

BEFORE THE CHAIRMAN OF THE  
NATIONAL LABOR RELATIONS BOARD

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ON APPEAL FROM THE FOIA DIVISION

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APPELLANT AMERICANS FOR LIMITED GOVERNMENT'S FREEDOM OF  
INFORMATION ACT APPEAL REGARDING DENIAL OF REQUEST FOR FEE  
WAIVER

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 2

TABLE OF AUTHORITIES..... 3

STATEMENT OF FACTS .....4

SUMMARY OF THE ARGUMENT..... 5

ARGUMENT..... 5

    I.    APPELLANT’S REQUEST MEETS THE CRITERIA FOR A FEE WAIVER IN THAT DISCLOSURE OF THE INFORMATION IS IN THE PUBLIC INTEREST BECAUSE IT IS LIKELY TO CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT..... 7

        A.    THE INFORMATION SOUGHT BY APPELLANT’S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE NLRB ..... 7

        B.    THE DISCLOSURE OF THE INFORMATION SOUGHT BY THE APPELLANT IS LIKELY TO CONTRIBUTE TO AN UNDERSTANDING OF THE NLRB’S OPERATIONS OR ACTIVITIES..... 8

        C.    THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE TO THE PUBLIC UNDERSTANDING AS OPPOSED TO THE INDIVIDUAL UNDERSTANDING OF THE REQUESTER OR A NARROW SEGMENT OF THE INTERESTED PERSONS..... 9

        D.    THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING ..... 10

    II.    THE DISCLOSURE OF THE INFORMATION REQUESTED IS NOT PRIMARILY IN THE COMMERCIAL INTEREST OF THE APPELLANT, AND THUS A FEE WAIVER SHOULD BE GRANTED..... 10

        A.    APPELLANT DOES NOT HAVE A COMMERCIAL INTEREST IN THE DISCLOSURE OF THE REQUESTED DOCUMENTS AND SHOULD THEREFORE BE GRANTED A FEE WAIVER 11

        B.    ANY IDENTIFIED COMMERCIAL INTEREST IS SUFFICIENTLY SMALL IN COMPARISON WITH THE PUBLIC’S INTEREST IN DISCLOSURE ..... 12

    III.    APPELLANT IS A REPRESENTATIVE OF THE NEWS MEDIA AS DESCRIBED IN NLRB FREEDOM OF INFORMATION ACT MANUAL, AND AS SUCH, APPELLANT’S REQUEST FOR A FEE WAIVER SHOULD BE GRANTED ..... 12

CONCLUSION..... 13

## TABLE OF AUTHORITIES

### Cases

Eudey v. Central Intelligence Agency, 478 F.Supp. 1175, 1177 (D.D.C. 1979) ..... 11

### Statutes

5 U.S.C. § 552 ..... 4

### Other Authorities

Freedom of Information Act, Attorney General Memorandum for Heads of Executive  
Departments and Agencies (March 19, 2009) ..... 7

Freedom of Information Act, Memorandum for the Heads of Executive Departments  
and Agencies, 74 Fed. Reg. 4,683 (January 26, 2009)..... 6

NLRB Freedom of Information Act Manual, NLRB, Revised Oct. 2011. .... passim

## STATEMENT OF FACTS

Appellant, Americans for Limited Government, (Appellant) filed a request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. with the National Labor Relations Board (NLRB) on June 19, 2012. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production of the following records created on or after September 1, 2010 regarding the NLRB's concerted activity initiative:

1. Costs associated with building the website;
2. Costs associated with producing, printing, and distributing the brochures; and
3. List of all "worker-advocacy groups" with which the NLRB is working on this initiative.

In its FOIA request Appellant sought a fee waiver due to the public benefit that disclosing these records will provide.

On July 31, 2012, NLRB Senior Attorney, Michele Wolin via a phone conversation, verbally stated that the NLRB was denying Appellant's fee waiver request based on an inadequate analysis of Appellant's right to a fee waiver. She requested a more thorough analysis in the form of an appeal as soon as possible.

## SUMMARY OF THE ARGUMENT

Appellant is entitled to a fee waiver because the records sought will significantly increase the public understanding of the operations or activities of the National Labor Relations Board and thus granting the fee waiver is in the public interest. Further, Appellant does not have a commercial interest in the records and is a “representative of news media” as described in NLRB Freedom of Information Act Manual.<sup>1</sup>

## ARGUMENT

### **THE FEE WAIVER PROVISIONS FOUND IN THE FOIA EXIST TO FURTHER THE PUBLIC UNDERSTANDING OF THE GOVERNMENT AND ARE TO BE LIBERALLY CONSTRUED**

The information sought by Appellant in its FOIA request concerns the operations or activities of the National Labor Relations Board and will be used to better the public’s understanding of how it is spending the taxpayers’ money and what worker advocacy groups it is working with on this project. Also, disclosure of the information is not primarily in the commercial interest of the requester. As such the public good that will occur in disclosing the information sought in and of itself weighs strongly in favor of a fee waiver.

Further, the NLRB should be reminded of the policy in favor of disclosure mandated by President Barack Obama on January 26, 2009. President Obama

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<sup>1</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. A(2)(b), pg. 5, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

instructed the executive departments and agencies to operate with a presumption towards disclosure. On this point the President stated as follows:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sun-light is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.<sup>2</sup>

These instructions from the President were followed up by further instructions from Attorney General Eric Holder on March 19, 2009. The Attorney General stated as follows:

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a

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<sup>2</sup> Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (January 26, 2009).

statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.<sup>3</sup>

In further support of its argument Appellant submits the following further analysis of the factors found in the NLRB's FOIA regulation related to fee waivers.

**I. APPELLANT'S REQUEST MEETS THE CRITERIA FOR A FEE WAIVER IN THAT DISCLOSURE OF THE INFORMATION IS IN THE PUBLIC INTEREST BECAUSE IT IS LIKELY TO CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT**

The NLRB's Freedom of Information Act Manual, Chapter XV, Section D(1) lists four factors that are to be used in determining whether a requestor has met the requirements for a waiver of fees, i.e. contributes to the public understanding. As discussed below, Appellant meets these factors, and as such qualifies for a fee waiver.

**A. THE INFORMATION SOUGHT BY APPELLANT'S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE NLRB**

The first factor in whether a fee waiver should be granted is, "Whether the subject matter of the requested records concerns the operations or activities of the government."<sup>4</sup> The subject of Appellant's request relates solely to the NLRB's spending of government money and asks which "worker-advocacy groups" it is working with on this project. As such, this subject concerns the operations and activities of the NLRB.

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<sup>3</sup> Freedom of Information Act, Attorney General Memorandum for Heads of Executive Departments and Agencies (March 19, 2009).

<sup>4</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(a)(1), pg. 20, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

**B. THE DISCLOSURE OF THE INFORMATION SOUGHT BY THE APPELLANT IS LIKELY TO CONTRIBUTE TO AN UNDERSTANDING OF THE NLRB'S OPERATIONS OR ACTIVITIES**

The second factor is, "Whether the disclosure is likely to contribute to an understanding of government operations or activities."<sup>5</sup> These expenditures have not previously been reported on in the public domain. As such the public has little or no current understanding of them. Therefore any disclosure of these records will increase the public's understanding of how the NLRB is spending its budget and which worker advocacy groups it is interacting with on this project. Upon receipt of the requested records Appellant will perform extensive analysis of these records. We have an experienced research and legal staff who will carefully scrutinize any responsive records provided. After completing that analysis Appellant will publish its findings using the media described below. The records sought will significantly improve the understanding of the public as to the operation and activities of the NLRB in this area.

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<sup>5</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(a)(2), pg. 21, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).



**C. THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE TO THE PUBLIC UNDERSTANDING AS OPPOSED TO THE INDIVIDUAL UNDERSTANDING OF THE REQUESTER OR A NARROW SEGMENT OF THE INTERESTED PERSONS**

The third factor is, “Whether disclosure of the requested information will contribute to public understanding.”<sup>6</sup> Appellant regularly publishes information on the activities, structure, and operations of the federal government. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which the Appellant regularly provides to the public through its publications and website, [www.getliberty.org](http://www.getliberty.org). By way of example, on a typical day our materials are read by over 70,000 individuals. Included in that number are 9,000 editors and publishers, 8,000 bloggers, 4,000 T.V. staff, 5,000 radio talk show personnel, 3,000 political journalists, and 3,000 key individuals in positions within Washington, DC. Many of these 70,000 individuals and their respective entities republish our materials which we provide free of charge and without copyright restriction, allowing for wide dispersal of these materials. Additionally, Appellant’s staff are regular guests on national T.V. and radio media outlets speaking to hundreds of thousands of individuals at a time regarding the activities of the federal government. The records received from the NLRB will be disseminated through these distribution channels. As such, the disclosure of the requested information will contribute to the general public understanding as opposed to an individual understanding of the Appellant or a narrow segment of interested persons.

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<sup>6</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(a)(3), pg. 22, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

**D. THE DISCLOSURE OF THE REQUESTED INFORMATION WILL CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING**

The final factor is, “Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.”<sup>7</sup> As noted above, records of these interactions have not been reported in the public domain. Appellant has an experienced research and legal staff who will carefully scrutinize any responsive records provided. Appellant will perform analysis of the expenditures found in these records to better understand how the NLRB is spending money on the new website and interacting with worker advocacy organizations. Since the public has little, if any, present understanding of how the NLRB is conducting these interactions, any further information published via the methods described above will constitute a significant increase in the public understanding of this issue.

**II. THE DISCLOSURE OF THE INFORMATION REQUESTED IS NOT PRIMARILY IN THE COMMERCIAL INTEREST OF THE APPELLANT, AND THUS A FEE WAIVER SHOULD BE GRANTED**

In addition to meeting the criteria laid out in the NLRB Freedom of Information Act Manual, Chapter XV, Section D(1)(a), the ALG also qualifies for a fee waiver under Chapter XV, Section D(1)(b), used to determine whether the requester has a primarily commercial interest in the disclosure of material. The two factors here consider whether the requester has a commercial interest in the requested information and if so

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<sup>7</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(a)(4), pg. 24, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

whether the magnitude of the commercial interest, if any, is sufficiently small in comparison to the public interest in disclosure. As discussed below, the Appellant does not have a commercial interest in the disclosure of the material, and as such should be granted a fee waiver.

**A. APPELLANT DOES NOT HAVE A COMMERCIAL INTEREST IN THE DISCLOSURE OF THE REQUESTED DOCUMENTS AND SHOULD THEREFORE BE GRANTED A FEE WAIVER**

The first prong of this section determines, “Whether the requester has a commercial interest that would be furthered by the requested disclosure.”<sup>8</sup> The central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. “The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents.” *Eudey v. Central Intelligence Agency*, 478 F.Supp. 1175, 1177 (D.D.C. 1979). In the instant case, the records sought will be used to further the public’s understanding of the operations and activities of the NLRB. We operate as a nonprofit, offering free expert analysis on a variety of political issues, and welcome republication of our materials in order to get the information to as wide an audience as possible. The records sought will be disseminated widely to parties interested in the workings of the government and as

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<sup>8</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(b)(1), pg. 25, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

such will not inure primarily to the benefit of the requestor. Therefore, we have no commercial interest in the disclosure of the records.

**B. ANY IDENTIFIED COMMERCIAL INTEREST IS SUFFICIENTLY SMALL IN COMPARISON WITH THE PUBLIC’S INTEREST IN DISCLOSURE**

The last prong determines if it could be construed that the Appellant would have a commercial interest in the release of the information, “Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.”<sup>9</sup> Even if Appellant should be found to have a commercial interest in the disclosure, its interest would be minimal in comparison to the magnitude of the public’s interest in records sought by the Appellant, i.e., the cost of the website and the list of the worker advocacy groups working with the NLRB on this project. Therefore, the request for waiver of fees should be granted.

**III. APPELLANT IS A REPRESENTATIVE OF THE NEWS MEDIA AS DESCRIBED IN NLRB FREEDOM OF INFORMATION ACT MANUAL, AND AS SUCH, APPELLANT’S REQUEST FOR A FEE WAIVER SHOULD BE GRANTED**

Based on the previous arguments, the nature of Appellant’s work, and the description given in NLRB Freedom of Information Act Manual, Chapter XV, Section

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<sup>9</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. D(1)(b)(2), pg. 26, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).

A(2)(b), Appellant is a “representative of the news media.”<sup>10</sup> As such, the Appellant’s request for a fee waiver should be granted.

### CONCLUSION

Based on the foregoing Appellant respectfully urges the National Labor Relations Board Chairman to reverse the decision to deny our request and grant Appellant a waiver of fees for its June 19, 2012 FOIA request.

Dated this 31<sup>st</sup> day of July, 2012.

Respectfully Submitted,



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Nathan Paul Mehrens



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<sup>10</sup> NLRB Freedom of Information Act Manual, NLRB, Ch. XV, Sec. A(2)(b), pg. 5, Revised Oct. 2011. Available online at <https://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (Last viewed July 31, 2012) (Internal citations omitted).



# AMERICANS FOR LIMITED GOVERNMENT

APPENDIX 1

9900 MAIN STREET SUITE 303 · FAIRFAX, VA 22031 · PHONE: 703.383.0880 · FAX: 703.383.5288 · WWW.GETLIBERTY.ORG

June 19, 2012

Jacqueline Young  
FOIA Officer  
National Labor Relations Board  
1099 14th Street, N.W., Room 10600  
Washington, D.C. 20570

Via fax to: (202) 273-4275

**Re: Freedom of Information Act (FOIA) Request**

Dear Ms. Young:

A recent *Wall Street Journal* article made reference to promotion activities by the National Labor Relations Board, which include a website and pamphlets to explain “‘concerted activity’ and highlight cases involving unlawful punishment of it.”<sup>1</sup> The article went on to note that the NLRB would distribute this material through “worker-advocacy groups and sister federal agencies.”

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 et seq., I request on behalf of Americans for Limited Government (ALG) copies of the records described below. Please provide records which disclose the following:

1. Costs associated with building the website;
2. Costs associated with producing, printing, and distributing the brochures; and
3. List of all “worker-advocacy groups” with which the NLRB is working on this initiative.

Please provide copies of any such records that were created on or after September 1, 2010. **If reasonably possible I request that responsive records be provided in**

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<sup>1</sup> Melanie Trottman, *Worker Rights Get Promotional Drive*, THE WALL STREET JOURNAL, March 22, 2012. Available online at <http://online.wsj.com/article/SB10001424052702303812904577297992885374370.html>. (Last viewed April 10, 2012).

**electronic form on either unencrypted CDs or DVDs.**

Pursuant to 5 U.S.C. § 552(a)(6)(A), please advise my counsel, whose contact information is listed below, within 20 days whether you will comply with this request and provide the documents.

I work for Americans for Limited Government, but am not seeking this information for any commercial use. Disclosure of such information is in the public interest as it would likely contribute significantly to public understanding of the operations or activities of the government. I therefore request that any fees associated with this request be waived in accordance with 5 U.S.C. 552(a)(4)(A)(iii), or at least be limited in accordance with 5 U.S.C. § 552(a)(4)(A)(ii)(II). I would also request that if you deny the fee waiver, that I be notified in advance.

To the extent that you deny any part of this request, please cite specific exemptions to FOIA that you believe justifies your denial. In addition, for any documents withheld by the agency, please provide a description containing the information that would be required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Please send the requested records to the following address:

Nathan Paul Mehrens  
General Counsel  
Americans for Limited Government  
9900 Main Street  
Suite 303  
Fairfax, VA 22031

If you have any questions regarding this FOIA request please contact Nathan Paul Mehrens at [nathan@getliberty.org](mailto:nathan@getliberty.org).

Thank you in advance for your assistance.

Sincerely,



William Wilson  
President