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

OALJ 15-38

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER GUAYNABO
CATAÑO, PUERTO RICO

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 4052

CHARGING PARTY

Case No. BN-CA-12-0397

William D. Kirsner
For the General Counsel

K. Tyson Shaw
For the Respondent

Jorge A. Rivera
For the Charging Party

Before: CHARLES R. CENTER
Chief 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 July 30, 2012, the American Federation of Government Employees, AFL-CIO, Local 4052 (Union/Charging Party) filed an unfair labor practice (ULP) charge with the Boston Region of the FLRA, against the United States Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Cataño, Puerto Rico (Respondent). (G.C. Ex. 1(a)).

On March 28, 2014, the Regional Director of the Boston Region issued a Complaint and Notice of Hearing, alleging that the Respondent failed to provide information pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(e)). The complaint alleged that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute when it failed to either clearly state that four items of requested information did not exist, failed to provide the requested items, or failed to establish a legitimate basis for not providing the requested items to the Union. *Id.* The Respondent filed an Answer to the complaint on April 22, 2014, and admitted certain allegations and denied others, including the allegation that it violated the Statute. (G.C. Ex. 1(g)).

A hearing was held on June 3, 2014, in Fort Buchanan, Puerto Rico. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent filed timely post-hearing briefs, which have been fully considered.

Based upon the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees (AFGE) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of a nationwide consolidated unit of the Respondent's employees. (G.C. Ex. 1(e) & 1(g)). The Charging Party is an agent of the AFGE for the purpose of representing employees at the Respondent. (*Id.*). The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (*Id.*).

Beginning in 2002, the Charging Party pursued grievances regarding the conduct of one of the Respondent's employees, alleging that he engaged in sexual harassment, violated Title VII, and retaliated against the Charging Party. (G.C. Ex. 2; Tr. 101, 132). On July 19, 2002, Arbitrator Marcia Greenbaum sustained the Charging Party's grievance and ordered remedies, which were later upheld by the Authority. (*U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787, 791-92 (2004)); (G.C. Ex. 2; Tr. 112-13). Following the Greenbaum decision, on February 6, 2007, Arbitrator Jerome La Penna sustained the Charging Party's grievance in two awards, finding that the Respondent violated the parties' Master Agreement and Title VII and had systematically violated the remedial measures ordered in the Greenbaum award. (G.C. Ex. 2). The parties engaged in a third arbitration before Dr. David Helfeld regarding the same issues involved in the Greenbaum and La Penna decisions. (G.C. Ex. 2). During the Helfeld arbitration, the Charging Party concluded that the Respondent had failed to make referrals to the Office of Internal Affairs (OIA) following the Greenbaum and La Penna arbitrations based on testimony of the Respondent's witnesses. (Tr. 81-84). The Charging Party believed that the Respondent was required to make referrals to the OIA following the arbitrations since both arbitrators found that a Lieutenant employed the Respondent had committed sexual harassment against bargaining unit employees. (Tr. 69-70).

On June 13, 2012, Jorge Rivera, Union President of Local 4052, submitted a request for information on behalf of the Charging Party to the Respondent. (Tr. 65). The Charging Party requested specifically:

> 1. A redacted copy or in a (sanitized form) the OIA Referral of Incident form (BP-S715.012) submitted to the Office of Internal Affairs reporting the July 19, 2002, sustained allegations of Unprofessional Conduct & Sexual Harassment as perpetrated by Daniel Rivera, Lieutenant toward Migdalia Toro, Correctional Officer. (First Request).
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> 2. A redacted copy or in a (sanitized form) the OIA Referral of Incident form (BP-S715.012) submitted to the Office of Internal Affairs reporting the February 6, 2007, sustained violations of Title VII of the Civil Rights Act of 1964 as amended, Program Statements 3713.23 Discrimination and Complaint Processing and 3420.09 Standard of Employee Conduct as committed by Daniel Rivera, Lieutenant, toward Migdalia Toro, Correctional Officer and Jorge Rivera, Union President Local 4052. (Second Request).
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> 3. A redacted copy or in a (sanitized form), the investigative report derived by any Investigative Agent on behalf of the Office of Internal Affairs or Management at MDC Guaynabo regarding the July 19, 2002, sustained allegations of Unprofessional Conduct and Sexual Harassment as perpetrated by Daniel Rivera, Lieutenant toward Migdalia Toro, Correctional Officer. (Third Request).
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> 4. A redacted copy or in a (sanitized form), the investigative report derived by any Investigative Agent on behalf of the Office of Internal Affairs or Management at MDC Guaynabo regarding the February 6, 2007, sustained allegations of violations of Title VII of the Civil Rights Act of 1964 as amended, Program Statements 3713.23 Discrimination and Complaint Processing and 3420.09 Standard of Employee Conduct as committed by Daniel Rivera, Lieutenant. (Fourth Request). (Jt. Ex. 3 at 1, 2).

The Charging Party stated that its particularized need for the first two pieces of information was to determine whether the Respondent properly and timely referred the sustained violations of misconduct to the Office of Internal Affairs after receipt of the arbitration decisions. (Jt. Ex. 3). The Charging Party also stated that it needed the information to determine the "Office of Internal Affairs classification of the sustained charges and the timely disposition of these sustained violations . . . ." (*Id.*). The Charging Party noted it would use the information to determine whether to report management officials who were aware of the violations to the Office of Internal Affairs under provisions in the Respondent's Program Statement 3420.09, and to determine whether to file a grievance for violations of law and policy. (*Id.*). The Charging Party also indicated that it wanted the information to determine whether the Respondent applied its policies, rules and regulations fairly and equitably. (*Id.*). Lastly, the Charging Party stated it needed the information to

provide the Office of Special Counsel evidence of prohibited personnel practices committed by the Respondent's management officials and to inform the Equal Employment Opportunity Commission and request corrective measures. (*Id.*). The Charging Party gave substantially similar reasons as to its particularized need for the third and fourth items of information. (*Id.*).

DOJ Program Statement 3420.09 provides for Standards of Employee Conduct at the Bureau of Prisons. (Jt. Ex. 11; Tr. 117). Section 2(f) of the Program Statement requires that employees report any violation of the standards of conduct to the Chief Executive Officer (CEO) or another appropriate authority. (Jt. Ex. 11). The CEO of a federal prison is the warden. (Tr. 119). Section 8(a) of the Program Statement requires employees to conduct themselves in a manner that creates and maintains respect for the Bureau of Prisons. (Jt. Ex. 11). The Program Statement also provides a guide to imposing discipline for various types of offenses including using insulting or obscene language to others and infamous or notoriously disgraceful conduct. (*Id.*).

The Respondent's Program Statement 1210.24 instructs Bureau of Prisons staff on procedures for reporting allegations of staff misconduct to the Office of Internal Affairs (OIA). (Jt. Ex. 12). OIA is responsible for ensuring that all violations of staff misconduct per the Standards of Employee Conduct are reported to the Department of Justice, OIG. (*Id.*). Program Statement 1210.24 also provides for classification levels of different types of misconduct, from Classification 1 for the most serious offenses to Classification 3 for the least serious offenses. (*Id.*). The CEO at the institution is required to report violations of the Standards of Employee Conduct to the OIA upon becoming aware of them. (*Id.*).

The Respondent replied to the Charging Party's request by stating that it needed more time to respond to the request. (Jt. Ex. 4; Tr. 96). The Charging Party responded and agreed to extend the date by which it wanted the information. (Jt. Ex. 5; Tr. 96-97). On July 9, 2012, the Respondent replied with an answer to the Charging Party regarding the requested information. (Jt. Ex. 6; Tr. 97-98). The Respondent first stated the requirements for an information request made pursuant to 5 U.S.C. § 7114(b)(4). (Jt. Ex. 6). It then identified the requirements for the union to establish a particularized need for information to be considered "necessary" under the Statute. (*Id.*). The Respondent then addressed the Charging Party's four requests.

In response to the Charging Party's first request, the Respondent stated that the request was resolved through BN-CA-11-0395 and that no further information would be provided. (*Id.*). The Respondent denied the second request as well, stating that a referral to the Office of Internal Affairs begins the investigative process and does not offer any conclusions. (*Id.*). The Respondent also asserted that if the information did exist, it would violate employees' privacy rights to provide the Union with a copy of the document. (*Id.*).

The Respondent denied the Charging Party's third request, again asserting it would violate employees' privacy rights to provide the information to the Union. (*Id.*). The Respondent also contended that the Bureau of Prisons has substantial confidentiality interests in its investigative techniques and policies pertaining to the Agency's SIS Manual and cited

U.S. DOJ, Fed. BOP, FCI, Forrest City, Ark., 62 FLRA 308 (2007) (*Local 0922*), in support of that position. (*Id.*). The Respondent denied the Charging Party's fourth request and repeated the same reasons for its denial to the third request. (*Id.*).

The Charging Party replied to the Respondent on July 16, 2012. (Jt. Ex. 7; Tr. 104-05). The Charging Party first articulated why it needed the information in general. It stated that it needed the information to determine whether responsible management officials properly and timely referred the incidents to the Office of Internal Affairs after it received the arbitration decisions found misconduct in the form of violations of law and Agency policy by Respondent's employee. (Jt. Ex. 7). The Charging Party also wanted to know how the matters were classified by the Office of Internal Affairs. (*Id.*). The Charging Party stated how it would use the information to determine whether to file a grievance against the Respondent. (*Id.*). The Charging Party also wanted to determine whether the Respondent had applied its policies, rules and regulations in a fair and equitable manner. (*Id.*). The Charging Party then discussed how it would use the information related to its representational responsibilities under the Statute. The Charging Party pointed out that a union's representational responsibilities include determining whether to file grievances and processing grievances, among other areas of responsibility. (*Id.*).

The Charging Party then responded to the specific points raised in the Respondent's reply to each of the Charging Party's requests. Regarding the first request, the Charging Party argued that the resolution outlined in BN-CA-11-0395 referred to an apparent allegation of misconduct while the Greenbaum arbitration decision contained sustained violations of law and agency policy. (*Id.*). The Charging Party wrote that the Respondent's refusal to accept the arbitrator's decision should have no bearing on management's responsibility to report the violations. (*Id.*). The Charging Party stated that if the Respondent believed it had no duty to report the sustained violations, the Charging Party would accept a written statement to support its position citing Agency policies, rules, regulations and case law. (*Id.*).

With respect to the second request, the Charging Party refuted the Respondent's contention that the Union did not have a basis to state that the allegations were sustained. The Charging Party referred to the La Penna arbitration decision, which found violations of Title VII. (*Id.*). The Charging Party argued that the privacy rights of employees involved could be protected by producing redacted or "sanitized" versions of the requested information. (*Id.*). The Charging Party also rejected the Respondent's contention that referrals to the Office of Internal Affairs begin the investigative process and thus do not offer any conclusions. The Charging Party pointed to Program Statement 3420.09, which it argued, did not limit investigations solely to apparent violations of standards. (*Id.*). The Charging Party asserted that investigations by the Office of Internal Affairs could include decided violations that were determined by outside resources such as Federal and local law enforcement authorities and background investigators. (*Id.*). The Charging Party stated that the Respondent was obligated to refer the findings of the arbitrator for official investigation once it became aware of them. (*Id.*). Lastly, the Charging Party wrote that there were fundamental differences between the information it requested here and the information

requested in *Local 0922*, the case cited by the Respondent. The Charging Party stated that it was not interested in the Agency's investigative techniques or a complete copy of the SIS manual. The Charging Party wrote that it only wanted to know if the factual determinations contained in the arbitration findings were referred to the Office of Internal Affairs and if so, how they were categorized. (*Id.*).

The Respondent sent a reply to the Charging Party on August 15, 2012. (Jt. Ex. 8; Tr. 108-09). The Respondent again referred to the requirements for an information request to an agency under 5 U.S.C. § 7114(b)(4) of the Statute and noted that the Union had to establish a particularized need for information to be deemed "necessary" under the Statute. (Jt. Ex. 8). The Respondent then proceeded to deny each of the Charging Party's four requests with the same explanation. The Respondent stated that it would be a violation of employees' privacy rights to release the requested document without their consent. (*Id.*). The Respondent also wrote that providing redacted copies of the documents would not address the privacy concerns because the involved individuals could still be identified from the documents. (*Id.*). The Respondent ended the letter by stating that it "consider[ed] the matter closed." (*Id.*).

On May 20, 2014, a subpoena duces tecum was issued by the General Counsel to Steve Mora, the Warden at MDC Guaynabo and to Dr. John Digman, the Chief of the Office of Internal Affairs for the Federal Bureau of Prisons. (G.C. Exs. 1(k), 1(l)). The subpoenas required the Respondent to produce the information requested by the Charging Party at the hearing. (*Id.*).

Dr. Digman is responsible for overseeing internal investigations at the Bureau of Prisons. (Tr. 158). Dr. Digman testified that the OIA might reopen investigations when presented with new evidence. (Tr. 163). Dr. Digman stated that he did not know of any investigations that were reopened as a result of an arbitration decision, but he added that this may have been due to the fact that arbitrations did not typically involve matters of employee misconduct. (*Id.*). Dr. Digman admitted that investigations have been reopened in instances where the EEOC rendered an adverse decision against the agency after a previous OIA investigation on the matter found the allegations were not sustained. (*Id.*).

Dr. Dingman did not search the Respondent's records himself for the requested documents and was not involved in responding to the request prior to the hearing. (Tr. 170-72). He was not involved in any search conducted for the documents by his office and had no personal knowledge of whether the documents existed. (*Id.*).

The Respondent did not produce any of the requested documents to the Charging Party, nor did it tell the Charging Party that it did not understand the requests. (Tr. 108, 111). The Respondent did provide documents to me at the hearing for an *in camera* review. However, these documents consisted of the investigative reports and referrals underlying the Greenbaum and La Penna arbitrations. In other words, these investigative reports and referrals were created prior to the arbitration decisions and were not completed in response to the findings made by those arbitrators. Respondent's counsel stated during the hearing that

no additional referrals or investigations were done following the arbitration decisions. (Tr. 30-32). The General Counsel subsequently withdrew the subpoenas during the hearing after learning there were no documents in existence that were responsive to the requests. (Tr. 38).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the Charging Party's information requests met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to either furnish the information or tell the union the information did not exist violated § 7116(a)(1), (5) and (8) of the Statute. The GC contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and did not constitute guidance, advice, counsel, or training related to collective bargaining.

The GC maintains that when a union has established a particularized need for information that does not exist, the agency is obligated under § 7114(b)(4) to inform the union of that fact. *SSA, Balt., Md.*, 60 FLRA 674, 679 (2005). The GC contends that when the Respondent did not acknowledge until the hearing that its managers and supervisors made no post-arbitration award referrals to the OIA, the Respondent violated the Statute by not stating this clearly to the Charging Party.

The GC believes there is a possibility that the Respondent may actually have the data but does not want to provide it. The GC points to the Authority's decision in *IRS, Kansas City*, which held that an agency's refusal to give the union requested information violates the Statute when the union has shown that the information is necessary and either the agency has not established an anti-disclosure interest, or the agency has established an anti-disclosure interest but it does not outweigh the union's need for information. *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 671 (1995) (*IRS Kansas City*). The GC argues that if the Respondent does have the data, then the Charging Party is entitled to it since the Charging Party showed a particularized need for the data and the Respondent did not establish a recognized basis for not disclosing it. *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91 (2004).

The GC utilizes the analytical framework set forth in *IRS Kansas City*, to argue that the Union articulated a particularized need for the information and established that the information was "necessary," as defined by the Statute. 50 FLRA at 661. The GC maintains the Charging Party properly established why it needed the performance appraisals, how it would use the information, and how that use related to the Union's representational responsibilities.

The GC asserts that the Union required the information because the Respondent had failed to prevent, investigate, and take action against a supervisor who was found by an arbitrator to be a "serial sexual harasser." (G.C. Ex. 2). The GC points out that the Charging Party referred to the Respondent's policies and the contract in explaining why the Charging Party had a legitimate interest in seeing if, when and what was referred to the OIA. The Charging Party addressed how it would use the information by noting that it could decide whether to report managers or supervisors who failed to comply with the Respondent's policies and it could decide to file a grievance or address matters with the Office of Special Counsel or Equal Employment Opportunity Commission. The GC argues that the Charging Party established a link between its use of the data and its representational responsibilities under the Statute when it stated that the Charging Party's use of the information was related to collective bargaining, including contract administration and processing of grievances. The GC asserts that the Charging Party met the requirements by articulating a particularized need under *IRS Kanas City* and thus established that the requested information was "necessary," as required by the Statute.

The GC argues that the Privacy Act does not bar disclosure of the requested information in this case. The GC contends that the Respondent failed to put into evidence the nature and significance of any employee's privacy interests. The GC also asserts that the information should be disclosed because the Charging Party articulated a public interest under FOIA and requested the information in a redacted format. The GC notes that the Charging Party was awarded $500,000 by arbitrator Helfeld for training purposes. The GC contends that examining how the Respondent handled two prior arbitration decisions, which found violations of Title VII by determining that sexual harassment had occurred, relate to the public interest of evaluating the Respondent's compliance with the laws of the United States and its stewardship of taxpayer money. The GC points out that the Respondent was ordered to pay monetary damages to employees and the Union, which was justified in part by Respondent's failure to properly address the findings of prior arbitrations. The GC argues that disclosing the requested information will shed light on Respondent's performance of its statutory duties under Title VII and will also inform citizens about the activities of the federal government.

The GC notes the Authority has consistently held that the public interest can be "substantially, if not equally, served by disclosure of sanitized information which does not identify individual employees by name or other identifying information." *Dep't of Transp., FAA, Fort Worth, Tex.*, 51 FLRA 324, 329 (1995). The GC argues that *USP Marion,* which allowed the agency to refuse to provide SIS, OIA, and FBI reports pursuant to the Privacy Act is distinguishable because here the Charging Party established a public interest in disclosure under FOIA and it requested the documents in redacted form. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669 (2012) (*USP Marion*).

The GC believes the Authority's decision in *U.S. DOJ, INS, Border Patrol, El Paso, Tex.*, 37 FLRA 1310 (1990), where the Authority held it unnecessary to reach Privacy Act issues when a union requests data in a sanitized format, supports its position that the Privacy

Act does not bar disclosure in this case. The GC maintains there are no privacy concerns here since the Charging Party's request does not require the release of employee names or personal identifiers and because the information was already made public.

The GC refutes the Respondent's contention that the documents cannot be sufficiently redacted to protect the privacy interests implicated because the requests themselves each ask for information about one individual. The GC argues that purpose of the Privacy Act is to protect information from people who don't know, but the fact that some information is already known that would allow those in the know to attach a name to the facts does not, in and of itself, support non-disclosure of the documents. Therefore, the fact that redaction would protect identifying information on a document from the vast majority of people supports disclosure under the Privacy Act.

The GC also contends that the routine use exception "j" to the Privacy Act supports disclosure in this case. For disclosure to be consistent with routine use exception "j," the information must be relevant to the express purpose for which it is sought and the information must be necessary, meaning there are no adequate alternative means or sources for satisfying the union's informational need. *Dep't of the Air Force, Scott AFB, Ill.*, 51 FLRA 675 (1995). The GC argues that since the evidence here is directly relevant to determining whether the Respondent complied with its internal policies, the first routine use prerequisite is met. The GC also contends that since there are no adequate alternate means for the Charging Party to get information about how the Respondent referred the arbitration awards to the OIA and how the OIA classified and investigated those findings, the Charging Party has the right to the information under exception "j."

Lastly, the GC rejects the Respondent's contention that the settlement agreement in BN-CA-12-0236 barred the Charging Party's request in this case. The GC contends the Charging Party did not receive the data at issue in this case as part of that settlement. The settlement agreement did not include any waiver of the Charging Party's right to request related data in the future. The GC maintains that in the absence of any clear and unmistakable waiver, the Charging Party did not waive its right to the information in this case.

As a remedy, the GC seeks an order requiring the Respondent to provide the Charging Party with copies of the requested documents or clearly state that they do not exist. The GC also requests that the Respondent post a notice and send a copy of the notice via electronic mail to all bargaining unit employees at MDC Guaynabo, informing them that it violated § 7116(a)(1), (5), and (8) of the Statute. The GC requests that the Warden at MDC Guaynabo, sign the notice.

Respondent

The Respondent argues that it did not violate the Statute because it made a good faith, reasonable interpretation of the information requests at issue, identified responsive documents, and timely responded with countervailing anti-disclosure interests. The Respondent maintains that the GC failed to prove that the Charging Party established a

particularized need for the information. The Respondent further alleges that disclosure of the OIA records identified as responsive would constitute a clearly unwarranted invasion of privacy and is prohibited by law. The Respondent also contends that two of the information requests are governed by the Charging Party's settlement with the Respondent in a prior matter.

The Respondent argues it reasonably interpreted the Charging Party's requests to mean that it was seeking OIA referrals and reports relating to allegations and violations that were ultimately addressed by arbitrators on July 19, 2002 and February 6, 2007. The Respondent asserts it did not have a duty to inform the Charging Party that the requested information did not exist because its reasonable interpretation of the requests led the Respondent to believe it had documents that were responsive. The Respondent asserts that it timely raised anti-disclosure interests to the Charging Party. The Respondent contends it should not be accountable for the imprecision of the Charging Party's request. The Respondent asserts that the Charging Party is responsible to ensure that an information request is sufficiently clear as to put the Agency on notice as to the nature of the information in question. *IRS Kansas City*, 50 FLRA at 669-70. The Respondent asserts that it was not required to seek clarification of the information requests because it reasonably interpreted them.

The Respondent argues that the Charging Party did not articulate a particularized need at the time the information requests were filed. Specifically, the Charging Party did not refer to the third arbitration hearing, which was pending at the time the information requests were filed. The Charging Party did not claim that it needed the information for the arbitration until the hearing in this case. The Respondent asserts that the Charging Party was required to articulate its need for the documents at or near the time of the request and it failed to do that. *U.S. DOJ, INS, Twin Cities, Minn.*, 51 FLRA 1467 (1996) (*INS Twin Cities*).

The Respondent contends the Charging Party did not establish that the documents were "necessary" as required by *DOJ, U.S. INS, U.S. Border Patrol, El Paso, Tex. v. FLRA*, 991 F.2d 285, 295 (1993). The Respondent argues that the Charging Party did not need the requested documents because it was authorized to report any suspected violations of the Standards of Conduct by the Warden at MDC Guaynabo if the Charging Party believed that the Warden did not properly make referrals to the OIA following the arbitration decisions. The Respondent also asserts that the requested information was not necessary because any potential grievance by the Charging Party regarding the arbitration decisions in 2002 and 2007 would not have been timely when the information requests were issued in 2012.

The Respondent asserts that the requested information cannot be disclosed because the Respondent has valid anti-disclosure interests. The Respondent asserts that the information sought includes investigative techniques and policies pertaining to the Respondent's SIS Manual. The Respondent argues it has substantial confidentiality interests in these materials and therefore they should not be produced.

The Respondent also argues that the information requested is protected by the Privacy Act and thus cannot be disclosed. The Respondent maintains that the requested documents are held within a system of records and that disclosure of the information would implicate employee privacy interests. The Respondent asserts that since each information request identifies the subjects of the OIA documents by name, the privacy rights of the individual are necessarily implicated and that no level of redaction would reduce the association between the responsive documents and the individual. Consistent with *El Reno,* the fact that the employee's name is already known to the Charging Party and was discussed in a hearing before a third party does not diminish the employee's privacy interests or protections under Statute. *U.S. DOJ, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584 (1995). The Respondent argues that its employees have significant privacy interests in its records regarding allegations or investigations into misconduct. *USP Marion*, 66 FLRA at 673-74. The Respondent cites the testimony of its witness that OIA reports and referrals contain information that could be considered embarrassing or stigmatizing to the employee.

The Respondent contends the GC did not establish a cognizable public interest under FOIA and failed to demonstrate how disclosure of name-identified OIA documents would further the public interest. The Respondent argues the GC never established that the Respondent was required to make referrals to the OIA following the arbitration decisions. Further, the Respondent points out that any expenditure of taxpayer funds ordered by an arbitrator is already in the public realm since arbitration rulings are made public. The Respondent argues that the Charging Party's asserted interest in the matter more closely aligns with the Union's interest and not the public's interest. *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 344-49 (1995). The Respondent argues that the public's limited interest in disclosure of the documents does not outweigh the employee's substantial privacy interests in the OIA documents and therefore they should not be disclosed.

The Respondent asserts that disclosure of the information is also prohibited by FOIA Exemption 7, 5 U.S.C. § 552(b)(7) and § 552a(k)(2) of the Privacy Act. The Respondent maintains that the OIA records contain investigatory material created for law enforcement purposes within the meaning of these provisions.

Lastly, the Respondent argues that two of the Charging Party's information requests pertaining to investigation reports by the OIA are foreclosed by an earlier settlement agreement between the parties. The Respondent asserts that the information requested in the earlier case is substantially similar to two of the information requests in the present case. The Respondent contends that the language of the settlement agreement in the previous case waives the Charging Party's right to request the information in this case.

ANALYSIS

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, data: (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. 5 U.S.C. § 7114(b)(4).

As an initial matter, the parties disagree on the correct interpretation of the Charging Party's requests. The Respondent interprets the requests to include referrals and investigative reports regarding the matters underlying the arbitration decisions of July 2002 and February 2007. Thus, under the Respondent's interpretation, OIA referrals and reports created before those arbitration decisions would be responsive to the Charging Party's requests. The Charging Party asserts that its requests only seek any OIA referrals or reports created in response to the arbitration decisions after they were issued.

Authority precedent requires information requests to be specific and to set forth the necessity of the particular information requested, including the scope of the request, which encompasses the type of the information requested as well as the temporal and geographic aspects of the request. *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009) (citing *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 52 FLRA 1323, 1330 (1997)). Here the Charging Party made a request that was not overly broad, which was in fact quite specific and easy to understand. Based on the language in the correspondence, it is clear that the requests sought any referrals and reports created *after* the arbitration decisions. While discussing its particularized need, the Charging Party stated in a follow up letter to the Respondent that it needed the information, "[t]o determine whether the responsible Management Officials, *upon receiving notice of these violations via both arbitral rulings*, properly and timely exercised its responsibility of referring the sustained misconduct and violations of law to the Office of Internal Affairs." (Jt. Ex. 7) (emphasis added). Later in the response, the Charging Party stated, "the Correctional Supervisor had been found to have violated the grievants legal and contractual rights by violating Title VII of the Civil Rights Act of 1964, as Agency officials continuously committed unfair labor practices (*See* FMCS Case No. 2005-05206-8). As such, upon becoming aware, Management was obligated to report the factual findings for an official investigation." (*Id.* at 15). It would be difficult for the Charging Party to state any more clearly that it wanted to know whether the Respondent made referrals to the OIA after the Respondent received the arbitration decisions and whether any reports were created as result of those referrals. In contrast, the Respondent's reply was ambiguous as to whether the documents even existed and contained boilerplate language citing Privacy Act anti-disclosure interests. (Jt. Ex. 8). The Respondent never indicated that it did not understand the requests or sought clarification of the requests. (Tr. 108, 111). The Respondent's interpretation of the information requests, which it did not articulate until the hearing, is not supported by the evidence.

I find that the information requests here specifically sought any OIA referrals or reports created after the arbitration decisions were handed down on July 19, 2002 and February 6, 2007. Thus, the documents presented by the Respondent at the hearing, which were referrals and reports generated as part of investigating the underlying conduct that formed the basis of the arbitration decisions, were not responsive to the information requests.

The Respondent contends that a settlement agreement in BN-CA-12-0236 waived the Charging Party's right to request the investigative reports in its third and fourth information requests in this case. The Charging Party in BN-CA-12-0236 requested "investigative reports conducted by . . . any Agency investigator detailing allegations of Title VII Sexual Harassment as alleged by Midaglia Toro, Former Senior Officer." (Tr. 140). The Respondent argues this request is substantially similar to the Charging Party's third and fourth information requests in this case. The Respondent argues that since the settlement agreement in the prior case did not require it to release the information, the Charging Party waived its right to information sought in its third and fourth requests in this case. However, the settlement agreement did not include any specific language waiving the Charging Party's right to request related data in the future. (R. Ex. 3; Tr. 143). For an agency to use the language of a negotiated agreement as a valid defense, the Authority requires the language of the agreement demonstrate that a union clearly and mistakably waived its statutory right. *Dep't of HUD, S.F., Cal.*, 40 FLRA 1116, 1122 (1991). In this case, the Charging Party did not waive its right to the information, as the settlement agreement in BN-CA-12-0236 did not contain a clear and unmistakable waiver by the Charging Party.

There is no dispute as to whether the requested information is normally maintained under 5 U.S.C. § 7114(b)(4). The parties dispute whether the requested information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 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." *IRS Kansas City*, 50 FLRA 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.*).

The Charging Party clearly established a particularized need for the information requests at issue here. The Charging Party stated the reason it needed copies of OIA Referral forms reporting the violations found by arbitrators on July 19, 2002 and February 6, 2007, which was to determine whether management had properly and timely referred the violations found to the OIA under Program Statement 3420.09, and determine the OIA classification of these violations. (Jt. Ex. 3). The Charging Party showed how the OIA Referrals would be used to determine whether: (1) to report management officials aware of the violations to the OIA; (2) to file a grievance under Article 31, Article 6 § (b)(1), (2), Article 7 § (a) and

Article 30 § (d) of the Master Agreement; (3) the Respondent was applying its policies, rules and regulations fairly and equitably; and (4) to provide evidence of prohibited personnel practices by responsible management officials to the Office of Special Counsel. (*Id.*).

The Charging Party also provided sufficient information to establish a particularized need for the OIA reports regarding the violations found by arbitrators on July 19, 2002, and February 6, 2007. The Charging Party needed the information to determine how the OIA classified the findings of the arbitrators. (*Id.*). The Charging Party showed how it would use the investigative reports to determine whether to report OIA personnel for failing to categorize and investigate the violations found by the arbitrators, in addition to the other uses discussed above. (*Id.*). The Charging Party also indicated it needed the reports to determine whether to file a grievance or take other action over the OIA's handling of the referrals. (*Id.*).

Lastly, the Charging Party addressed how the articulated uses of the information relate to its representational responsibilities under the Statute. The Charging Party noted that its use of the information was related to contract administration and processing of grievances (Jt. Ex. 7), which are indisputably within the scope of collective bargaining. *See U.S. Dep't of Transp., FAA, New England Region, Burlington, Mass.*, 38 FLRA 1623, 1629 (1991). The Charging Party therefore successfully articulated a particularized need for the documents.

The Respondent asserts the Charging Party did not establish a need for the information because the union president could have, but did not report management officials whom he believed had failed to make referrals to OIA following the arbitration decisions, in violation of the Standards of Conduct. This argument seems to miss the entire point of the information request. The Charging Party wanted to know what action the Respondent took after learning that two different arbitrators determined that a management official had committed sexual harassment and other violations. Finding out if OIA referrals and reports existed and what those documents contained regarding the arbitration decisions would allow the Charging Party to make an informed decision about whether to file a grievance or pursue other actions as discussed above.

During the hearing, it was established that the Respondent did not make any referrals to the OIA and thus no reports were generated by the OIA in response to either of the arbitration decisions. (Tr. 30, 32). The Respondent did not produce any new evidence to challenge this finding. Therefore, there were no OIA referrals or reports in existence that were responsive when the Respondent denied the requests. When information requested by a union from an agency does not exist, the agency is obligated under § 7114(b)(4) of the Statute to inform the union of that fact. *Soc. Sec. Admin., Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1226 (1996) (*SSA*); *Veterans Admin., Long Beach, Cal.*, 48 FLRA 970, 975-78 (1993); *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987). Furthermore, failing to inform the Union that the requested information does not exist does not depend upon a determination that the requested information was subject to disclosure, and failure to inform a union of the nonexistence of requested information constitutes a violation of § 7116(a)(1), (5), and (8) of the Statute. *SSA*, 51 FLRA at 1226-27.

After receiving the information requests and follow-up correspondence from the Charging Party, which required no further explanation as to what was sought, the Respondent should have informed the Charging Party that it did not make any referrals to the OIA following the arbitration decisions and thus the information did not exist. Instead, the Respondent refused to confirm or deny the existence of the documents but asserted that disclosure would be barred by the Privacy Act if they did exist. Regardless of whether the Privacy Act would prevent disclosure of the documents in question if they existed, an agency has a duty to inform the union that the documents do not exist even where documents are not disclosable under § 7114(b)(4). *SSA*, 51 FLRA at 1226. Because the Respondent did not advise the Charging Party that there were no OIA referrals or reports in response to the arbitration decisions, the Respondent violated § 7116(a)(1), (5), and (8) of the Statute.

The Respondent's failure to inform the Charging Party that the information did not exist also shows a lack of good faith. The obligation to provide information under § 7114(b)(4) is one component of the duty to negotiate in good faith. Deceiving a union that requests information under § 7114(b)(4) concerning the existence of that information does not constitute good faith. *SSA*, 51 FLRA at 1227. The Respondent was deliberately ambiguous as to whether responsive documents existed in its correspondence with the Charging Party but asserted various non-disclosure interests *if* the documents did exist. The Respondent's lone witness had no personal involvement in responding to the information requests at issue here. (Tr. 170-72). Then, at the hearing, the Respondent presented documents it claimed were protected by the Privacy Act that were not responsive under a reasonable reading of the information requests, so it would not have to reveal to the Charging Party that it took no action following the two arbitration decisions. The Respondent's actions here did not reflect the good faith communication and dialog envisioned by the Authority in *IRS, Kansas City*, 50 FLRA at 661.

I conclude that the Charging Party met its burden of establishing a particularized need for the requested information and the Respondent failed to inform the Charging Party that it did not make referrals in response to the two arbitration decisions on July 19, 2002 and February 6, 2007. Therefore, I find that the Respondent violated § 7116(a)(1), (5), and (8) by not informing the Charging Party that the requested information did not exist.

REMEDY

The Respondent will be ordered to cease and desist its unlawful conduct and clearly state that the requested information does not exist. The Authority recently held that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, such postings are ordered. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014). As such, I will incorporate the electronic dissemination into the Order:

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 United States Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Cataño, Puerto Rico, shall:

1. Cease and desist from:

(a) Failing to inform the American Federation of Government Employees, AFL-CIO, Local 4052 (Union/Local 4052), that the information requested under § 7114(b)(4) of the Statute does not exist.

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

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

(a) Inform Local 4052 that the information it requested under § 7114(b)(4) of the Statute does not exist.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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, of the Metropolitan Detention Center Guaynabo, Cataño, Puerto Rico, and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other 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 bargaining unit employees in represented by Local 4052. The Notice will be sent by email on the same day that the Notice is physically posted.

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

Issued, Washington, D.C., July 24, 2015

CHARLES R. CENTER
Chief 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 United States Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center Guaynabo, Cataño, Puerto Rico, 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 to inform the American Federation of Government Employees, AFL-CIO, Local 4052 (Union), that information it requested under § 7114(b)(4) of the Statute does not exist.

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

_____
(Agency/Respondent)

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

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.