

Guidance for Handling Confidential Information During Pre-Decisional Involvement (PDI) Discussions

Pre-decisional Involvement (PDI) discussions may from time-to-time benefit from the disclosure of information that management considers to be confidential or sensitive in nature. In such cases, management and labor representatives are encouraged to communicate their interests and expectations regarding that information. To the extent labor and management have developed practical safeguards to manage confidential information in other contexts (e.g. consultation, collective bargaining or grievances) they may choose to apply them to PDI discussions generally, or may develop arrangements to meet their interests and expectations regarding disclosure of confidential information if no existing arrangements have already been established.

This document is not intended to address the handling of confidential information in PDI discussions generally. This document and the accompanying “Agreement Template” address a narrow subset of potential PDI discussions – those concerning budget-related issues – that have unique and specific confidentiality considerations arising out of OMB Circular A-11. The guidance which follows and the accompanying “Agreement Template” are solely intended to facilitate budget-related PDI discussions.

Budget Related Issues

This guidance is provided to assist agencies and labor organizations in the event they determine that disclosure of confidential information would facilitate PDI discussion of budget-related issues under E. O. 13522, *Creating Labor-Management Forums to Improve Delivery of Government Services*. Budget-related issues may include, for example, organizational, workforce or work process restructuring, when these issues are considered as a part of budget development, planning and implementation. In the event PDI discussions regarding these issues involve disclosure of confidential information, it is important that the parties to the discussion reach a shared understanding about what information is confidential and how confidentiality will be preserved. Specifically, this guidance assists agency and labor organization representatives who determine that a written confidentiality agreement would promote the PDI process. A written confidentiality agreement is not a requirement, but one of many tools agencies and labor organizations may choose to use to facilitate PDI discussions that involve disclosure of confidential information.

Executive Order 13522 instructs agencies to:

[A]llow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106; provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. 7106(b)(1), through discussions in its labor-management forums . . .
E.O. 13522, Section 3 (a)(ii)

In furtherance of this provision, Co-Chairs of the National Council on Federal Labor-Management Relations (National Council) issued additional guidance in a memorandum dated January 19, 2011 and identified the three key phases in the agency budgeting process during which PDI may occur:

[I]t is imperative that management immediately engage unions [in PDI] on an ongoing basis consistent with the spirit and intent of the Executive Order.

Agencies should develop a shared understanding with employee representatives on how the pre-decisional process can best be utilized for their workplace. Generally, agencies should begin the pre-decisional process as soon as possible after they determine that some decision or action is needed to address a particular issue or problem. Pre-decisional discussions, by their nature, should be conducted confidentially among the parties to the discussions. This confidentiality is an essential ingredient in building the environment of mutual trust and respect necessary for the honest exchange of views and collaboration. Ultimately, the goal is to allow employees, through their elected labor representatives, to have meaningful input which results in better quality decision-making, more support for decisions, and timelier implementation.

One example of an opportunity for pre-decisional involvement is the annual budget process. The Executive Order explicitly provides that nothing in the order affects the functions of the OMB Director related to budgetary proposals. Additionally, there are restrictions on the release of the nature, amounts, and underlying budget materials prior to the budget being submitted to Congress. However, recognizing that this memorandum should not be construed to override any OMB or agency-specific policies on the budget process, employee representatives can still play a role in this process, when practicable.

During the budget development phase, before the President submits the Budget to Congress, management develops proposed funding levels and draft programmatic narratives to be included in the budget document. At this stage, management has the option to solicit input from employee representatives. If management chooses to solicit such input, it should be limited to high-level discussions of goals and strategies. Moreover, to the extent that anyone receives confidential pre-decisional, deliberative information during this budget-development period, such information remains subject to the long-standing OMB policies on preserving the confidentiality of the deliberations that lead to the President's budget decisions.

During the period when Congress is considering the President's Budget proposal, pre-decisional involvement can take the form of employee representatives providing input to management on possible ways of implementing the President's proposals. Additionally, when the agency's appropriations have been enacted into law, employee representatives may provide input to management on the use of budgetary resources to carry out its mission.

While pre-decisional input does not bind or obligate an agency to reach a specific decision or take a specific action, opportunities for pre-decisional involvement are valuable sources of input from employees through their representatives. This supplement to the bargaining process can be beneficial to both parties as it may identify and address unexplored ideas, or expedite any bargaining that may be required as a result of budget execution initiatives.

This guidance provided by the National Council should be read in conjunction with OMB Circular A-11, Sections 22.1 and 22.2, which prohibits the sharing of certain confidential information during an agency's budget development phase:

[t]he nature and amounts of the President's decisions and underlying materials are confidential. Do not release the President's decisions outside of your agency until the Budget is transmitted to the Congress. The materials underlying those decisions may not be released at any time, except in accordance with this section. In addition, outyear discretionary data is considered pre-decisional [as defined by OMB Circular A-11 and accompanying documents] and may not be released without prior OMB approval.

Presidential decisions on current and budget year estimates (other than forecasts of items that will be transmitted formally later), both in total and in detail, become the "proposed appropriations" as that term is used in the Budget and Accounting Act of 1921, as amended, and must be justified by your agency. Do not release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside the Executive Branch, except in accordance with this section.

The Executive Branch communications that led to the President's budgetary decisions will not be disclosed either by the agencies or by those who have prepared the budget. In addition, agency justifications provided to OMB and any agency future year plans or long-range estimates will not be furnished to anyone outside the Executive Branch, except in accordance with this section.

OMB Memorandum M-01-17, dated April 25, 2001, provides the following regarding the restrictions on release of confidential pre-decisional budget information:

Since the Budget has been formally submitted, it is important that the Executive Branch's internal deliberations regarding the various issues and options that were considered in the process leading to the President's decisions should remain a matter of internal record. Examples of confidential budget information are an agency component's budget requests to the agency, the agency's budget requests to OMB, and OMB's passback to the agency.

Thus, although the memorandum from the National Council discusses pre-decisional involvement regarding budget matters, that memorandum must be read in accordance with the budget confidentiality provisions of OMB Circular A-11, which prohibits the release of certain budget information. Therefore, the scope of confidential information that agencies may disclose is limited by OMB Circular A-11. Further, the focus of PDI discussions depends on the budget

phase in which it takes place. The chart below illustrates this framework for budget-related PDI discussions.

Phase	Focus	Information Disclosure
Budget Development	Input from the unions with discussion of high level goals and strategies	OMB Circular A-11 prohibits disclosure of agency budget development information (prohibited at all phases of the budget)
Planning - congressional consideration	Input from the unions on possible implementation plans	Agency discretion
Implementation - FY appropriations enacted	Input from the unions on use of budgetary resources	Agency discretion

The following points address practical issues relating to sharing releasable confidential information to facilitate pre-decisional involvement regarding budget development, planning and implementation, including proposed organizational, workforce, or work process restructuring. This guidance does not contemplate, and does not provide a basis for, disclosing information the disclosure of which is prohibited by policy, regulation or law, e.g. classified information, or, as stated above, by OMB Circular A-11.

1. For PDI purposes, agency information is confidential if so designated by the agency. Similarly, the union may designate as confidential PDI information that it provides to an agency.
2. The agency must *inform* the union (and the union must inform the agency)—before or simultaneously with transmission of particular information—that the information is confidential. If the disclosing party fails to do this, and only later informs the other party that information previously provided is confidential, the parties will take immediate steps to protect the confidentiality of the information once the disclosure is made.
3. Written information should state on each page that it is confidential, unless this is impractical. In cases where it is impractical to place such an indicator on each page, the first page should be marked budget confidential. If the first page of a document is marked confidential, the entirety of the document should be treated as being confidential.
4. The parties should be alert to the possibility that a party providing information might mistakenly fail to say that it is confidential. Receiving parties should contact disclosing parties if they have reason to believe there may have been a mistake in this regard.
5. The union must restrict disclosure of confidential agency information to only a *limited number* of persons. Similarly, agencies must restrict disclosure of union confidential information to a limited number of agency officials.

6. Agencies and unions will limit disclosure of confidential information to those who actively participate in the PDI to which the information pertains, including legal counsel, if necessary, consistent with agency policy and the parties' agreement on sharing confidential information. This normally will be a small number of persons. In no case will the PDI process and PDI participants violate the restrictions of OMB Circular A-11. All nondisclosure agreements relating to the PDI process will contain the following language: "Nothing in this agreement or the PDI process shall be construed by the agency or union to override any OMB or agency-specific policies on restrictions pertaining to the release of the nature, amounts, and underlying budget materials related to budgetary proposals, supporting budget documentation, or input provided during the budget development period, prior to the budget being submitted to Congress. All participants in the PDI process, to include nongovernment employees, voluntarily agree not to disclose confidential information and to abide by the OMB and agency-specific policies."

7. The union and agency should reach agreement on the precise number and identity of individuals (e.g. union officers, employees, members and legal counsel) to whom the union may disclose confidential agency information before engaging on PDI on budget matters as provided for in the PDI guidance, and prior to any further disclosure deemed necessary to individuals not engaged in the PDI. This guidance is not intended to interfere with the union's right to select its representative. Recognizing that this guidance is general in nature and that agencies engaged may have more restrictive guidelines on the release of confidential information, organizations should consult with their agency counsel prior to the release of any confidential budget information.

8. The receiving party must inform each person to whom it discloses confidential information of the identities of the persons in receipt of the same confidential information with whom she or he may communicate about the PDI matter to which the confidential information pertains, and must instruct them not to disclose the confidential information to other persons.

9. The parties should discuss what may be said publicly about PDI matters, so that PDI participants have a common understanding of what they may say in periodic reports (e.g., a union participants' reports to officers and represented employees), and in response to questions, while maintaining the confidential information.

10. Both during the PDI process and after it has been completed and the agency has announced a decision or taken other public action, it is in the parties' mutual interest to communicate to agency employees the value of PDI and the results that can be achieved, if confidentiality is preserved during PDI process. Consistent with the union's representational responsibility, the union should be allowed to inform represented employees about the union's participation and input during the PDI process.

11. The parties may enter into a written confidentiality agreement, and may also require that each recipient of confidential information sign the agreement. Accompanying this Guidance is a sample agreement template implementing the principles articulated in this guidance. This template is provided as a resource that can be modified by the parties to address their particular requirements and circumstances.