

December 23, 2013

The Honorable Barbara Boxer
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Madam Chairman:

I write in further response to your letter of November 26, 2013, regarding the U.S. Nuclear Regulatory Commission's (NRC) production of documents requested by individual members of Congress or by committees. As stated in the prior response to your letter, I would welcome the opportunity to meet with you - along with one of my Commission colleagues - to discuss our recent revisions to the Internal Commission Procedures. We believe that the framework discussed below will serve as a constructive starting point for the meeting we have requested. Cooperation with our Congressional oversight committees is essential and an important agency priority reflected in longstanding agency policy and practice.

In recent weeks, the Commission has provided briefings to Congressional committees and several personal offices discussing the legal and policy background for this framework. The Commission has committed to look at its framework in light of the feedback it has received from Congress. We understand that in advance of any meeting you would like our legal position on the matters you raise.

Insofar as your letter and its appendices raise concerns about the provision of sensitive materials, the NRC acknowledges its obligation under section 303 of the Atomic Energy Act, as amended, to keep its oversight committees currently informed of its activities and to provide them with requested information, and we are committed to cooperating with these committees to ensure that they can carry out their obligations. At the same time, the Constitution establishes a separation of responsibilities between the executive and legislative branches and a duty on each branch to work to accommodate each other's needs and interests. *See United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977) ("Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme."). Pertinent to these matters, the NRC is an independent regulatory agency that is part of the executive branch. *See In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("[T]he Nuclear Regulatory Commission [is an] agency in the Executive Branch.")

These separation of powers considerations are heightened in the rare circumstance when a Congressional committee seeks particularly sensitive information, such as pre-decisional documents in agency formal adjudications or documents related to pending investigations or enforcement actions. The courts have stressed that agency actions in these matters not be the product of Congressional interference. See, e.g., *Pillsbury Co. v. FTC*, 354 F. 2d 952 (5th Cir. 1966) (addressing Congressional intercession into agency adjudicatory proceedings); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took the appropriate steps to insulate itself from Congressional intervention); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555 (W.D. Pa. 1979) (SEC's decision to investigate should not be rooted in third-party political pressure), *vacated and remanded*, 648 F.2d 118 (3rd Cir. 1981) (en banc). Separation of powers concerns are similarly heightened when Congress seeks documents that reflect an agency's internal deliberations over whether the provision of certain materials to Congress might impair the agency's institutional independence or statutory mission. More generally, an agency's ability to fulfill its statutory mission – whether in an investigatory, adjudicatory, or enforcement context – can be significantly compromised if its decisionmakers, or those providing advice to decisionmakers, are concerned about the public disclosure of their deliberative communications and, for that reason, do not communicate freely or candidly during the decisionmaking process.

For these reasons, and consistent with the constitutional principles reflected in the case law, our expectation and practice (and, again, the expectation and practice of the other Federal agencies with which we have consulted) is that committee requests for sensitive documents should be accompanied by discussions between the committee and the agency. These discussions should be aimed toward providing Congress with the information it needs, while preserving the appearance of fairness and impartiality as the agency carries out important adjudicatory, investigatory and enforcement functions. The Commission has engaged in discussions of this type with its oversight committees during its four decades of existence, and, except in extremely rare instances, mutually acceptable accommodations have been reached. We believe that the circumstances that have led to the Committee's current request – in which the Committee seeks information related to the replacement of steam generators at the San Onofre Nuclear Generation Station, while this matter is the subject of an ongoing investigation – is well-suited for discussions of this type.

The constitutionally-based accommodation process between the legislative and executive branches is important background for our policy regarding requests from individual Members of Congress. Each Chamber of Congress exercises its investigative and oversight authority through delegations of its authority to its committees, which in turn typically delegate their authority to their chairmen. Accordingly, the executive branch works to accommodate congressional oversight needs by responding to requests from committee chairmen. This policy does not extend to requests from individual Members because they do not exercise Congress' constitutional oversight authority. See *Morton Rosenberg, Cong. Research Serv., Rpt 95-464A, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* 56 (Apr. 7, 1995) (“[N]o judicial precedent has recognized a right in an individual member, other than the chair of a committee, to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair.”); *Leach v. RTC*, 860 F. Supp. 868 (D.D.C. 1994) (dismissing FOIA suit by individual Member because “it [was] clear ... that [the] complaint derives solely from [the Member's] failure to persuade his

colleagues to authorize his request for the documents in question, and that the [Member] thus has a clear 'collegial remedy' capable of affording him 'substantial relief'").

Again, I assure you that the Commission is prepared to work with the Committee to provide it with the information it needs to carry out its important legislative and oversight responsibilities. We look forward to the opportunity to meet with you to discuss these matters more fully.

Sincerely,

/RA/

Allison M. Macfarlane

cc: Senator David Vitter