony of a Member of Congress before an Administrative Law Judge that expressed the same position regarding the petition.[10] The court held that those facts neither "created an appearance of impropriety nor actually affected the outcome of the agency action at issue."[11] The court discussed that "the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision-making process."[12] Here, the Committee is concerned with what transpired *before* the Complaint was filed; receipt of such documents does not affect a decision-making process.

Deliberative process privilege can permit government agencies to withhold documents related to agency policies *from the courts*. Federal agencies also attempt to cite it as a reason to withhold documents from Congress. However, the D.C. Circuit has held that deliberative process privilege is a common law privilege that can be overcome by a showing of need.[13] Here, in order to fulfill the Committee's constitutional obligation to conduct oversight to determine whether the NLRB is properly carrying out its mandate under the NLRA and, in turn, using taxpayer dollars appropriately, the Committee needs all the documents requested. Further, any concern that documents provided to the Committee will waive a future claim of privilege is unwarranted. For example, in *Murphy v. Department of the Army*,[14] the court held that a memorandum withheld by the

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[5] *See* Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (June 29, 2011).
[6] *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964 (5th Cir. 1966).
[7] *See* CRS Memorandum, *Application of Pillsbury Doctrine to Congressional Oversight Inquires*, by Todd Tatelman (May 2011).
[8] *ATX, Inc. v. U.S. Dept. of Transp.*, 41 F.3d 1522 (D.C. Cir. 1994).
[9] *Id.* at 1524-26.
[10] *Id.* at 1524.
[11] *Id.* at 1527.
[12] *Id.*
[13] *See, e.g., In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997).
[14] *Murphy v. Dep't of Army*, 613 F.2d 1151, 1159 (D.C. Cir. 1979).

Department of Army from the plaintiff did not lose its deliberative process privilege by reason of its disclosure to a Member of Congress, even absent an express understanding that the document would remain confidential.

Attorney-client privilege is a judicially-developed policy intended to foster client confidence and encourage full disclosure to an attorney in anticipation of an adversarial setting.[15] However, the need to protect this interest in an investigative setting where a congressional committee is not adjudicating the liberty or property interests of a witness is less compelling.[16] Accordingly, courts have recognized that "only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding."[17] Therefore, attorney-client privilege claims can be overcome by Congress.

Finally, the claim that these materials are privileged attorney work product is also unsubstantiated. Work product claims are invoked by parties in a litigation proceeding.[18] As a congressional committee conducting oversight, the Committee is not involved in such a proceeding. Further, courts have recognized that work product is a qualified privilege which may also be defeated by a sufficient showing of need.[19]

The concept that the investigative power of the legislative branch of government is bound by non-constitutional, common law rules developed by the judicial branch is contrary to the concept of separation of powers.[20] As there is no basis to withhold the outstanding documents, I again request the following documents and information for the time period from January 1, 2009 to present:

1) All documents and communications referring or relating to the Office of General Counsel's investigation of Boeing, including but not limited to all communications between the Office of General Counsel and the National Labor Relations Board. To clarify, this would include, but is not limited to, all documents and communications between anyone in the Executive Office of the President, other federal agencies, or Member of Congress and the Office of General Counsel or the National Labor Relations Board referring or relating to the International Association of Machinists charge against Boeing or the Office of General Counsel's investigation of Boeing.

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[15] CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.
[16] *Id.*
[17] *Hannah v. Larche*, 363 U.S. 420, 445 (1960).
[18] Fed. Rules Civ. Pro.26(b)(3).
[19] *See Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968).
[20] CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.

2) All documents, including emails and call logs, and communications between anyone in the Office of General Counsel or the National Labor Relations Board and the International Association of Machinists.

3) All documents, including emails and call logs, and communications between the Office of General Counsel or the National Labor Relations Board and any representative(s) of the Boeing Company.

If the entirety of the documents requested are not received by 5:00 p.m. on July 26, 2011, the Committee will be required to consider the use of the compulsory process. When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Kristina Moore or Kristin Nelson of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Enclosure

Cc: The Honorable Elijah E. Cummings, Ranking Member

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
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Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

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6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

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17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

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otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

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