



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-17

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FCC PETERSBURG, VA

RESPONDENT

AND

Case No. WA-CA-15-0045

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON LOCALS 33,
LOCAL 2052, AFL-CIO

CHARGING PARTY

Christopher A. Bowers
For the General Counsel

Meryl A. White
For the Respondent

Samuel D. Engle Jr.
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

In connection with grievances objecting to performance evaluations given to two employees, the employees' union asked the Agency for sanitized copies of performance appraisals and supporting documents for most, if not all, bargaining unit employees in the past two years. The Union explained that it needed the information to determine whether "multiple" complaints it had received about unfair ratings were accurate, and to prove the contract violations alleged in the grievances. It said it needed two years' worth of information in order to identify and show a pattern of misconduct. The Union also asserted that disclosing the information would not violate the Privacy Act, because the names and other identifying information of bargaining unit employees (but not the names of supervisors) would be redacted.

The Agency denied the request, asserting that the information was not reasonably available and that the Union had failed to establish a particularized need for the information. Subsequently, the parties stipulated (among other things) that the Agency maintains the requested information in electronic form.

There are three questions before me. The first is whether the Union established a particularized need for the requested information. The Union's request was long and detailed (albeit repetitive), explaining that it would use the information to prove contract violations in connection with two specific grievances, which were slated for arbitration. Moreover, the Union said that it was investigating similar complaints from other bargaining unit employees and therefore needed information from across the bargaining unit in order to demonstrate at the arbitration hearings that the Agency was applying its performance standards disparately and unfairly, in violation of the collective bargaining agreement. Further, the Union showed that it needed two years' worth of information in order to prove that the Agency had engaged in a pattern of misconduct. Because the Union explained in detail its need for the requested information, it established a particularized need.

The second question is whether the requested information was reasonably available. Although the Union sought a large number of documents, the information was stored electronically and thus was easily obtainable. Moreover, the Agency failed to demonstrate that redacting the documents would require extreme or excessive means. Accordingly, the answer to this question is yes.

The third question is whether the Privacy Act bars disclosure of the performance appraisals of bargaining unit employees, as requested by the Union. Because all identifying information of bargaining unit employees would be redacted, and because the appraisals would not contain any personal information about the supervisors who prepared the appraisals, disclosure would not involve a clearly unwarranted invasion of personal privacy. Accordingly, the answer to the third question is no.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On October 9, 2014, the American Federation of Government Employees, Council of Prison Locals 33, Local 2052, AFL-CIO (the Charging Party or Union), filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, FCC Petersburg, VA (the Agency, Respondent or FCC Petersburg). Jt. Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on March 10, 2015, on behalf of the FLRA's General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by

failing to furnish the Union with information it had requested. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on April 6, 2015, denying that it violated the Statute. GC Ex. 1(c).

A hearing in the matter was scheduled for May 7, 2015, but the hearing was canceled when the parties filed a Consent Motion for Leave to File Stipulations of Fact in Lieu of Hearing, which was accompanied by a Joint Stipulations of Fact and Joint Exhibits 1 through 12. The motion was granted, and June 8, 2015, was set as the date for filing briefs. Both the General Counsel and Respondent filed briefs, which I have fully considered.

Based on the record in this case, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. Stip. ¶1. The American Federation of Government Employees, Council of Prison Locals 33, AFL-CIO (Council), is the exclusive representative of a nationwide bargaining unit of employees at the Federal Bureau of Prisons. *Id.* ¶2. The Union, a labor organization within the meaning of § 7103(a)(4) of the Statute, is an agent of the Council for the purpose of representing bargaining unit employees at FCC Petersburg. *Id.* ¶4. The Council and the Federal Bureau of Prisons are parties to a collective bargaining agreement, known as the Master Agreement.¹ *Id.* ¶3.

This case pertains to an information request that the Union submitted in connection to grievances filed on behalf of two employees: Jawan Banks, a Unit Secretary in FCC Petersburg's Unit Management department, and Kelly Blankenship, a Senior Officer Specialist in the Correctional Services department. *Id.* ¶¶9-10, 13-14.

The Union filed the Banks grievance on April 3, 2014, alleging that the Agency violated Articles 6(b)(2) and 14(b) of the Master Agreement with regard to Banks's quarterly progress review and annual performance evaluation, for the rating period ending on March 31, 2014.² Jt. Ex. 2; Stip. ¶9. (Banks's performance evaluation is based on

¹ The parties submitted provisions from the current Master Agreement and stipulated that the prior Master Agreement, which expired on July 21, 2014, did not differ materially from the current Master Agreement. Stip. ¶26.

² Article 6(b)(2) of the Master Agreement states, in pertinent part, that "there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights," including the right "to be treated fairly and equitably in all aspects of personnel management." Jt. Ex. 10 at 5.

Article 14(b) of the Master Agreement states: "Bargaining unit employees shall have the right to appeal their performance ratings through the negotiated grievance procedure with or without the Union. It is understood that only the Union or the Agency can pursue the matter to arbitration." *Id.* at 15.

the performance standards for office support staff.) Stip. ¶10. The Union claimed that Banks's supervisor had stated in an informal meeting that she had been "instructed by my higher ups to marginalize my staff in relation to performance evaluations," and that "according to the standards no employee should be able to receive an overall outstanding rating on their performance evaluation." Jt. Ex. 2 at 1-2 (emphasis omitted). At the same time, the same supervisor allegedly acknowledged that "upwards of 200 staff throughout the FCC Petersburg Complex" receive an overall rating of outstanding on their performance evaluations each year. *Id.* at 2. The Agency denied Banks's grievance, and the Union invoked arbitration. As of May 2015, the arbitration hearing was still pending. Jt. Exs. 3, 4; Stip. ¶12.

The Union filed the Blankenship grievance on April 30, 2014. In that grievance, the Union alleged that the Agency violated Articles 6(b)(2), 7, 7(a), and 14(b) with regard to Blankenship's quarterly progress review and annual performance evaluation.³ Jt. Ex. 5; Stip. ¶13. (Blankenship's performance evaluation is based on the performance standards for non-supervisory correctional officers.) Stip. ¶14. The Union claimed that the Agency was "holding Ms. Blankenship to standards which other Federal Bureau of Prisons bargaining unit employees are not being held to." Jt. Ex. 5 at 2. The Agency denied the grievance, and the Union invoked arbitration. The arbitration hearing was still pending in May 2015. Stip. ¶¶15-16.

On July 21, 2014, the Union submitted an information request in connection with the Banks and Blankenship grievances. *Id.* ¶17. In the eleven-page request, the Union asked for copies of annual performance evaluations, six-month performance appraisals, and quarterly performance logs for bargaining unit employees. (For ease of reading, I will refer to the annual performance evaluations, six-month performance appraisals, and quarterly performance logs collectively as performance appraisals, unless otherwise noted.) The Union stated that the performance appraisals could be "sanitized," meaning that the Agency could redact all "identifying information" pertaining to employees, including their names and social security numbers. Jt. Ex. 8 at 3, 5; Stip. ¶19. However, the Union asked that the Agency not redact the names of supervisors, raters, or approving officials whose names were on the bargaining unit employees' performance appraisals. Jt. Ex. 8 at 3.

³ Article 7 of the Master Agreement pertains to the rights of the Union. Article 7(a) of the Master Agreement states: "There will be no restraint, interference, coercion, or discrimination against any employee in the statutory exercise of any right to organize and designate representatives of their own choosing for the purposes of collective bargaining, presentation of grievances, labor management related activity, representation of employees before the Employer, or upon duly designated Union representatives acting as an agent of the Union on behalf of an employee or group of employees in the bargaining unit." Jt. Ex. 10 at 11.

There are approximately 513 bargaining unit employees in the various departments at FCC Petersburg.⁴ Stip. ¶21. The information request sought performance appraisals of all bargaining unit employees subject to the performance standards for nonsupervisory correctional officers, office support staff, professionals, wage board employees, and technician assistants.⁵ *Id.* ¶17. These positions have different performance elements, though they have some elements in common. Jt. Exs. 11(a)-(e). Although employees are rated outstanding, excellent, successful, minimally satisfactory, or unacceptable on each element, the standards simply describe the performance criteria for outstanding, successful, and unacceptable. Jt. Exs. 11(a) at 1, 12 at 6. The Union asked for performance appraisals from July 1, 2012, to July 21, 2014, a period covering two annual performance cycles.⁶ Stip. ¶¶17, 20.

The Union asserted in its information request that it was justified under § 7114(b)(4) of the Statute. As an initial matter, the Union stated that the requested information was normally maintained, was reasonably available, and did not constitute guidance, advice, counsel, or training relating to collective bargaining. Jt. Ex. 8 at 1.

The Union then turned its attention to two arguments: (1) the requested information was necessary within the meaning of § 7114(b)(4) of the Statute; and (2) the Privacy Act did not bar the Agency from providing the Union with the requested information.

⁴ Bargaining unit employees are employed in the following departments at FCC Petersburg: Computer Services, Correctional Services, Correctional Systems, Drug Treatment, Education, Facilities, Financial Management, Food Services, Health Services, Inmate Services, Psychology, Recreation, Reentry Affairs, Religious Services, Safety, Sex Offender Management Program, Trust Fund, UNICOR, and Unit Management. Stip. ¶22.

⁵ More specifically, the Union requested:

Annual Performance Evaluations, Six Month Employee Performance Appraisals, and Quarterly Performance Logs for all bargaining unit members subject to the Standard Set of Elements #3B – Bargaining Unit for Non-Supervisory Correctional Officers; Standard Set of Elements #4B – Bargaining Unit for Office Support Staff; Standard Set of Elements #6B – Bargaining Unit for Professionals; Standard Set of Elements #7B – Bargaining Unit for Wage Board; and Standard Set of Elements #8B – Bargaining Unit for Technician Assistant at FCC Petersburg, Virginia, for July 1, 2012, to July 21, 2014.

Stip. ¶17.

⁶ At one point in its request, the Union asserted that it sought the information for the time period from “July 1, 2014 through the present” It is apparent, however, that this was a typographical error. Elsewhere in the information request (Jt. Ex. 8 at 5), the Union specified that it was seeking information for “the past two (2) years from July 1, 2012 to the present date [July 21, 2014].” In its response to the information request, the Respondent acknowledged the request as covering the period from July 1, 2012, to the present. Jt. Ex. 9 at 1. The Stipulation further reflects the parties’ mutual understanding that the Union was seeking information from July 1, 2012, to July 21, 2014. Stip. ¶17.

With regard to need, the Union argued that it would use the information as evidence, at the Banks and Blankenship arbitration hearings, to “establish and prove . . . disparate treatment in the application of the . . . Performance Standards[,]” as well as the failure of supervisors to apply the performance standards “in a fair and equitable manner as prescribed by the Master Agreement. Jt. Ex. 8 at 4, 6-7, 9-10. In this regard, the Union stated that Article 6(b)(2) provides that employees have the right “to be treated fairly and equitably in all aspects of personnel management.” *Id.* at 7. The Union also argued that it needed the requested information to show “discriminatory behavior” and violations of “29 CFR 1614.”⁷ *Id.* at 6-7. Further, the Union elaborated that it would use the performance appraisals “to prove[] that some bargaining unit members are being held to a higher standard than other bargaining unit members at FCC Petersburg” (*id.* at 7) and that “[s]ome bargaining unit members are being ‘rigidly’ [held] to those standards while others are not, thus creating disparity.” *Id.* at 4. In addition, the Union contended that disparate treatment could “only be demonstrated by comparing how the standards in question were applied to the grievant[s] as compared to how the standards were applied to other bargaining unit members at FCC Petersburg.” *Id.* at 10. Similarly, the Union contended that it was necessary to see the names of supervisors on the documents so that the Union would be able to “differentiate one supervisor . . . from another . . . to prove that our bargaining unit members are being treated in a disparate manner.” *Id.* at 3.

The Union argued that the request was based not just on the Banks and Blankenship grievances, but also on “multiple complaints in relation to the lack of equal application of the performance standards among bargaining unit staff . . . at FCC Petersburg.” *Id.* at 7. The Union argued that it therefore needed the requested performance appraisals to “ascertain whether . . . disparate treatment of the bargaining unit is occurring,” and to “demonstrate that the Agency was applying the . . . performance standards in a disparate manner to all bargaining unit employees.” *Id.* at 8, 10.

With regard to its representational responsibilities, the Union asserted that “it is the responsibility of the Union to monitor [the performance evaluation] program and ensure equal and fair treatment of the members we represent.” *Id.* at 6. In this regard, the Union cited Article 14(d) of the Master Agreement, which states: “The Employer agrees to provide information requested by the Union regarding the performance evaluation program and distribution of ratings if a valid request is made under the provisions of 5 USC, Chapter 7114(b)(4).” Jt. Ex. 10 at 16.

As for the scope of its request, the Union argued that the scope was limited to bargaining unit employees at FCC Petersburg. Jt. Ex. 8 at 5. In addition, the Union asserted that the “time period” for the request was “reasonable” given the Union’s “need . . . to establish a pattern of behavior and practice by the Agency . . .” *Id.*

⁷ Part 1614 of title 29 of the Code of Federal Regulations, entitled “Federal Sector Equal Employment Opportunity,” sets forth the policies and procedures for complaints of employment discrimination.

With regard to the Privacy Act, the Union asserted that “[n]o privacy rights of the bargaining unit employees would be affected” by the request, “because . . . the documents will be sanitized and unidentifiable.” *Id.* at 4. The Union further asserted that it “will not know, or be able to identify which document is related to which staff member.” *Id.* The Union further argued that it was acceptable not to redact the names of supervisors on the performance appraisals, because the appraisals rated the work of bargaining unit employees and did not contain any personal information pertaining to supervisors. *Id.* at 3, 11.

Associate Warden Richard Engel responded to the request on September 8, 2014. Jt. Ex. 9; Stip. ¶23. After summarizing the Union’s request, Engel asserted that it was “lacking the required particularized need and specificity in many areas.” Jt. Ex. 9 at 2. Engel also stated, “You are requesting an enormous amount of information which is not reasonably available and would require man power which is also not available.” *Id.* He further noted that bargaining unit employees “have access to their individual performance appraisals” in electronic form. *Id.* For all these reasons, the Agency denied the Union’s request. Jt. Ex. 9.

As of June 8, 2015, when this case was submitted to me, the Agency had not provided the Union with any of the requested information.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Respondent violated the Statute by failing to provide the Union with the requested information. Citing *Internal Revenue Serv., Wash., D.C.*, 50 FLRA 661, 669-70 (1995) (*IRS*), the GC argues first that the Union established a particularized need for the requested information. In this regard, the GC contends that the Union needed the information to use as evidence in two pending grievances to show that some supervisors assessed employees “rigidly,” while others did not, resulting in a violation of the Master Agreement. Further, the GC argues, the Union needed the information to investigate complaints that the Agency was rating other employees unfairly. GC Br. at 16-17.

The General Counsel contends that the geographic scope of the request was reasonable, as it was limited to FCC Petersburg. In this regard, it says the Union cannot properly represent the two grievants if it “arbitrarily limits” its request to a “particular employee or supervisor or department,” and that a full comparison between the grievants and other employees requires information coming from “different supervisors in different departments.” *Id.* at 16. Further, the fact that the Union wanted to investigate “multiple complaints” shows that the Union’s request pertained to all bargaining unit employees at FCC Petersburg, not just the individual grievants. *Id.*

The GC contends that the temporal scope of the request was reasonable because it covered “only two annual performance cycles, the minimum amount of information the Union would need to determine whether a pattern of discriminatory treatment has persisted over time.” *Id.* at 13.

In support of the claim that the requested information was reasonably available, the GC notes that the information was available in electronic form and that there is no evidence that it would take extreme or excessive means to obtain the information. *Id.* at 17-18. While Engel asserted in conclusory terms that the Union's request was burdensome, he offered no specific evidence to back up that claim. The GC argues that the quantity of information sought here is consistent with other cases in which the Authority has found information to be reasonably available. See *Dep't of Justice, U.S. Immigration & Naturalization Serv., U.S. Border Patrol, El Paso, Tex.*, 40 FLRA 792, 804-05 (1991) (*Border Patrol*); *Dep't of HHS, Soc. Sec. Admin.*, 36 FLRA 943, 950 (1990).

The General Counsel argues that the Agency failed to provide more than a conclusory argument against disclosure at or near the time of the Union's request, and new arguments against disclosure should not be considered. GC Br. at 14-15. Specifically, the Agency did not refer to any Privacy Act considerations in its response to the information request, or in its Answer to the Complaint. Furthermore, the GC argues that no legitimate privacy interests are jeopardized by the requested information, because the Union requested the documents in sanitized form and pledged to protect the information. Moreover, the Union would not be able to identify individual employees because of the large number of employees involved. See *Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000) (*HCFA*).

Respondent

The Respondent justified its refusal to furnish the requested information differently at the time of the Union's request than it has done in this ULP proceeding. As noted above, Associate Warden Engel denied the request because the Union failed to establish a particularized need for the information. He further stated, "You are requesting an enormous amount of information which is not reasonably available and would require man power which is also not available." Jt. Ex. 9 at 2. At or around the time of Engel's response, neither he nor any other Agency official raised any objection that disclosing the information would violate anyone's privacy interests or the Privacy Act. Then, in its Answer to the Complaint, the Respondent denied (without elaborating) the allegations that the requested information was "reasonably available" and "necessary for full and proper discussion . . . of subjects within the scope of collective bargaining[.]" as well as the allegation that disclosure was not prohibited by law. Jt. Exs. 1(b) & 1(c). Now, in its brief, the Respondent argues that the Union failed to establish a particularized need for the information and that the Privacy Act prohibits disclosure of the information. Resp. Br. at 1-2, 13. Its brief does not assert that the information was not reasonably available.

With regard to the Union's need for the information, the Respondent asserts that the Union's explanation – that it needed the requested information to prove that the Agency was engaging in "disparate treatment" by applying performance standards more "rigidly" to some employees than to others – was conclusory and therefore failed to establish a particularized need for the requested information. *Id.* at 7 (citing *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998) (*AFGE v. FLRA*); *U.S. Dep't of the Air Force, Air Force Materiel Command, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 795 (2005) (*Kirtland AFB*),

aff'd in part sub nom. AFGE, AFL-CIO, Local 2263 v. FLRA, 454 F.3d 1101 (10th Cir. 2006); *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261 (2004) (*Randolph AFB*). Respondent insists that the Union did not explain specifically why it needed the information or how it would use the information.

Regarding the scope of the request, the Respondent argues that the Union did not explain why it needed information pertaining to a broad range of employees at FCC Petersburg, many of whom work in different departments and have different performance standards from the two named grievants. Resp. Br. at 5-6. The Respondent also argues that the Union did not explain why it needed two years' worth of information when the grievants challenged appraisals from only one performance year. *Id.* at 8 (citing *Randolph AFB; U.S. Customs Serv. S. Cent. Region, New Orleans Dist., New Orleans, La.*, 53 FLRA 789, 799 (1997) (*Customs*); *U.S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 463 (1995) (*DOL*)).

The Respondent next argues that disclosure of the performance appraisal documents would involve a clearly unwarranted invasion of personal privacy under Freedom of Information Act (FOIA) Exemption 6, and therefore would have violated the Privacy Act. Respondent notes the Authority has held that performance appraisals are contained in a system of records. Respondent then asserts that individuals could who saw the names of supervisors on the requested documents would be able to "match up" those documents "with specific employees." Resp. Br. at 12 (citing *U.S. Dep't of Veterans Affairs Med. Ctr., Northport, N.Y.*, 51 FLRA 66, 73 (1995)). In addition, the Respondent argues that managers and supervisors have privacy interests, and that disclosure of appraisals with supervisors' names could "chill candor in the evaluation process." Resp. Br. at 11-12 (citing *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 350 (1995) (*FAA Westbury*)).

ANALYSIS AND CONCLUSIONS

Under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if that information is (1) normally maintained by the agency in the regular course of business; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance or training for management relating to collective bargaining. 5 U.S.C. § 7114(b)(4); *Library of Cong.*, 63 FLRA 515, 518-19 (2009) (*Library*). An agency that fails to comply with § 7114(b)(4) of the Statute commits an unfair labor practice in violation of § 7116(a)(1), (5), and (8) of the Statute. *See, e.g., HCFA*, 56 FLRA at 503.

The parties have stipulated that the requested information "is normally maintained in electronic form by the Respondent in the regular course of business," and that it "does not constitute guidance, advice, counsel, or training provided by management officials or supervisors, relating to collective bargaining." Stip. ¶¶24-25. The parties dispute whether the requested information was necessary, whether it was reasonably available, and whether disclosure was prohibited by law. As I noted earlier, the Respondent has changed its position on two of these issues over the course of this litigation, and I will address the implications of those changes when I address each issue.

The Union Established a Particularized Need for the Requested Information

The one argument that the Respondent has consistently made in this case, from the time of its response to the information request to its brief on the stipulated record, is that the Union did not demonstrate a particularized need for the information it sought.

In order to demonstrate that requested information is “necessary” within the meaning of § 7114(b)(4), a union must establish a “particularized need” by articulating, with specificity, why it needs the requested information, including how the union will use it, and how the union’s use of the information relates to its representational responsibilities under the Statute, including representing grievants at arbitration. The Authority set forth the process that unions and agencies should follow in handling information requests and the analytical approach that the Authority would utilize in evaluating such cases in its *IRS* decision, 50 FLRA at 669-71. More recently, the Authority has reiterated this framework in *U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015) (*FCI*), and *U.S. Dep’t of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 673 (2012) (*USP Marion*). The union’s explanation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information. *FCI*, 68 FLRA at 495-96.

The Authority has found that a union established a particularized need where the union stated that it needed information (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance. *Id.* at 496. In addition, the Authority has held that a union’s citation to specific collective bargaining agreement provisions served to notify the agency that the requested information was necessary for the union to administer and enforce the agreement. *Id.* A union may also establish need by showing that it will use the information to police the parties’ collective bargaining agreement. *See, e.g., Library*, 63 FLRA at 519. But a union’s request need not be so specific as to reveal its strategies. *FCI*, 68 FLRA at 496. In addition, the question of whether requested information would accomplish a union’s purpose is not determinative of whether it is necessary within the meaning of the Statute. *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009) (*SSA*).

A union’s burden of establishing a particularized need includes the burden of establishing the necessity of “the scope of the request,” including its temporal and geographic scope. *Soc. Sec. Admin.*, 67 FLRA 534, 538 (2014) (*SSA II*); *SSA*, 64 FLRA at 295. Where the information sought is broader than the circumstances covered by the request, and the union has not been able to establish a connection between the broader scope of the information requested and the particular matter referenced in the request, the Authority has found that the union has not established a particularized need for the requested information. *SSA II*, 67 FLRA at 538-39; *Randolph AFB*, 60 FLRA at 264.

As appropriate under the circumstances of each case, the agency must furnish the information, ask for clarification of the request, identify any countervailing anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. The agency must explain its anti-disclosure interests in more than a conclusory way, and the agency must raise these interests at or near the time of the union's request. See *SSA*, 64 FLRA at 295-96; *Randolph AFB*, 60 FLRA at 264-65. If the agency fails to raise its objection at or near the time of the request, the objection will not be considered by the judge or the Authority. *FCI*, 68 FLRA at 496-97; *Library*, 63 FLRA at 520.

Here, the Union stated in great detail why it needed the information it had requested. It asked for the appraisals in connection with two grievances (Banks's and Blankenship's), which were headed for arbitration. It cited the requirement, set forth in Article 6(b)(2) of the Master Agreement, that employees be treated fairly and equitably in all aspects of performance management. The Union stated that it would use the appraisals as evidence at the arbitration hearings to prove that the Agency rated Banks and Blankenship differently from at least some other bargaining unit employees, in violation of the Master Agreement. And it explained that it could not prove that the Agency was rating Banks and Blankenship more strictly than other employees unless it had copies of other employees' performance appraisals. *Jt. Ex. 8* at 10. Further, the Union stated that it had received "multiple" complaints and needed other employees' performance appraisals to determine whether the Agency was engaging in disparate treatment throughout the bargaining unit, and if so, to demonstrate that. *Id.* at 7, 10. In addition, the Union explained that it would use the information in connection with its responsibility to represent grievants at arbitration, and in connection with its responsibility, referenced in Article 14(d) of the Master Agreement, to monitor the Agency's application of its performance evaluation program to ensure that employees were treated fairly and equally. *Id.* at 6.

The Union also provided an explanation for the scope of its request. Specifically, the Union asked for performance appraisals from most, if not all, bargaining unit employees at FCC Petersburg because it sought to prove that the Agency was treating Banks and Blankenship differently from other bargaining unit employees at FCC Petersburg. *Id.* at 10. This was especially important in the Banks grievance, where the Union sought to prove that the Agency treated Banks differently from "upwards of 200 staff throughout" FCC Petersburg. *Jt. Ex. 2* at 2. Further, the Union needed appraisals from across FCC Petersburg because the Union had to determine whether the "multiple" complaints it had received, which raised similar allegations, were valid. *Jt. Ex. 8* at 7, 10.

The Respondent suggests that performance appraisals for employees in positions different from Banks (office support staff) and Blankenship (non-supervisory correctional officer) would not help the Union prove its cases at arbitration. *Resp. Br.* at 5-6. It is apparent, however, that the Union sincerely believed that it could prove unfair treatment by showing that the Agency was applying performance standards rigidly to some bargaining unit employees but not to others, regardless of position, and the Respondent's belief to the

contrary is irrelevant in determining whether the Union established a particularized need for the requested information. *See SSA*, 64 FLRA at 296. Moreover, the Union's repeated references to "multiple" complaints about the Agency's application of performance standards adequately explained the Union's need to review performance appraisals in other job categories.

With regard to the request for two years' worth of performance appraisals, the Union cited its "need . . . to establish a pattern of behavior and practice by the Agency" Jt. Ex. 8 at 5. It would be difficult to establish a "pattern" of misconduct in an annual performance appraisal system without at least two years' worth of data to work with. Thus, the Union's request for two years' worth of data was reasonable and not overly broad. Since the Union provided a clear and valid reason for needing two years' worth of information, the Union's request is distinguishable from the requests in the cases cited by the Respondent. *See Randolph AFB*, 60 FLRA at 265 (where "[n]othing in the record" justified the union's request for two years of data); *Customs*, 53 FLRA at 799 (judge determined that there was "no need" for four years of data); *DOL*, 51 FLRA at 476-77 (the fact that data was "available" for five years did not mean that the union needed data for five years).

Finally, the Respondent cites several cases involving union requests found to be conclusory. The Union's explanation for its request in this case is anything but conclusory, however. In the request at issue in *AFGE v. FLRA*, the union said only that it needed information "to prepare for arbitration." 144 F.3d at 88-89. In *Kirtland AFB*, the union provided only short, vague explanations of need – specifically, that it needed the requested information to "perform Post-Promotion Audit(s)," "ensur[e] compliance with Merit System Principles," "monitor contract compliance," "address bargaining unit . . . concerns," and represent employees in "further legal actions" 60 FLRA at 795 (alterations in original). By contrast, the Union's explanation in our case could hardly have been written in a more detailed manner, or more specifically tailored to the facts of the grievances. The cases cited by the Respondent, therefore, are inapposite. *See, e.g., Randolph AFB*, 60 FLRA at 264.

Based on the foregoing, I find that the Union provided a detailed and extensive explanation of need, one that enabled the Agency to make a reasoned judgment as to whether the Statute required it to furnish the requested information. Accordingly, I find that the Union established a particularized need for the requested information.

The Requested Information was Reasonably Available

The Statute requires an agency to provide data that is reasonably available. Consistent with this requirement, an agency is not required to provide data that is available only through "extreme" or "excessive" means. *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1254 (2000) (*BOP*). Determining whether extreme or excessive means are required to retrieve available data requires a case-by-case analysis of relevant facts and circumstances, including the efforts required to make the documents available, the costs of such efforts, and the extent to which the agency's workforce would be displaced. *Id.* at 1254-55 & n.9; *Dep't of HHS*,

Soc. Sec. Admin., 36 FLRA 943, 950 (1990) (*HHS*). The Authority has found information to be reasonably available when, for example, retrieval would have taken 150 hours and cost \$1500, *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987 993-94 (1990), or taken three weeks to accomplish, *HHS*, 36 FLRA at 950-51. The Authority has even found information to be reasonably available when retrieval would have taken 350 hours and involved approximately 10,000 documents. *Border Patrol*, 40 FLRA at 804-05. On the other hand, the court held in *Dep't of Justice v. FLRA*, 991 F.2d 285, 291 (5th Cir. 1993) (*DOJ v. FLRA*), *rev'g* 43 FLRA 697 (1991), that information was not reasonably available, where retrieving it would have required the agency to "remove several employees from their regularly assigned duties for several weeks to search for, collect, collate, and redact [5000 to 6000] pages of documents in various locations around the world."

In addition, the Authority has found information to be reasonably available where the agency provided little or no evidence quantifying the time, cost, or difficulty of furnishing the requested information. *BOP*, 55 FLRA at 1255; *Dep't of the Navy, Naval Submarine Base, New London (New London, Conn.)*, 27 FLRA 785, 796-97 (1987). In the *BOP* case, the Authority emphasized an agency's responsibility "to develop the record in support of their position" and the agency's "superior knowledge of the costs and burdens required to retrieve the data in question." 55 FLRA at 1255. The Authority contrasted the agency's "nebulous proffer" concerning the cost or difficulty of obtaining the data in the *BOP* case to the "substantial evidence" offered on this issue in *DOJ v. FLRA. Id.*

The agency's failure to develop the evidentiary record in *BOP*, has been repeated in our case. We can make an educated guess as to the total number of documents requested, but the Respondent has done nothing to explain in practical terms the difficulty of the task of producing them. The parties have stipulated that the performance appraisals (that is, the annual performance evaluations, the six-month appraisals, and the quarterly performance logs) were "normally maintained in electronic form by the Respondent in the regular course of business." Stip. ¶24. Accordingly, we can estimate that the request might have encompassed as many as 6,156 documents (assuming the request applied to 513 bargaining unit employees, the request would require the Agency to produce 513 annual performance evaluations, 513 six-month appraisals, and 2,052 quarterly logs, multiplied by two years). I can safely say that 6,156 documents is a substantial quantity, but the bare number does not really tell us how much work it would have taken to furnish them, especially since the records were stored electronically and could be easily located and printed. The stress would be felt primarily by the Agency's computer printers, not its employees. In *Border Patrol*, 40 FLRA at 804-05, the Authority found a larger quantity of documents to be reasonably available.

I am not saying, however, that a request for 6,000 documents is automatically "reasonable," simply because the Authority previously approved a request for 10,000 documents. Rather, I am saying that the numbers themselves do not paint an accurate enough picture of the task involved in producing a set of documents to evaluate whether they are reasonably available. Furnishing 6,000 documents that are stored on computer is not the

same as furnishing 6,000 documents that are scattered at various remote sites and must be identified by hand. The Union went to considerable lengths to explain why it needed all the requested documents; if the Agency disagreed, it owed the Union a detailed explanation. And in this respect, it utterly failed.

In his response to the Union's request for the appraisal documents, Associate Warden Engel said only that the Union was asking for "an enormous amount of information which is not reasonably available and would require man power which is also not available." Jt. Ex. 9 at 2. This was simply a statement of a conclusion without any supporting evidence or details. It was at the time of his response to the Union, when the Banks and Blankenship grievances were still fresh and Engel was in dialogue with the Union, that he should have offered facts to quantify how much time it would take to retrieve the documents, and how much it would cost, in money and displaced staff. It was at that time that the parties might have engaged in give and take and found a mutually acceptable solution, as the Authority has repeatedly sought to encourage since its *IRS* decision, 50 FLRA at 670-71 (The new analytical framework "facilitates the exchange of information" and "permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.") As the Authority has repeatedly stated, "Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying 'no.'" *Id.* at 670. Moreover, in this ULP litigation, the Respondent has not offered any additional evidence to quantify the nature, amount, or cost of the work that would be required to furnish the documents, and in its brief it did not even dispute the GC's claim that the information was reasonably available.

Accordingly, I conclude that the Agency would not need to devote an extreme or excessive amount of time or expense to furnish the requested information. I find instead that the requested information was reasonably available.

Disclosing the Requested Information Would Not Violate the Privacy Act

The Respondent argues in its brief that disclosing the appraisals would violate the privacy interests of the supervisors who prepared those appraisals. The Agency did not raise this objection when it responded to the Union's request for information, and in its Answer to the GC's Complaint it simply denied that the information "is not prohibited from disclosure by law." Jt. Exs. 1(b) & 1(c). In light of the requirement (cited above) that an agency explain its anti-disclosure interests at or near the time it responds to an information request, I am skeptical that the Respondent's belated assertion of the Privacy Act was adequate to warrant further consideration. However, the Authority has, on occasion, addressed vague or belated Privacy Act claims. See *USP Marion*, 66 FLRA at 673-74; *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91, 95 (2004) (*Det. Ctr.*). Therefore, in order to ensure the fullest record possible, I will consider whether disclosure of the requested information would violate the Privacy Act.

In its *FAA Westbury* decision, the Authority set forth the analytical approach it follows when an agency argues that the Privacy Act prohibits disclosure of requested information because it would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6. 50 FLRA at 345. The agency bears the burden of demonstrating (1) that the information is contained in a system of records; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the respondent makes the requisite showings, then the burden shifts to the GC to (1) identify a public interest cognizable under the FOIA; and (2) demonstrate how disclosure would serve the public interest. Once the relevant interests are established, the Authority balances the privacy interest of employees against the public interest in disclosure. When the privacy interests outweigh the public interest, the Authority finds that disclosure of the requested information would result in a clearly unwarranted invasion of personal privacy under FOIA Exemption 6. And unless disclosure is permitted under another exception to the Privacy Act, the Authority concludes that the Privacy Act prohibits disclosure of the information and furnishing the information is prohibited by law within the meaning of § 7114(b)(4) of the Statute. See also *USP Marion*, 66 FLRA at 674.

In considering whether information is disclosable under the Privacy Act, the Authority has stated that the "concern is not with the identifying information *per se*, but with the connection between such information and some other detail . . . which the individual would not wish to be publicly disclosed." *Dep't of HHS, Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1141 (1997) (*SSA NY*) (quoting *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989) (*Halloran*)).

I first consider whether the requested information is contained in a system of records. The Authority has determined that performance appraisals are contained in a system of records. *Dep't of Transp., FAA, Fort Worth, Tex.*, 51 FLRA 324, 328 (1995) (*FAA Fort Worth*); *FAA Westbury*, 50 FLRA at 346. Based on this precedent, I find that the performance appraisals requested by the Union are contained in a system of records.

Next, I consider whether the Respondent has demonstrated that disclosure would implicate employee privacy interests. The Authority has found that employees have substantial privacy interests in shielding their own individual performance appraisals from public view, and that those privacy interests apply as well to documentation on which those ratings are based. *FAA Fort Worth*, 51 FLRA at 329. Based on these factors, the Authority held that the disclosure of unsanitized performance appraisals constitutes a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6. *Id.* at 330. However, the Authority subsequently held that the disclosure of sanitized documents does not constitute an unwarranted invasion of privacy within the meaning of FOIA Exemption 6, and that the Privacy Act does not bar disclosure of sanitized performance appraisals. *HCFA*, 56 FLRA at 506. Similarly, the Authority indicated that disclosing performance award information does not violate the Privacy Act where there is no evidence that disclosing the information would reveal an employee's specific performance rating or other information that employees would wish to keep confidential. *SSA NY*, 52 FLRA at 1144-45.

Here, the Union demanded only sanitized performance appraisals, i.e., performance appraisals and supporting documents in which all identifying information for bargaining unit employees, including their names and social security numbers, has been redacted. Jt. Ex. 8 at 3; Stip. ¶19. Further, the Union asserted in its request that sanitized documents would be "unidentifiable" so that an individual reading the documents "will not know, or be able to identify which document is related to which staff member." Jt. Ex. 8 at 4. Engel did not dispute these claims in his response to the Union's request. Jt. Ex. 9. All of this indicates that disclosing sanitized performance appraisals would not implicate any employee's privacy concerns.

The Respondent claims that employees could use the names of supervisors listed on the performance appraisals to "match up" these documents with specific employees. Resp. Br. at 12. But the Respondent cites no evidence to support this claim, and nothing in the record indicates that individuals could use the names of supervisors listed on the appraisals to determine the identities of bargaining unit employees.

In addition, the Respondent suggests that disclosure would raise privacy concerns with regard to supervisors. *See id.* at 11-12. As discussed above, the Union requested performance appraisals only for bargaining unit employees; it did not request performance appraisals for supervisors. Thus, while the appraisals requested by the Union might include the names of supervisors involved in the evaluation of the bargaining unit employee, the appraisals would not contain personal information about the supervisors themselves. *See SSA NY*, 52 FLRA at 1141, 1144-45. The mere presence of a supervisor's name on an evaluation, or the supervisor's rating of an employee's work, is not personal information "which the individual would not wish to be publicly disclosed." *Halloran*, 874 F.2d at 321. Further, because disclosure would not implicate any privacy interests with regard to bargaining unit employees or supervisors, it is unnecessary to engage in a balancing of privacy interests and disclosure interests, including the Respondent's unsupported claim that disclosure would chill candor in the evaluation process. *See HCFA*, 56 FLRA at 506. As the Authority ruled in *Det. Ctr.*, 60 FLRA at 95, the Respondent has failed to sustain its burden under *FAA Westbury* to establish that disclosure of the requested appraisal documents would implicate the privacy concerns of either bargaining unit employees or the supervisors who evaluated them.

Based on the foregoing, I find that disclosing the sanitized performance appraisals would not constitute an unwarranted invasion of privacy within the meaning of FOIA Exemption 6, and that the Privacy Act does not bar disclosure of sanitized performance appraisals.

CONCLUSION

The evidence of record establishes that the information requested by the Union meets the requirements of § 7114(b)(4) of the Statute. Accordingly, the Respondent was obligated to provide the Union with the requested information. By failing to do so, the Respondent violated § 7116(a)(1), (5), and (8) of the Statute.

In order to remedy the Agency's unfair labor practice, it will be ordered to furnish the requested information to the Union and to post a notice to employees to that effect, signed by the Warden. In accordance with the Authority's decision that ULP notices should, as a matter of course, be posted on bulletin boards and distributed to employees electronically, I will order both methods of dissemination. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Based on the foregoing, I recommend that the Authority adopt the following Order:

ORDER

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

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Council of Prison Locals 33, Local 2052, AFL-CIO (the Union), with the information it sought in its July 21, 2014, information request.

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

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


(a) Furnish the Union with sanitized copies of all Annual Performance Evaluations, Six-Month Employee Performance Appraisals, and Quarterly Performance Logs issued to all bargaining unit employees subject to the Standard Set of Elements #3B – Bargaining Unit for Non-Supervisory Correctional Officers; Standard Set of Elements #4B – Bargaining Unit for Office Support Staff; Standard Set of Elements #6B – Bargaining Unit for Professionals; Standard Set of Elements #7B – Bargaining Unit for Wage Board; and Standard Set of Elements #8B – Bargaining Unit for Technician Assistant, at FCC Petersburg, from July 1, 2012, to July 21, 2014.

(b) Post at the FCC Petersburg 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 FCC Petersburg, and shall be posted and maintained for sixty (60) consecutive days thereafter, in 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 to all bargaining unit employees at FCC Petersburg electronically, such as by email or by posting on an intranet or an internet site. This Notice shall be sent 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, Washington Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., February 29, 2016



RICHARD A. PEARSON
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, FCC Petersburg, Virginia, violated the Federal Service Labor-Management Relations Statute (the 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, Council of Prison Locals 33, Local 2052, AFL-CIO (the Union) with the information it sought in its July 21, 2014, information request.

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

WE WILL furnish the Union with sanitized copies of all Annual Performance Evaluations, Six-Month Employee Performance Appraisals, and Quarterly Performance Logs issued to all bargaining unit employees subject to the Standard Set of Elements #3B – Bargaining Unit for Non-Supervisory Correctional Officers; Standard Set of Elements #4B – Bargaining Unit for Office Support Staff; Standard Set of Elements #6B – Bargaining Unit for Professionals; Standard Set of Elements #7B – Bargaining Unit for Wage Board; and Standard Set of Elements #8B – Bargaining Unit for Technician Assistant, at FCC Petersburg, from July 1, 2012, to July 21, 2014.

(Agency/Respondent)

Date: _____ By: _____ (Title)
(Signature)

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 any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 1400 K Street, N.W., 2nd Fl., Washington, D.C. 20424, and whose telephone number is: (202) 357-6011.