

BEFORE THE CHAIRMAN OF THE  
NATIONAL LABOR RELATIONS BOARD

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ON APPEAL FROM THE FREEDOM OF INFORMATION OFFICE

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APPELLANT AMERICANS FOR LIMITED GOVERNMENT'S FREEDOM OF  
INFORMATION ACT APPEAL FOR FAILURE TO CONDUCT REASONABLE  
SEARCH

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## 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 November 16, 2011. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production from NLRB of specifically described federal records regarding a petition by various unions for the NLRB to issue rulemaking on the issue of members-only minority-union collective bargaining. Appellant sought such records from August 14, 2007 through the date of the request.

The NLRB's Freedom of Information Office, by letter dated December 29, 2011, produced some responsive records and indicated that "there are no Exchange repositories for former Members Battista, Kirsonaw, and Walsh."

## SUMMARY OF THE ARGUMENT

Appellant is entitled to a new search of the NLRB's "related office files" of the petition referenced above for hard copy prints of the emails of the former Members.

## ARGUMENT

### I. THE NLRB HAS A DUTY TO MAINTAIN THE RECORDS SOUGHT

Title 44 of the U.S. Code mandates that agencies preserve records in general as follows:

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3101.

These “records” are defined as follows:

As used in this chapter [44 USCS §§ 3301 et seq.], "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

44 U.S.C. § 3301.

The NLRB, pursuant to 29 U.S.C. § 153(a), is “an agency of the United States” and as such is covered by the record keeping requirements detailed above. In addition to

the statutory requirements, the NLRB also has a formal email retention policy.<sup>1</sup> This policy:

...directs Agency employees to preserve e-mail messages if they meet the definition of "records" contained in the Federal Records Act. Specifically, the memo instructs employees to print e-mail messages and attachments that met the definition of "records" and to annotate the printed message with essential transmission and receipt data if the printed message does not reflect that information (sender, receiver, date of transmission, receipt of message). The memo further directs employees to file the printed messages with related office files.<sup>2</sup>

Regardless of whether the NLRB maintains "Exchange repositories for former Members" the NLRB had a duty under the law and policy set forth above to preserve copies of these emails in hard copy.

## **II. BY NOT SEARCHING THE "RELATED OFFICE FILES" FOR THE EMAILS SOUGHT, THE NLRB HAS FAILED TO CONDUCT A REASONABLE SEARCH**

The Freedom of Information Office's letter of December 29, 2011 states a legal conclusion as a fact as follows:

Pursuant to the FOIA, the Agency has conducted a reasonable search for the requested documents.

However, in the absence of a search of the printed "email messages and attachments that met the definition of 'records'" in the "related office files" a reasonable search has not been conducted. The FOIA requires a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d

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<sup>1</sup> See NLRB Freedom of Information Act Manual, Chapter IV, at 5, available online at: <http://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (accessed January 16, 2012).

<sup>2</sup> NLRB Freedom of Information Act Manual, Chapter IV, at 5-6, available online at: <http://www.nlr.gov/sites/default/files/documents/44/foia-manual.pdf> (accessed January 16, 2012).

1476, 85 (D.C. Cir. 1984). Further, the agency cannot just search one records system if it knows that other records systems likely contain responsive records.

“The agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. United States Dep't of the Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990) (“*Oglesby I*”). The agency “cannot limit its search” to only one or more places if there are additional sources “that are likely to turn up the information requested.”

*Lucena v. U.S. Coast Guard*, 180 F.3d 321, 6 (D.C. Cir. 1999).

In the instant case the NLRB has a mandatory policy regarding the physical preservation of email records. Those email records are to be kept in hard copy form and filed with the “related office files,” but the Freedom of Information Office did not conduct a search of these files.

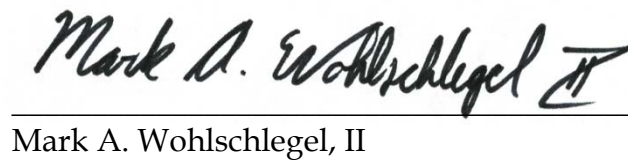
## CONCLUSION

Based on the foregoing Appellant respectfully urges the Chairman of the National Labor Relations Board to reverse the decision of the Freedom of Information Office, to order a new search to be conducted of the “related office files” for the relevant emails of the former Members, and that all responsive records found in such search be disclosed to the Appellant.

Dated this 17<sup>th</sup> day of January, 2012.

Respectfully Submitted,

  
Nathan Paul Mehrens

  
Mark A. Wohlschlegel, II

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9900 Main Street  
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Counsel for Appellant





# 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

November 16, 2011

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:

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.

I am hereby requesting copies of the following federal records under the Freedom of Information Act (“FOIA”), pursuant to 5 U.S.C. §552(a)(2):

- (1) All records and documents concerning or relating to the Petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and other labor organization for Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, submitted on August 14, 2007, including but not limited to:
- (2) Records that pertain to communications to or from any Member of the National Labor Relations Board (NLRB) or their immediate staff and labor organizations or their immediate staff about the petition.
- (3) Records that pertain to communications to or from any Member of the National Labor Relations Board (NLRB) or their immediate staff and Dr. Charles Morris, acknowledged author of the petition.

Please provide copies of any such records that were created on or after August 14, 2007.

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).

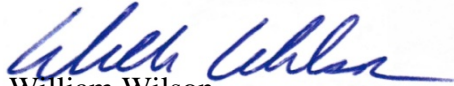
Please send the requested records to the following address:

Nathan Paul Mehrens  
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 703.383.0880.

Thank you in advance for your assistance.

Sincerely,



William Wilson  
President



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL

FREEDOM OF INFORMATION OFFICE  
Washington, D.C. 20570

Appendix 2

DATE: December 29, 2011

William Wilson  
President  
Americans for Limited Government  
9900 Main Street  
Suite 303  
Fairfax, VA 22031

Re: FOIA ID: ES-2012-0023

Dear Mr. Wilson:

This is our final response to your Freedom of Information Act (FOIA) request, dated and received in this Office of November 16, 2011, in which you request:

1. All records and documents concerning or relating to the Petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and other labor organizations for Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, submitted on August 14, 2007, including but not limited to:
2. Records that pertain to communications to or from any Member of the NLRB or their immediate staff and labor organizations or their immediate staff about the petition.
3. Records that pertain to communications to or from any Member of the NLRB or their immediate staff and Dr. Charles Morris, acknowledged author of the petition.

You seek all records created on or after August 14, 2007, and you requested that fees associated with your request be waived or limited. You also asked that all records be sent to Nathan Paul Mehrens and you designated Mr. Mehrens as the contact for any questions.

Interim replies were sent to you on December 1, 2011 and December 19, 2011.

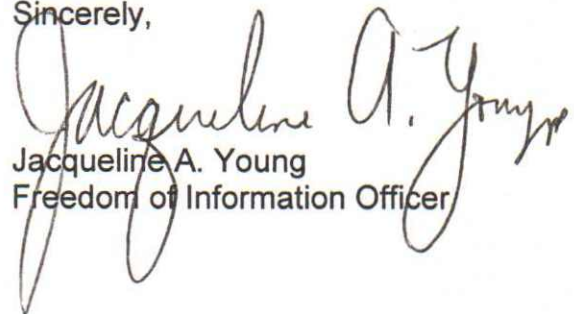
In a follow-up call with a member of my staff on December 7, 2011, Mr. Mehrens clarified that you were not seeking internal communications and news clippings dealing with this petition. It was also agreed that we would provide responsive documents at no cost, and that we would not pass on your request for a fee waiver.

Pursuant to the FOIA, the Agency has conducted a reasonable search for the requested documents. I have enclosed the responsive documents. Inquiries

were made to the Office of each Board Member, the Solicitor, and the Executive Secretary. In addition, the e-mail Exchange repositories for former Chairman Liebman and former Member Schaumber were searched. The Office of the Chief Information Officer informed this Office that there are no Exchange repositories for former Members Battista, Kirsanow, and Walsh, who also served during the specified time period.

The undersigned is responsible for the above determination. To the extent you wish to appeal this determination, you may, pursuant to the NLRB Rules and Regulations, Section 102.117(c)(2)(v), file an appeal with the Chairman of the Board, National Labor Relations Board, Washington, D.C., 20570, within 28 calendar days of the date of this letter, that is, on or before January 26, 2012. Questions concerning an appeal of this determination should be directed to the Office of the Chairman.

Sincerely,

A handwritten signature in black ink, appearing to read "Jacqueline A. Young". The signature is fluid and cursive, with a large loop at the end.

Jacqueline A. Young  
Freedom of Information Officer

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

LGK/kb  
ES-2012-0023.final.wilson.lgk.doc