**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-23

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 501

CHARGING PARTY

Case No. AT-CA-12-0596

Patricia J. Kush
For the General Counsel

Tara Roberts
For the Respondent

Khalil Abdel
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

## DECISION

## STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On August 24, 2012, the American Federation of Government Employees, Local 501 (Union), filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons (Respondent). (G.C. Ex. 1(a)). On January 18, 2013, the Regional Director of the Atlanta Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to provide the Union with

information requested pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(b)). The Respondent timely filed an Answer to the Complaint in which it admitted certain allegations and denied others, including the allegation that it violated the Statute. (G.C. Ex. 1(c)).

A hearing in this case was originally scheduled for March 21, 2013, at a place to be determined in Miami, Florida. (G.C. Ex. 1(b)). On February 21, 2013, the Respondent filed an unopposed Motion to Reschedule the Hearing. (G.C. Ex. 1(d)). The motion was granted and the hearing was rescheduled for March 27, 2013. (G.C. Ex. 1(e)).

The Respondent subsequently filed a Motion for Summary Judgment on March 1, 2013. (G.C. Ex. 1(f)). In response, the General Counsel filed an opposing motion and a Cross-Motion for Partial Summary Judgment. (G.C. Ex. 1(i)). Both motions were denied.

On March 27, 2013, a hearing in this case was held in Miami, Florida. The parties were afforded a full opportunity to be represented and heard, examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed post-hearing briefs that were fully considered.

## FINDINGS OF FACT

The Department of Justice, Federal Bureau of Prisons is an agency under 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(b) & 1(c)). At all times material, Rob Wilson occupied the position of Warden at the Respondent's Federal Correctional Institution in Miami, Florida (FCI Miami). (G.C. Exs. 1(b) & 1(c)). Liz Eskew occupied the position of Chief of the Consolidated Staffing Unit. (G.C. Exs. 1(b) & 1(c)). Wilson and Eskew acted on behalf of the Respondent at all material times. (G.C. Exs. 1(b) & 1(c)).

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4). The AFGE is the exclusive representative of units of employees appropriate for collective bargaining at the FCI Miami and the Federal Detention Center in Miami, Florida (FDC Miami). (G.C. Exs. 1(b) & 1(c)). The AFGE, Local 501 is an agent of AFGE for the purpose of representing employees at FDC Miami. (G.C. Exs. 1(b) & 1(c)).

The Respondent maintains a "Consolidated Staffing Unit" (CSU) in Grand Prairie, Texas that manages job vacancy announcements at 118 institutions, six regions, and a central office. (Tr. 81). Essentially, the CSU advertises position vacancies, performs applicant qualification determinations, and transmits promotion certificates containing the best qualified applicants to selecting officials. (*Id.*).

The CSU announces two types of job vacancies: "merit promotion," which are announced to the staff, and "delegated examining," which are announced to the public. (Tr. 82). The Merit Promotion Plan (MPP) in § 335.1 of the Respondent's Human Resource Management Manual (P3000.03) governs merit promotion vacancies. (R. Ex. 9). Generally speaking, the

Merit Promotion Plan establishes procedures used to implement the federal merit promotion policy. (R. Ex. 9). The Plan was enacted in 1993, negotiated with minimal change in 1997, and incorporated into the master agreement between the AFGE and the Respondent. (R. Exs. 4, 9, & 10).

In 2006 and 2007, the parties negotiated procedures for automating the merit promotion process, *i.e.,* going from a paper to a computerized system. (G.C. Ex. 2; Tr. 37, 73). Under the automated system, when a merit promotion position is available, the CSU announces the position online. (Tr. 83). After the job is posted, applicants can submit resumes for the position online. (Tr. 83). Applicants then answer questions regarding their time-in-grade, awards, performance, and experience. To answer, applicants select from pre-formed responses, the choice that best describes their experience, award history, performance history and time-in-grade experience. (Tr. 84). Based on the provided responses, the automated system assess each applicant a score. (Tr. 114).

After the job posting closes, the system will not accept additional applications. (Tr. 84). The CSU staff then classifies applicants as "excepted applicants" or "competitive applicants." (Tr. 84, 115). Veteran applicants, disabled applicants, and applicants that previously held a higher graded position, are "excepted" from the competitive grouping and do not participate in the merit promotion scoring. (Tr. 105). The scores of the competitive applicants are totaled and divided by the number of applicants to produce an average score. (Tr. 84, 86). Competitive applicants that individually scored higher than the average are placed on a "tentative" best-qualified list. (Tr. 84). Competitive applicants who scored below the average are no longer considered for the position. (Tr. 85).

At this point, the CSU staff evaluates the qualifications of the applicants on the tentative best qualified list to determine if they meet the position's time-in-grade requirement. (Tr. 84-85, 115-16). Qualified applicants are placed on the "official best qualified list." (Tr. 87, 116). The CSU then sends a promotion certificate to the selecting official at the hiring institution. (R. Ex. 9; Tr. 87). The promotion certificate contains the applicants' names, resumes, "and anything else that was used" for qualification, such as licenses or transcripts. (Tr. 87, 97). The certificate also contains the excepted applicants' names and resumes. (Tr. 97, 101). The CSU does not send information submitted by the applicants that was not used during qualification. (Tr. 105-06). The selecting official chooses the best qualified applicant to fill the position.

After a position is filled, the CSU maintains a "merit promotion file" that includes the documentation sent to the selecting official. (R. Ex. 9; Tr. 89). Employee service managers at the Respondent's various institutions coordinate with the CSU to provide this information at the local level. (G.C. Ex. 2; Tr. 45).

On July 18, 2012, Khalil Abdel, the Vice-President of the Union, submitted an information request pursuant to U.S.C. § 7114(b)(4) to the Human Resources Manager at FCI Miami, regarding job announcement MIA-2012-0014. (R. Ex. 1; Tr. 16). The Manager informed Abdel that FCI Miami did not retain the requested information and stated that she would forward the request to the CSU, where the information was maintained. (R. Ex. 1).

Roughly two weeks later, on August 1, 2012, Abdel re-sent the information request to Warden Wilson. (Jt. Ex. 1; Tr. 16). The request explained, over the course of five pages, that the Union believed that bargaining unit members applicants "might have been affected in [the] Promotional Board Selection[]" for job announcement MIA-2012-0014 and the Union sought to "evaluate management's compliance with . . . Article 33[]" of the MA to determine whether to file a grievance. (Jt. Ex. 1 at 2).

Relevant to this case, the Union sought the following information:

1. "Copies of all employees' names and their corresponding duty station that were contained in the Best Qualified (BQ) list for selection at the time this Job Announcement was closed." (Jt. Ex. 1). The Union stated that it required the information to "ensure that no favoritism and/or preferential treatment was imposed by the selecting official, as stated in the contract[,] specifically [in] Article 6 Section (b)(2)." (*Id.*).

2. "[C]opies of all Position Application[s] that were submitted and taken into consideration with regards to Job Announcement MIA-2012-0014." (*Id.*). The Union required the information to "ensure that employees were evaluated using the same parameters and guidelines . . . thus ensuring [the] consistency, equitability, and fairness through the promotional process." (*Id.*).

3. "Copies of all the Qualification Rating Forms . . . pertaining to all employees that applied for Job Announcement MIA-2012-0014." (*Id.*). The Union required the information to "ensure that all employees who met a specific element were rated accordingly, without deviating from protocol, and/or policy." ((*Id.*).

4. "Copies of all Merit Promotion Ranking Forms that were used in selecting the qualified and eligible employees with regards to the above cited announcement." (*Id.*). The Union required the information to "ensure that all applicants being ranked in the promotional process were advised of their classification in accordance to policy, and/or guidelines implemented by the Agency to ensure fairness, and equitability in [a]ccordance to Article 6 Section (b)(2), and Article 33 of the contract." (*Id.*).

5. "Copies of the Promotion Certification Forms used in accordance with the provisions of the Federal Prisons System Merit Promotion Plan to entail the position title, Series and Grade, Announcement Number, Qualification standards used, and the selection of factors used to determine promotional eligibility." (*Id.*). The Union required the information to "ensure that the Agency is in compliance with the Federal Prison System Merit Promotion Plan." (*Id.*).

6. "Copies of all applicants['] Yearly Performance Evaluation[s] that were used in making a determination and/or rating factor with regards to the promotional eligibility of the applicants." (*Id.*). The Union sought the information to ensure "that all employees were afforded the same ratings as opposed to others with the same evaluation." (*Id.*).

7. "[C]opies of all Training Records utilized by the Agency during this promotional board that were evaluate[d] to provide merit to the applicant promotional determination." (*Id.*). The Union required the information to "ensure that applicants who received the same training were not rated differently." (*Id.*).

8. "Copies of all Knowledge, Skills, and Abilities (KSA) information pertaining to the above cited job announcement which was submitted by each individual applicant and reviewed and evaluated by the Agency during this promotional board and/or selection process." (*Id.*). The Union required the information to "ensure that no one applicant was discriminated and/or imposed to differential treatment with regards to their performance, knowledge, and skills." (*Id.*).

9. "[C]opies of any and all Achievement Awards provided by the applicants that were introduced and/or taken into consideration during this promotional board and/or selection process." (*Id.*). The Union requested the information to "determine if all applicants with the same award received the same rating." (*Id.*).

10. "Copies of all Optional Application[s] for Employment (OF-612) that were submitted by the employees with regards to this job announcement." (*Id.*). The Union required the information to "ensure that the applicant[s] properly submitted the documentation required, thus providing the Agency with the information needed to ensure possible promotional advancement." (*Id.*).

11. "[C]opies of any/all Policies, Laws, and Guidelines with regard to commuting. Also the specific policy used to enforce local commuting distance from this specific institution." (*Id.*). The Union required the information to "ensure that all of the qualified applicants were within the commuting area as directed in the actual vacancy announcement." (*Id.*).

Eighty-seven individuals applied for job announcement MIA-2012-0014. (Tr. 123). In the information request, the Union requested the Respondent to redact "any personally identifiable information" before providing the information. (Jt. Ex. 1).

Two weeks after re-sending the information request, on August 15, 2012, Abdel submitted a formal grievance alleging that the Respondent violated various provisions of the parties' MA, including the Plan, by failing to treat bargaining unit members equitably in consideration for job announcement MIA-2012-0014. (R. Ex. 2; Tr. 22). The next day, on August 16th, the Respondent denied the information request. (Jt. Ex. 2; Tr. 100).

In the denial, the Respondent, by Liz Eskew, did not respond to each enumerated request. (Tr. 100). Instead, the Respondent listed anti-disclosure interests in a single paragraph. It contended that the information was "overly broad, would create an unjustified expense, [was] unduly burdensome and [was] not reasonably calculated to lead to admissible evidence[,] and the discovery would not render any sustainable claim or ruling." (Jt. Ex. 2 at 2). The Respondent also asserted that release of the information was protected by the Privacy Act, that searching for the "records would hinder and stall the operation of the agency," and that some of the documentation was "non-existent . . . ." (*Id.*). The Respondent did not specify what information did not exist or was subject to the Privacy Act. (*Id.*). The response concluded by stating that the Union could "review" the "certificates and resumes" of the applicants pursuant to the Plan in P3000.03. (*Id.*).

Paragraph 18(d) of the Merit Promotion Plan states that:

> [t]he grievant and his or her representative, if any, are entitled to access all relevant information concerning the applicant only. The grievant's representative may examine the entire promotion file on behalf of the grievant in accordance with the Privacy Act. However, the representative must maintain the confidentiality of the promotion file. The representative may not disclose any information which would tend to identify any applicant other than the grievant.

(R. Ex. 9 at 36).

On September 19, 2012, the Union re-sent the information request to the Respondent, adding that it now required the information to process the recently filed grievance. (R. Ex. 12).

## POSITIONS OF THE PARTIES

### General Counsel

The General Counsel (GC) alleges that the Agency violated § 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with the requested information. In support of its allegation, the GC maintains that the information requested by the Union met the requirements of § 7114(b)(4) of the Statute and the Union sufficiently demonstrated that the information was "necessary." Specifically, the Union established that it required the job announcement information to evaluate the Respondent's compliance with Article 33 of the parties' MA and to determine whether to file a grievance. In *NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992), the D.C. Circuit held that an agency has a statutory duty to provide information that aids a Union in determining whether to file a grievance.

The GC further argues that the Respondent's reply to the information request was conclusory and not sufficient to meet its statutory burden. *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 671-72 (1995) (*IRS, Kansas*). The GC avers that the Respondent provided several anti-disclosure interests, but failed to explain the applicability of

those interests to the requested information. According to the GC, the Respondent's reply is not the type of articulate communication that the Authority envisioned in *IRS, Kansas*.

Next, the GC challenges the Respondent's position that the Privacy Act bars the requested information from disclosure. The Respondent merely raised Privacy Act concerns and failed to establish, among other things, the nature and significance of the privacy interests at stake. Accordingly, the Respondent failed to meet its burden of proof. Moreover, the Union informed the Respondent to redact any personally identifiable information, which would permit disclosure of the information. *Health Care Fin. Admin.*, 56 FLRA 503 (2000) (*Health Care*).

The GC additionally contends that the requested information exists – although in a different format than requested – and that the Respondent was capable of producing the requested information.

The GC disputes the Respondent's assertion that the requested information would reveal the Respondent's crediting plan. Specifically, the GC cites *Fed. Aviation Admin.*, 55 FLRA 254 (1999) (*FAA*) for the proposition that an agency must articulate its anti-disclosure interests at the time of denial. The Respondent raised concerns about the crediting plan for the first time at the hearing. According to the GC, the Union did not request and does not seek a copy of the Respondent's crediting plan.

Finally, the GC contends that the Plan does not excuse the Respondent's failure to provide the requested information. From an equitable standpoint, the GC argues that the Plan cannot be used as a defense in this matter because the relevant portions of the Plan were not negotiated with the AFGE. In the alternative, the GC stresses that the Respondent failed to prove that the Plan truncates the Respondent's statutory obligations under § 7114(b)(4) of the Statute. The ability to review requested information does not satisfy the Respondent's duty to furnish the information under § 7114(b)(4) of the Statute. *U.S. Dep't of Hous. & Urban Dev.*, 42 FLRA 1002 (1991) (*HUD*).

For a remedy, the GC requests an Order directing the Respondent to provide the requested information. The GC also requests that the Respondent post a Notice signed by the Warden on all bulletin boards throughout the facility, and send a copy of the Notice via electronic mail to all bargaining unit employees.

**Respondent**

The Respondent denies that it violated the Statute as alleged and maintains that the Union failed to establish a particularized need for the requested information. In the Respondent's view, the Union required the information merely because it was "unsatisfied with the selection for the job." (R. Br. at 13). The Respondent contends that the Union's request is analogous to the request found insufficient in *U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791 (2005) (*Kirtland*).

The Respondent further alleges that the Union waived its right to information under § 7114(b)(4) of the Statute in instances where the Union challenges a merit promotion job selection. The proper procedure, under the Plan, is for the Union to view the merit promotion file, not make an information request. The Respondent additionally claims that the Union, as a local of the AFGE, does not have standing to challenge the Plan. *U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1273 (1998).

If the Union did establish a particularized need, the Respondent asserts that its countervailing interests outweigh the Union's need. The Respondent argues that there are significant non-disclosure interests including the privacy of the applicants and the confidentiality of its crediting plan. In addition, much of the information requested is non-existent or would require burdensome sanitization.

Lastly, the Respondent declares that the Union acted in bad faith by repeatedly submitting the same information request without attempting to modify the request based on the Respondent's denial.

## ANALYSIS AND CONCLUSIONS

Section 7114(b)(4) of the Statute requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, information: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.[1] 5 U.S.C. § 7114(b)(4).

In *IRS, Kansas*, the Authority set forth the analysis for determining whether information is "necessary" under § 7114(b)(4) of the Statute. 50 FLRA at 669-71. To demonstrate that information is "necessary," a Union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." *Id.* at 669-70 (footnote omitted). A Union's responsibility for articulating its interests requires more than a conclusory or bare assertion. *Id.* at 670. The request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. *Id.*

[1] The Respondent admitted in its answer to the Complaint that the requested information does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. (G.C. Exs. 1(b) & 1(c)).

If an agency denies an information request, it must "assert and establish any countervailing anti-disclosure interests." *Id.* An agency does not satisfy its burden by making conclusory or bare assertions. *Id.* Countervailing disclosure interests must be raised at or near the time of the Union's request, not for the first time at the ULP hearing. *FAA*, 55 FLRA at 260.

If the parties cannot agree on disclosure, the agency will have committed a ULP if the Union has established a particularized need for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the Union's demonstration of a particularized need. *IRS, Kansas*, 50 FLRA at 671.

In this case, the Union requested the Respondent to provide it with information related to job announcement MIA-2012-0014, for the purpose of investigating whether there were grounds for filing grievances on behalf of bargaining unit members who were not selected for the position. (Jt. Ex. 1); *see e.g., VA, Wash., D.C. & VA, Reg'l Office Buffalo, N.Y.*, 28 FLRA 260, 265 (1987) (a Union has the right to information that is necessary for it to determine whether or not to file a grievance). Over the span of five pages, the Union set forth its particularized need for each enumerated information request. (Jt. Ex. 1). The Union clearly articulated that one of the reasons it required the job announcement information was to determine whether to file a grievance over the selection process, and the basis for such a grievance would be the Respondent's nonconformity with the "Merit Promotion Plan," "Article 6 Section (b)(2)" and "Article 33" of the contract. (Jt. Ex. 1); *Library of Cong.*, 63 FLRA 515, 519 (2009) (a Union's citation to specific provisions in the CBA supports the necessity for the information).

The Union prominently communicated to the Respondent that it needed the information because it believed that the selection process affected "bargaining unit members" who applied for the position. (Jt. Ex. 1). Although the Union did not identify the members or describe how the members were affected until the hearing, a request is not required to "be so specific as to reveal [the Union's] strategies or the identity of potential grievants." *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1202 (1997). Furthermore, it is evident that the Union would require the applicants' resumes, education, training, and achievements to determine whether to file a grievance on behalf of a prospective grievant. *See Dep't of HHS, SSA & SSA, Field Operations, N.Y. Region*, 21 FLRA 253, 276 (1986), *rev'd sub nom., AFGE, AFL-CIO v. FLRA*, 811 F.2d 769 (2nd Cir. 1987) (the "necessity" of the information may be evident). In order to determine whether a potential grievant would have been chosen for the position, the Union would need other applicants' information for comparison. In addition, the requested information is essential for the Union to ascertain whether the automated selection procedures and staff qualification determinations were conducted in accordance with the MA and the Plan.

In my view, the Union articulated, with sufficient specificity, why it needed the information (because it believed bargaining unit members were affected by an inequitable application of the merit promotion plan and master agreement), the uses for which it would put the information ("to ensure that all bargaining unit employees that applied were properly

evaluated using the same merit system principles . . . which were incorporated [into the] contract . . . ."), and the connection between those uses and the Union's representational responsibilities under the Statute (determining whether to file a grievance on behalf of bargaining unit members). (Jt. Ex. 1).

I disagree with the Respondent's contention that the Union's request is similar to the request found conclusory in *Kirtland*, 60 FLRA at 792. In that case, the Union sought several different categories of information, but offered a single explanation as its particularized need. *Id.* at 795. The Union stated that it required the information to perform "Audits," ensure compliance with "Merit System Principles," and "monitor contract compliance." *Id.* (internal quotation marks omitted). The bare justification provided by the Union in *Kirtland* is readily distinguishable from the Union's actions in this case, where the Union articulated an individualized explanation for each of its eleven enumerated requests over five pages, and additionally provided a general overview concerning its need for the information as a whole. (Jt. Ex. 1).

Accordingly, I conclude that the Union met its threshold burden of establishing a particularized need for the requested information.

In response to the information request, the Respondent asserted, among other things, that the request was "not reasonably calculated to lead to admissible evidence" and "would not render any sustainable claim or ruling." (Jt. Ex. 2). The Respondent's contentions in this regard are speculative, and fail to illustrate whether the requested information is necessary under the Statute. *See Dep't of the Air Force, Scott AFB, Ill.*, 51 FLRA 675, 684 (1995) ("[C]onjecture falls short of establishing any agency interests deserving of much weight."); *cf. IRS, Austin Dist. Office, Austin, Tex.*, 51 FLRA 1166, 1180 (1996) ("Arguments regarding the admissibility of information as evidence . . . do not relieve an agency of its obligation to furnish information under Statute."). Matters regarding the admissibility of evidence are resolved at arbitration or at hearing, not during the processing of information requests. Likewise, an arbitrator or Judge will decide whether a claim or ruling should be rendered, not the Respondent. Consequently, I find that the Respondent failed to establish any appreciable countervailing interests in this regard.

As for the Respondent's other countervailing interests, I agree with the GC and find the Respondent's interests conclusory, unresponsive, and in violation of § 7116(a)(1), (5) and (8) of the Statute. As noted above, an agency is responsible for establishing anti-disclosure interests to the Union and must do so in more than a conclusory or general way. *IRS, Kansas*, 50 FLRA at 670. Interests raised by an agency for the first time at the ULP hearing will not be considered in evaluating the Union's particularized need. *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 416 (2004) (*ACE*).

The Respondent, in response to the Union's eleven requests and five pages of explanation, listed several countervailing interests in a mechanical and boilerplate fashion. In so doing, it failed to explain to the Union which of the countervailing interests applied to the

individual requests. *See IRS, Kansas*, 50 FLRA at 670 (§ 7114(b)(4) "requires" parties to engage in productive communication for the purpose of accommodating the respective interests). In essence, the Respondent denied eleven requests in just one paragraph.

It was not until the ULP hearing that the Respondent addressed each of the Union's eleven requests individually. At the hearing, the Respondent articulated, for the first time, that it could not provide: the applicants' resumes (item 2) because it would be unduly burdensome; the qualification rating forms (item 3), merit promotion forms (item 4), promotion certificate forms (item 5), KSAs (item 8), and OF-612s (item 10) because they do not exist in the format requested; yearly performance evaluations (item 6), achievement awards (item 9), or training records (item 7) because applicants are not required to submit such information; and the commuting policy (item 11) because it is determined by statute. The Respondent also stated, for the first time, that it could not disclose the qualification rating forms (item 3) or the KSAs (item 8) because it would reveal the Respondent's crediting plan and be excessively burdensome to sanitize.

Although the Respondent initially informed the Union that it could "review the Merit Promotion [file] in accordance with P3000.03" "[i]n the interest of fostering a positive Labor[-]Management relationship," (Jt. Ex 2), at the hearing and in its brief, the Respondent argued that P3000.03 waived the Union's right to receive information under § 7114(b)(4) of the Statute. (R. Br. at 14-16).

I hold that the Respondent's specification of countervailing interests for the first time at hearing does not pardon its conclusory assertions to the Union. Under the *IRS, Kansas* framework, an agency is obligated to respond in a way that opens dialogue with the Union – not cut it off. 50 FLRA at 670-71. The Statute does not permit an agency to respond to an information request by inserting any and every countervailing interest that might apply, and later, while at the hearing, articulate how those interests apply. Such a practice would severely undercut the Authority's policy of accommodation and communication during information requests. By responding in a conclusory and general manner, the Respondent left the Union uninformed and ill-equipped to pursue a compromise. Consequently, and according to Authority precedent, the Respondent's arguments raised and defined for the first time at the ULP hearing cannot be considered in evaluating the Union's particularized need. *See ACE*, 60 FLRA at 416.

Even if the Respondent's countervailing interests were considered, I find that they would not outweigh the Union's particularized need.

First, the Respondent appears to argue in its brief that the Union waived its right to receive information related to job announcements by negotiating the Merit Promotion Plan in P3000.03, as incorporated into the master agreement. Under Authority precedent, a waiver of a statutory right must be clear and unmistakable. *U.S. Dep't of the Navy, U.S. Marine Corps (MPL), Wash., D.C. & Marine Corps Logistics Base, Albany, Ga.*, 38 FLRA 632, 636 (1990). To determine whether a provision in a collective bargaining agreement constitutes a clear and

unmistakable waiver, the wording of the provision at issue, and other relevant provisions, should be considered along with the parties' bargaining history. *Id.* at 636. With that said, the Authority will "not lightly infer a waiver of a statutory right." *Id.*

As noted above, paragraph 18(d) of the Plan provides that the grievant is "entitled to access all relevant information concerning the applicant only[]" and the Union "may examine the entire promotion file on behalf of the grievant." (R. Ex. 9 at 36) (emphasis omitted). The only other relevant provision is Article 3, Section a, which states that "[b]oth parties mutually agree that [the] Agreement takes precedence over any Bureau policy, procedure, and/or regulation *which is not* derived from higher government-wide laws, rules, and regulations." (R. Ex. 7 at 5). The evidence presented concerning the bargaining history of the Plan in P3000.03 merely demonstrates that the Plan was bargained over. (R. Exs. 3, 5, 6, 11). The bargaining history provides zero insight into the meaning of paragraph 18(d). (Tr. 55, 75).

Taking into account Article 3 of the parties' MA and the plain language of the Plan, I find that the Merit Promotion Plan does not unmistakably waive the Union's right to receive information related to a merit promotion job announcement. Paragraph 18(d) lacks the obligatory language that would mandate the Union to only seek information pursuant to the Plan; the provision states that the Union "may examine" as opposed to "must examine." (R. Ex. 9). Moreover, the Statute and the Merit Promotion Plan can apply harmoniously to the parties. Under the Plan, the Union can *view* limited information and it need not establish a particularized need to do so. In return, the CSU is not required to sift through, sanitize, or provide information for the Union. Under the Statute, however, the Union is entitled to *receive* a much greater quantity of information, but it must meet its statutory obligations to do so. *See HUD*, 42 FLRA at 1014 (1991) (agency's offer permitting Union to review requested information did not satisfy the agency's burden under the Statute). In short, the Merit Promotion Plan does not expressly contend to act as a substitute for § 7114(b)(4) of the Statute.

Article 3 of the parties' MA further buttresses the conclusion that the Merit Promotion Plan does not waive the Union's right to information under the Statute. Article 3 unequivocally declares that government laws take precedence over the parties' agreement. (R. Ex. 7; Tr. 61). This indicates that the parties had no intention of waiving any statutory rights in favor of a provision in the master agreement. Thus, contrary to the Respondent's contention, I find that the Plan does not waive the Union's right to information under § 7114(b)(4) of the Statute.

In its brief, the Respondent alternatively argues that the Union lacks standing to challenge the Plan because "only the national Union, which is the exclusive representative of the parties, may challenge the negotiated status of national policy." (R. Br. at 14). In support of this assertion, the Respondent incomprehensibly cites Authority precedent involving requests to negotiate – not requests for information. *FDA*, 53 FLRA at 1273. Undeniably, that case has no application here. In this case, the Union is not requesting to bargain with the Respondent over the Merit Promotion Plan. The Union is merely challenging the Respondent's interpretation that the Plan waives the Union's rights under § 7114(b)(4) of the Statute. Accordingly, I reject the Respondent's argument in this matter.

Second, the Respondent's contention that certain information does not exist must be rejected as a countervailing interest. Under the Statute, if the requested information exists and is physically maintained by the agency, the agency must extract the information and provide it to the Union. *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987, 1993 (1990).

In this case, the Union mistakenly requested the information in paper form, as it existed prior to the system's automation in 2007. Nonetheless, the evidence establishes that the Respondent physically maintained the requested information. At the hearing, Eskew testified that the qualification rating forms (item 3) did "not exist." (Tr. 93). However, Eskew went on to testify that, although the specific form did not exist, the equivalent of the information existed within the automated system as "pre-populated" questions regarding the applicants' experience and other qualifications. (Tr. 94). Similarly, with regard to the KSA information (item 8), Eskew testified that she did not provide the information "[b]ecause [it] did not exist *in that format*." (Tr. 98) (emphasis added). Eskew declared that the KSA information is currently maintained in the automated system as questions that applicants answers by "select[ing] what best describes their experience." (*Id.*).

The record is replete with instances of Eskew alleging that information does not exist, but then describing how corresponding information exists within the automated system. (Tr. 95) (merit promotion forms *were* used to "determine the best qualified grouping" and are now a "mathematical calculation" in the system);( Tr. 96) (the promotion certificate is the best qualified list); (Tr. 99) (OF-612 was a form that the Respondent "used to use" and now exists as the applicants' resumes). Eskew's testimony clearly demonstrates that the Respondent understood each of the eleven enumerated requests and maintains records that contain the information sought by the Union. Accordingly, I find that the Respondent normally maintains the requested information.

The Respondent similarly claimed at the hearing that the yearly performance evaluations (item 6), achievement awards (item 9), and training records (item 7) did not exist because applicants are not required to submit such documentation. (Tr. 96-99). However, the record verifies that applicants were permitted to submit documentation regarding their awards, training, and performance. (Tr. 111). The Respondent failed to reveal if any of the eighty-seven applicants provided such information and instead declared that it was not required. Based on the evidence, I cannot conclude that items six, seven, and nine do not exist.

Third, the Respondent's assertion that it would be unduly burdensome to produce the requested information is without merit. Here, the Respondent's primary concern is that it cannot provide the requested resumes because it would have to sanitize "addresses, phone number[s], e-mail addresses" and "job assignments" that "*might* be unique." (Tr. 93) (emphasis added). It also contended that it would need to sanitize reference information *if* it were provided on the application. (Tr. 93).

Under the Statute an agency is required to provide information that is reasonably available. *Dep't of HHS, SSA*, 36 FLRA 943, 950 (1990) (*SSA*). An agency is not required to provide information that is available only through "extreme or excessive means." *Id.* "Determining whether 'extreme' or 'excessive' means are required to retrieve available data requires case-by-case analyses of [the] relevant facts and circumstances." *Id.*

Initially, I note that the sanitization of names, telephone numbers, and email addresses on eighty-seven applications is not excessive without evidence establishing otherwise. *See Dep't of HHS, Region IV, Health Care Fin. Admin.*, 21 FLRA 431, 441 (1986) (record did not support that the duplication of 1,500 pages was unduly burdensome). In this case, the Respondent failed to present any credible or material evidence that the information was obtainable only through excessive means. In fact, Eskew testified that the CSU has, in the past, sanitized more than eighty-seven applications. (Tr. 108). Moreover, the Respondent acknowledged that it could obtain the requested information simply by printing it from the automated system. (Tr. 103-04). As for the burden of sanitizing the "unique" identifiers, the concern is purely speculative. The Respondent failed to provide evidence that any of the resumes contained unique identifiers that would require sanitization. Even if such identifiers existed, there is no evidence that the additional sanitization would be excessive.

The Respondent further contended that it would need to sanitize the information to conceal its crediting plan. Eskew testified that she did not provide the requested information because the printer only prints "a lot of information." (Tr. 94-95); *See SSA*, 36 FLRA at 951 (to some extent, the burden of retrieving requested information is attributable to "the manner in which the Respondent keeps its records."). Again, the Respondent failed to provide any evidence regarding the cost or time associated with printing or sanitizing. In short, there is nothing to support the extent of the Respondent's burden, aside from the Respondent allegation that it would be burdensome. Accordingly, I find that the requested information was reasonably available, within the meaning of § 7114(b)(4) of the Statute. *See U.S. DOJ, INS, Border Patrol, El Paso, Tex.*, 37 FLRA 1310, 1323 (1990) (agency failed to establish that providing the requested information would be excessive).

Turning to the Respondent's Privacy Act defense, I find that the requested information is not prohibited from disclosure. In response to the Union's information request, the Respondent stated that it could not release the information because it was "protected by the Privacy Act." (Jt. Ex. 2). Despite the conclusory nature of this assertion, the Authority has previously found comparably bare declarations regarding the Privacy Act adequate to require resolution of the issue. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669 (2012).

Generally speaking, the Privacy Act, 5 U.S.C. § 552a restricts the disclosure of personally identifiable information, with certain exceptions. *See Health Care*, 56 FLRA at 506. One such exception permits disclosure of otherwise protected information if the information is required to be released under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). *Id.* Under the FOIA, certain records must be disclosed upon request unless subject to a specific FOIA exemption. FIO exemption (b)(6) permits an agency to withhold information if disclosure

would constitute a clearly unwarranted invasion of privacy. The Authority has consistently held that the disclosure of information in sanitized form, to remove names and personal identifiers, protects against a clearly unwarranted invasion of employee privacy and therefore, does not violate the Privacy Act. *Id.*

In this case, there is no dispute that the requested information would be sanitized to protect the privacy interests of the applicants. The Union notified the Respondent in its request that "some of the data . . . is retrieved by reference to an individual's name or some other personal identifier." (Jt. Ex. 1). The Union requested the Respondent to redact "any personally identifiable information." (*Id.*). Because the Union requested the information is sanitized form, the Privacy Act would not prohibit disclosure. *See e.g., Health Care*, 56 FLRA at 506.

Lastly, I reject the Respondent's contention that the Union acted in bad faith by re-sending the information request on September 19, 2012. As stated previously, due to the Respondent's obscure and formulaic response, the Union was initially unable to pursue an accommodation regarding disclosure. Thus, after it filed the grievance, it resent the information noting that it additionally required the information to process the recently filed grievance through arbitration. (R. Ex. 12). I view the Union's conduct as an effort to encourage the Respondent to further engage in communication regarding disclosure, consistent with the policies set forth in *IRS, Kansas*, 50 FLRA at 670-71.

## REMEDY

In this case, the General Counsel requested that the Notice be distributed via email and physically posted. I will incorporate the electronic dissemination into the Order in accordance with the Authority's decision that ULP notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

## CONCLUSION

The Union's request for information was sufficient to permit the Respondent to make an informed response, as it did during the hearing. Because the Union established its particularized need for the requested information and the Respondent's asserted countervailing interests were not presented to the Union in accordance with Authority case law, I find the Respondent's failure to furnish the requested information violated § 7116(a)(1), (5) and (8) of the Statute.

Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Justice, Federal Bureau of Prisons, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 501 (Union) with the following information, or its normally-maintained equivalent:

i. Copies of all employees' names and their corresponding duty station that were contained in the best qualified list for selection at the time job announcement MIA-2012-0014 was closed;

ii. Copies of all position applications that were submitted and taken into consideration with regards to job announcement MIA-2012-0014;

iii. Copies of all the qualification rating forms pertaining to job announcement MIA-2012-0014;

iv. Copies of all merit promotion ranking forms that were used in selecting the qualified and eligible employees with regards to job announcement MIA-2012-0014;

v. Copies of the promotion certification forms used in accordance with the provisions of the Federal Prisons System Merit Promotion Plan to entail the position title, series and grade, announcement number, qualification standards used, and the selection of factors used to determine promotional eligibility;

vi. Copies of all applicants' yearly performance evaluations that were used in making a determination and/or rating factor with regards to the promotional eligibility of the applicants for job announcement MIA-2012-0014;

vii. Copies of all training records utilized in job announcement MIA-2012-0014;

viii. Copies of all knowledge, skills, and abilities information pertaining to job announcement MIA-2012-0014;

ix. Copies of any and all Achievement Awards provided by the applicants that were introduced and/or taken into consideration for job announcement MIA-2012-0014;

x. Copies of all optional application for employment (OF-612) that were submitted by the applicants with regards to job announcement MIA-2012-0014;

xi. Copies of any/all policies, laws, and guidelines with regard to commuting and the specific policy used to enforce local commuting distance from the Federal Correctional Institution in Miami, Florida.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Furnish the Union with the following information or its normally maintained equivalent:

i. Copies of all employees' names and their corresponding duty station that were contained in the best qualified list for selection at the time job announcement MIA-2012-0014 was closed;

ii. Copies of all position applications that were submitted and taken into consideration with regards to job announcement MIA-2012-0014;

iii. Copies of all the qualification rating forms pertaining to job announcement MIA-2012-0014;

iv. Copies of all merit promotion ranking forms that were used in selecting the qualified and eligible employees with regards to job announcement MIA-2012-0014;

v. Copies of the promotion certification forms used in accordance with the provisions of the Federal Prisons System Merit Promotion Plan to entail the position title, series and grade, announcement number, qualification standards used, and the selection of factors used to determine promotional eligibility;

vi. Copies of all applicants' yearly performance evaluations that were used in making a determination and/or rating factor with regards to the promotional eligibility of the applicants for job announcement MIA-2012-0014;

vii. Copies of all training records utilized in job announcement MIA-2012-0014;

viii. Copies of all knowledge, skills, and abilities information pertaining to job announcement MIA-2012-0014;

ix. Copies of any and all Achievement Awards provided by the applicants that were introduced and/or taken into consideration for job announcement MIA-2012-0014;

x. Copies of all optional application for employment (OF-612) that were submitted by the applicants with regards to job announcement MIA-2012-0014;

xi. Copies of any/all policies, laws, and guidelines with regard to commuting and the specific policy used to enforce local commuting distance from the Federal Correctional Institution in Miami, Florida.

(b) Post at the Federal Correctional Institution in Miami, Florida, where bargaining unit employees are represented, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, Federal Correctional Institution, Miami, Florida, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Send the Notice by electronic mail to all American Federation of Government Employees bargaining unit employees in the Federal Correctional Institution in Miami, Florida. This Notice will be sent on the same day that the Notice is physically posted.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., March 25, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail and refuse to furnish the American Federation of Government Employees, Local 501 (Union) with the information requested on August 1, 2012, related to job announcement MIA-2012-0014.

**WE WILL NOT**, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

**WE WILL** furnish the Union with copies of the following information, or its normally-maintained equivalent: all employees' names and their corresponding duty station that were contained in the best qualified list; all position applications that were submitted and taken into consideration; all the qualification rating forms pertaining to all applicants; all merit promotion ranking forms that were used in selecting the qualified and eligible employees; the promotion certification forms used in accordance with the provisions of the Federal Prisons System Merit Promotion Plan; all applicants yearly performance evaluations that were used in making a determination; all training records utilized by the agency; all knowledge, skills, and abilities information pertaining to the job announcement; all achievement awards provided by the applicants that were taken into consideration; all optional applications for employment (OF-612) that were submitted; all policies, laws, and guidelines with regard to commuting and the specific policy used to enforce local commuting distance from the Federal Correctional Institution in Miami, Florida.

_____
(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.