



## REQUEST UNDER THE FREEDOM OF INFORMATION ACT

September 18 2018

NLRB FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E.  
4<sup>th</sup> Floor  
Washington, D.C. 20570

**BY ELECTRONIC MAIL:**

**Re: FOIA Request for Certain Agency Records — National Labor Relations Board Office of Inspector General and Designated Agency Ethics Officer Communications.**

To NLRB Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI) and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and considering **CEI's status as a media outlet**, please provide us, within the statutorily prescribed time, certain *information*<sup>1</sup> described, below. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to labor policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,<sup>2</sup> copies of **all correspondence, and its accompanying information** (See FN 1, and discussion, *infra*), **including also any attachments:**

---

<sup>1</sup> This includes public records, and associated public information. See discussion of Data Delivery Standards, *infra*.

<sup>2</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.



1) Any and all correspondence sent to or from or which copies (whether as cc: or bcc:) **NLRB Inspector General David P. Berry** which is dated from August 1, 2017, to September 18, 2018, inclusive, and contains **@help.senate.gov**, in the To or From, cc: and/or bcc: fields, or anywhere in the body of an email.<sup>3</sup>

2) Any and all correspondence sent to or from or copies (whether as cc: or bcc:) **NLRB Inspector General David P. Berry** which is dated from August 1, 2017, to September 20, 2018, inclusive, and contains a) **Senator Patty Murray**, b) **Senator Bernie Sanders**, c) **Senator Robert Casey**, d) **Senator Michael Bennet**, e) **Senator Tammy Baldwin**, f) **Senator Christopher Murphy**, g) **Senator Elizabeth Warren**, h) **Senator Tim Kaine**, i) **Senator Maggie Hassan**, j) **Senator Tina Smith**, k) **Senator Doug Jones**, in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body.

3) Any and all correspondence sent to or from or copies (whether as cc: or bcc:) **NLRB Inspector General David P. Berry** which is dated from August 1, 2017, to September 18, 2018, inclusive, and contains **NLRB Designated Agency Ethics Officer Lori Ketcham** in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body.

4) Any and all correspondence sent to or from or copies (whether as cc: or bcc:) **NLRB Designated Agency Ethics Officer Lori Ketcham** which is dated from August 1, 2017, to

---

<sup>3</sup> That is, an email is responsive if it is to, from, copies *or* references any of the parties anywhere. This includes referencing a party, for example Maureen Cropper, in a To, From or cc:/bcc: field if her address (e.g., [cropper@econ.umd.edu](mailto:cropper@econ.umd.edu)) appears therein, or the party's name appears in any form, e.g., "Cropper, Maureen" or "Maureen Cropper".



September 18, 2018, inclusive, and contains @**help.senate.gov** in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body.

### **Definition of Information Sought/Delivery Standards**

Noting also FN 1, *supra*, **please consider as responsive entire email “threads”** containing any information responsive to this request, regardless whether any part of that thread falls outside the cited time parameters.

As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with the Act’s prescribed timelines.

**We request records on your system**, e.g., its backend logs, and do *not* seek only those records which survive on an employee’s own machine or account.

We do not demand your Office produce requested information in any particular form, instead **we request records in their native form, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.**<sup>4</sup> The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, “Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (*Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.*)” (emphases in original).

---

<sup>4</sup> <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.



In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your Office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

In the context of our experience with responsive agencies taking the effort to physically print, then (often, poorly) scan *electronic* mail into (typically, non-searchable) PDF files, we note that production of electronic records necessitates no such additional time, effort or other resources, and no photocopying expense. Any such effort as described is most reasonably viewed as an effort to frustrate the requester's use of the public information.



We request the entire thread in which any email responsive to the above description appears regardless if portions of the thread(s) pre-date the dates cited above.

**Relevant Background to this Request and the Public Interest**

This request seeks to educate the public whether staffers from the Senate Health, Education, Labor and Pensions (HELP) Committee have attempted to improperly influence the outcome of cases before the NLRB.

On August 21, 2018, NLRB Chairman John Ring wrote a letter to Chairman Lamar Alexander and Ranking Member Patty Murray of the Senate HELP Committee that raised concerns about contact between minority staff members at the HELP Committee and the NLRB Inspector General.

Ring wrote:

I understand that the minority staff of the Senate Committee on Health, Education, Labor, and Pensions (HELP) has contacted the NLRB's Inspector General (IG) regarding the pending recusal motion, even though there is no active IG investigation or audit involving the matter. For whatever reason, the IG then discussed the call with the NLRB's Designated Agency Ethics Officer (DAEO), who has the responsibility to provide the Board's members independent and objective advice regarding recusal matters.

...

It is distressing, however, that the Committee's minority staff would reach out to the IG to discuss a pending recusal motion where there is currently no IG involvement. As the Committee staff knows, the NLRB has a Congressional Affairs Office, which typically handles inquiries from Congress. And the Committee staff certainly knows that the



NLRB (like every other federal agency) has a Designated Agency Ethics Official (DAEO) whose duties include advising the Board on recusal matters. Given the public statements made by the Democratic members of the HELP Committee prejudging the recusal motion, the minority staff's contact with the IG, who then discussed the outreach with the DAEO, has the unfortunate appearance of an attempt to improperly influence the outcome of the pending recusal motion.<sup>5</sup>

It is in the public interest to understand whether staffers from the Senate HELP Committee attempted to improperly influence the outcome in a pending recusal motion.

Regardless, FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue, and respectfully remind NLRB that federal agencies acknowledge CEI is a representative of the news media.

### **NLRB Must Err on the Side of Disclosure**

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v.*

---

<sup>5</sup> Letter from NLRB Chairman John Ring to Chairman Lamar Alexander and Ranking Member Patty Murray, August 21, 2018, <http://src.bna.com/Big>.



*Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the immediate-past President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the immediate-past President directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

## **Conclusion**

We expect NLRB to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by FOIA’s discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law’s clear intent, judicial precedent affirming this bias, and former President Obama’s directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) (“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, or because of speculative or abstract fears”).

**We expect all aspects of this request including the search for responsive records be processed free from conflict of interest.** We request NLRB provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). NLRB must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires NLRB to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI’s right to appeal; further, FOIA’s unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also, Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing “the statutory requirement that [agencies] provide estimated dates of completion”).

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform NLRB of our intention to protect our appellate rights



1310 L Street, NW, 7th Floor  
Washington, DC 20005  
[cei.org](http://cei.org)

202 331 1010 *main*  
202 331 0640 *fax*



on this matter at the earliest date should NLRB not comply with FOIA per, *e.g.*, *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

Trey Kovacs  
Policy Analyst  
Competitive Enterprise Institute  
202-331-2273  
[Trey.kovacs@cei.org](mailto:Trey.kovacs@cei.org)