



Nov. 15, 2019

LEVIN CENTER AT WAYNE LAW OVERSIGHT TIPS

HANDLING OBJECTIONS TO THE PRODUCTION OF REQUESTED INFORMATION

Jurisdiction

CLAIM: Your request exceeds the jurisdiction of your committee.

RESPONSE: Here is a copy of the committee's jurisdiction; this investigation comes under ___.

Overbroad

CLAIM: Your request is overbroad.

RESPONSE: The courts have held that a Congressional committee has the authority to make very broad requests (see case citations at end), so long as the subject matter is within the committee's jurisdiction. At the same time, we are willing to work with you on initially producing a more limited set of documents or other information to see the extent to which they meet our needs, while reserving the right to obtain all of the requested information at a later date.

For example:

- Request a sample by date (such as emails for 1 month out of the total period requested).
- Request a sample by person (such as emails or memos sent or received by a specified person during the specified period).
- Request a sample by zip code or case file number (such as case files starting in "2").

If refusal continues: The Committee will now have to consider taking additional steps to secure the information, including issuing a subpoena or holding a hearing on your failure to produce.

Expensive and Time Consuming

CLAIM: Your request requires the production of hundreds of thousands of responsive pages that would require over \$1 million and two years to redact and produce.

RESPONSE: We are willing to work with you on initially producing a more limited set of documents to see the extent to which they meet our needs, while reserving the right to obtain all of the requested documents at a later date if necessary. (See examples above.)

Not Relevant

CLAIM: Your request seeks information that is not relevant to your inquiry.

RESPONSE: The courts have held that a Congressional committee has the authority to make very broad requests, so long as the subject matter is within the committee's jurisdiction and has a legislative purpose (see case citations at end). At the same time, we are willing to work with you on the scope of the request. Please identify which items you believe are not relevant or helpful to our inquiry and why, or suggest other documents or topics that would better meet our needs. Please keep in mind that the Committee has the authority to determine what is relevant.

Freedom of Information Act

CLAIM: The information you requested is exempt from disclosure under FOIA.

RESPONSE: Congress is not subject to FOIA. FOIA provides a process for the public, not Congress, to obtain information from the Executive Branch. See 5 U.S.C. § 552(d): FOIA "is not authority to withhold information from Congress."

NOTE: You may want to review an agency's prior FOIA productions to see what it has produced in the past and rebut any objections to producing similar information to Congress.

Privacy Act

CLAIM: The information is protected by the Privacy Act and can't be produced.

RESPONSE: The Privacy Act permits disclosure of protected information without the consent of the individual "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." 5 U.S.C. § 552a(b)(9).

Right to Financial Privacy Act

CLAIM: The information is protected by the Right to Financial Privacy Act.

RESPONSE: A Congressional subpoena may be used to obtain documents from banks without triggering the Right to Financial Privacy Act. See 12 U.S.C. § 3413(d) and (h)(1)(A).

No Names

CLAIM: We don't give out the names of lower level employees as a matter of policy, which is why those names have been redacted from the documents we gave you.

RESPONSE: Congress is not subject to your policy, and that policy does not provide a legal basis for withholding the names, so you are legally obligated to provide them.

If an agency cites the Privacy Act, see above.

No Employee Interviews

CLAIM: We do not make line employees available for interviews, but we would be happy to have a more senior person brief the committee.

RESPONSE: Congress has authority to speak with any of your employees and is not bound by your policy. What is your legal basis for refusing to provide the person we've requested?

Other Proceedings

CLAIM: We can't provide any information due to an ongoing DOJ/SEC/IG/state investigation and potential civil suits. Your request covers sensitive law enforcement data in ongoing proceedings.

RESPONSE: The Supreme Court has held that other legal proceedings, even criminal prosecutions, do not limit the right of Congress to conduct its own investigations. McGrain v. Daugherty, 273 U.S. 135 (1927). We are sensitive to negatively affecting other proceedings and will be as careful as we can, but we are proceeding with our inquiry, and you are legally obligated to produce the requested information.

Grand Jury materials

CLAIM: Your request seeks grand jury material, material under seal, or wiretap information that cannot be produced.

RESPONSE: If the request is directed to a prosecutor or agency conducting the investigation: We understand. You do not have to produce those materials unless we obtain a court order. See Committee on Oversight and Government Reform, United States House of Representatives v. Sessions, No. 12-cv-1332 (D.D.C. Oct. 22, 2018)(granting a court order for the committee to review grand jury materials from the Mueller investigation).

If the request is directed to a person who testified before a grand jury: Testifying before a grand jury does not excuse you from answering a Congressional request. Congress has the right to ask for the information you have, whether or not you provided that information to a grand jury. We will not ask you about the grand jury proceedings as those are, by law, confidential.

Another Agency

CLAIM: We cannot produce the documents until another agency has reviewed its equities.

RESPONSE: Which agency and documents, and why? Is there a Memorandum of Understanding between your agencies that you can provide? Have you given the agency a deadline in writing? Please identify the responsible point of contact for that agency. If delay continues: Your response is overdue, and it is no longer acceptable to blame another agency for the delay.

Can't Find the Documents

CLAIM: We are still trying to locate the records you have requested.

RESPONSE: Who is in charge of the search? What specific actions have been taken to locate the records? We would like to speak with the key person to find out what has been done. Are you willing to provide a sworn affidavit that the records cannot be located?

Common Law Privileges

CLAIM: Your request seeks information protected by the attorney-client privilege, attorney work product, spousal privilege, clergy-communicant privilege, or doctor-patient privilege.

RESPONSE: It is up to Congress to determine the extent to which it recognizes common-law privileges, although we are sensitive to the underlying concerns. If you want to assert the

privilege, you first need to provide us with a privilege log which lists all the documents you are withholding, the privileges you are asserting, and why each privilege applies.

Confidential Informant

CLAIM: Your request seeks information that would disclose the identity of a confidential informant.

RESPONSE: Can you ask the confidential source if they would be willing to talk to us? Could we talk on the telephone or by email, if not in person? Let's talk about how we can get the substantive information we need without outing anyone.

OR

RESPONSE: Even if that's true, you need to provide the requested information. We are sensitive to the confidentiality issue and will be careful in how we treat the information. If a decision is made to make the informant's identity public, we will give you and the informant an opportunity first to explain why we shouldn't go ahead. The final decision will be made by the Committee. But there is no legal basis for withholding the information.

Confidential business information

CLAIM: Your request would require us to disclose trade secrets, sensitive business information, commercial data, or information subject to a confidentiality agreement.

RESPONSE: That is not a legal basis for withholding the information from Congress. You are legally obligated to produce it. If a decision is made to use the information publicly, you will be given an opportunity first to explain why we should not go ahead. The final decision will be made by the Committee. [Possible addition: We are sensitive to your concerns and have a good record of not disclosing that type of information needlessly.]

Classified Information

CLAIM: Your request touches on intelligence sources and methods, which are the exclusive province of the intelligence committees.

RESPONSE: You are mistaken; there is no law or rule that restricts classified information to the intelligence committees. Staffer X has clearance, and you can submit the classified information to the Senate/House security office to ensure it is protected.

Self-Incrimination

CLAIM: Your request violates my client's Fifth Amendment right against self-incrimination.

RESPONSE: If the dispute is over documents: Fifth Amendment rights against self-incrimination are narrow and apply only in specific circumstances involved in producing documents in response to a subpoena. If you would like to submit a letter or memo with your legal analysis and case cites, we will consider your assertion of the Fifth Amendment and get back to you.

OR

If the dispute is over an interview or hearing testimony: Is your client officially asserting a Fifth Amendment right not to speak with us or testify at a hearing? If so, you need to put it in writing in a letter to the Committee. Even then, the Committee may call your client as a witness at a hearing. If that happens, we will talk to you more about what your client can say in that setting and still preserve their right not to answer questions at the hearing.

NOTE: If a witness asserts a Fifth Amendment right but the committee considers the testimony to be critical, the committee can consider a grant of immunity. A grant of immunity from criminal prosecution requires approval by two-thirds of the full committee, and waiting up to 30 days after notifying the Department of Justice under 18 U.S.C. § 6005. Immunity is then officially granted by a court as a purely ministerial act. Immunity grants are very rare and should be considered only after conferring with Senate/House counsel and the relevant prosecutors.

First Amendment

CLAIM: Your request would violate my client's First Amendment rights not to disclose the information.

RESPONSE: To assert a First Amendment right against providing the requested information, you need to submit a letter or memo with your legal analysis and case cites. We will consider your assertion and get back to you.

Executive Branch confidentiality

CLAIM: While we recognize Congress' oversight interest, your request would raise executive branch confidentiality problems, and other sources of information can meet your needs.

RESPONSE: Congress has the authority to obtain the requested information, and you have not cited any legal authority to withhold it. We are willing to discuss obtaining the information from other sources, but we do not relinquish our right to seek the information from you directly.

Deliberative Process/Executive Privilege

CLAIM: Your request raises significant executive branch confidentiality interests that implicate deliberative process, Presidential communications, executive privilege, state secrets, national security information, adjudicative due process rights, or diplomatic relations.

RESPONSE: If you are asserting a privilege, you need to prepare a privilege log which lists all the documents you are withholding, the exact privileges you are asserting, and why each applies. On the deliberative process privilege, as you know, the courts have held the privilege disappears when there is any reason to believe government misconduct has occurred. In re Sealed Case, 121 F.3d 729 (DC Cir. 1997). The courts have also held that the privilege needs to be asserted on a document-by-document basis. On the Presidential communications privilege, the courts have held that the privilege applies only to the President and key presidential advisers. Id.

NOTE: Two leading cases on deliberative process, from the House Fast and Furious investigation, are Committee on Oversight and Government Reform, United States House of Representatives v. Holder, No. 12-cv-1332, 2014 WL 12662665 (D.D.C. Aug. 20, 2014); and Committee on Oversight and Government Reform, United States House of Representatives v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

Section 6103

CLAIM: The requested information cannot be produced, because it is confidential taxpayer return information, and we are barred by 26 U.S.C. § 6103 from producing it.

RESPONSE: If it is the IRS: Please provide a letter or memo asserting the claim, identifying the documents, and explaining why Section 6103 applies with case cites.

NOTE: If the IRS determines it is barred by Section 6103 from producing the information, it would probably require legal proceedings to overturn the decision. The Senate Finance and Ways and Means Committees have special rules to obtain taxpayer return information.

If it is another agency or individual: Only the IRS is subject to and can assert Section 6103 as a reason not to produce. If you have the requested information, you must produce it.

Federalism

CLAIM: Your request would violate federalism by calling for information that would impede the autonomy and essential functions of state government.

RESPONSE: We are unaware of any federalism doctrine that provides a legal basis for withholding information from Congress.

Records Preservation

CLAIM: Your committee has no authority to issue a records preservation order.

RESPONSE: Our committee is conducting an official investigation into ___. Any willful destruction of records may open you up to criminal obstruction or contempt proceedings. You have been warned.

BACKGROUND MATERIALS:

Broad subpoena authority

McGrain v. Daugherty, 273 U.S. 135 (1927):

“[T]he power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function. ... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”

Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir.), cert. denied, 303 U.S. 665 (1938):

“A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad.”

Watkins v. United States, 354 US 178, 187 (1957):

“The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. ... There is no general authority to expose the private affairs of individuals without justifications in terms of the functions of the Congress ... Nor is the Congress a law enforcement or trial agency. ... No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.”

Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 504, n. 15 (1975)(quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)):

“The scope of [Congress’] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”

No Lying to Congress

18 U.S.C. § 1001 states that anyone who “knowingly and willfully ... falsifies, conceals, or covers up ... a material fact” or “makes any materially false, fictitious, or fraudulent statement,” or makes or uses “any false writing” in a matter within the jurisdiction of Congress can be fined, imprisoned for up to 5 years (8 years for terrorism), or both. In other words, a person who lies to a Senator, Representative, or Congressional staffer during an authorized “investigation or review,” including in a deposition, interview, telephone call, letter, or email, risks prosecution.

Perjury

18 U.S.C. § 1621 makes a misstatement of a “material matter” under oath punishable with a fine, imprisonment of not more than five years, or both.

Congressional Obstruction Statute

18 U.S.C. § 1505 makes it a crime for anyone to “corruptly” or through the use of “any threatening letter or communication” to “influence, obstruct, or impede” a Congressional inquiry or investigation. Violating the statute is punishable with a fine, imprisonment of not more than five years, or both.

Congressional Criminal Contempt Statute

2 U.S.C. § 192 authorizes Congress to find that a person who was summoned as a “witness” before a house of Congress, and refused to appear, answer questions, or produce requested “papers,” is guilty of a criminal misdemeanor, and subject to a monetary fine or imprisonment of not more than one year.

Senate Civil Contempt Statutes

2 U.S.C. §§ 288b(b) and 288d, and 28 U.S.C. § 1365 authorize the filing of a civil suit in the U.S. District Court for the District of Columbia against anyone resisting a Senate subpoena. Typically, the civil lawsuit is filed by Senate legal counsel after a Senate authorizing resolution. Civil contempt proceedings can be brought against anyone other than an Executive Branch officer or employee (who enjoy a statutory exemption). Defendants found in contempt are generally imprisoned until they comply with the Congressional subpoena; in theory, they could also be fined. No comparable statute applies to House civil contempt proceedings.

For more Information:

When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry, by Morton Rosenberg (Constitution Project 2017), <https://constitutionproject.org/documents/when-congress-comes-calling-2/>.

The Art of Congressional Oversight: A User's Guide to Doing It Right, Project On Government Oversight (2015), <http://www.pogo.org/coi/resources/the-art-of-congressional-oversight.html?referrer=http://pogo.org/coi/?referrer=https://www.google.com/>.

Congressional Oversight Manual, Congressional Research Service, CRS No. 7-5700, RL30240 (12/19/2014).

Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, Congressional Research Service, Report No. RL34097 (5/14/2014).

Congressional Investigations and Oversight, Lance Cole and Stanley M. Brand (Carolina Academic Press 2011).

Defining Congressional Oversight and Measuring its Effectiveness, by former U.S. Sen. Carl Levin and Elise J. Bean (3/2018), https://law.wayne.edu/pdfs/bean-levin_article_07-13-18.pdf.

Financial Exposure: Carl Levin's Senate Investigations into Finance and Tax Abuse, by Elise J. Bean (Palgrave MacMillan 2018).