66 FLRA No. 127

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
MARION, ILLINOIS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2343
(Charging Party)

CH-CA-08-0601

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DECISION AND ORDER

May 16, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) when it failed to furnish information requested by an employee (the grievant) on behalf of the Charging Party (the Union) pursuant to § 7114(b)(4) of the Statute. The Judge found that the Respondent violated § 7116(a)(1), (5), and (8) as alleged.

For the reasons that follow, we: (1) do not consider one of the Respondent's arguments; (2) adopt, without precedential significance, the Judge's unexcepted-to finding that the Respondent violated the Statute by failing to inform the Union that certain requested information did not exist; (3) deny the exception to the Judge's finding that the Union established particularized need for the requested information; and (4) find that the Privacy Act prohibits disclosure of some of the requested information.

II. Background

After an alleged assault of two prison inmates, the Respondent, its office of internal affairs (OIA), and the Federal Bureau of Investigation (FBI) separately interviewed the grievant – a correctional specialist and Union steward – and investigated whether he was involved in the alleged assault. After the interviews and investigations, the Respondent placed the grievant on extended home duty. Judge's Decision at 2. The Union filed a grievance on behalf of the grievant over his placement on home duty. The grievance alleged that the Respondent violated Article 6, Section (b)(2) and (3) of the collective-bargaining agreement (CBA)[1] by treating the grievant unfairly and inequitably and by retaliating against him for his union activities. GC Ex. 6. The grievance also alleged that the Respondent violated Article 30, Section (d)(2) of the CBA[2] by failing to timely notify the grievant of the Respondent's decision not to take disciplinary action against the grievant.

In conjunction with the grievance, the Union submitted an information request to the Respondent. Judge's Decision at 2-3. The Union requested the following eight categories of information relating to the investigations of the alleged assault: (1) all reports and documents of the "special investigative supervisor" (SIS) that relate to the grievant; (2) a copy of the standard form that OIA used to summarize the basic information relating to its investigation of the grievant; (3) all OIA reports and documents that relate to the grievant's involvement in the alleged assault; (4) all statements by any person that resulted in the grievant's interview and subsequent investigation by the FBI; (5) all FBI reports and documents, relating to the grievant, that the FBI released to the Respondent; (6) all documents that the Respondent relied on to place the grievant on home leave; (7) all OIA reports and documents of OIA's "second investigation" of the alleged assault that relate to

[1] Article 6, Section (b)(2) provides for the right of employees "to be treated fairly and equitably in all aspects of personnel management[.]" Section (b)(3) provides for the right of employees "to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity[.]" GC Ex. 20 at 2.

[2] Article 30, Section (d)(2) provides that "employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee." *Id.* at 8-9.

the grievant;[3] and (8) all documents that the Respondent used to justify the "prolonged investigation" of the grievant. *Id.* (quoting GC's Ex. 9).

The Union explained to the Respondent that the information was necessary for the Union to fulfill its representational duties, to determine whether the investigations violated the Respondent's policies, and to indicate the reasons for the Respondent's treatment of the grievant. Specifically, the Union asserted that: (1) category 1 was needed to determine what allegations were made about the grievant at the outset of the investigations; (2) category 2 was needed to determine what rationale or justification the Respondent relied on to place the grievant under OIA investigation; (3) category 3 was needed to determine whether the OIA investigation resulted in the grievant being interviewed and investigated by the FBI; (4) category 4 was needed to determine what evidence the Respondent relied on to place the grievant under FBI investigation and on home duty; (5) category 5 was needed to determine what information the Respondent received from the FBI to justify the continued investigation of the grievant; (6) category 6 was needed to determine the Respondent's justification for placement of the grievant on home duty and whether the justification followed Respondent's policies; (7) category 7 was needed to determine whether then grievant was the subject of a subsequent investigation by OIA; and (8) category 8 was needed to determine whether the Respondent relied on any other information to support the prolonged investigation of the grievant. GC Ex. 9. The Union further explained that the information was necessary to: (1) demonstrate a violation of Article 6, Section (b)(2)-(3) and Article 30, Section (d)(2) of the CBA; and (2) provide support for the pending grievance. *Id.*

The Respondent denied the request. The Respondent asserted that the Union had failed to articulate a particularized need as to any of the requested information because the Union had not explained with specificity why it needed the information. In this regard, the Respondent maintained that the Union had failed to explain how the information would demonstrate that the Respondent violated the CBA or how the Union would use the information, and had failed to establish a connection between any use of the information and the Union's representational duties. Judge's Decision at 8.

In addition, as to the SIS, OIA, and FBI reports, the Respondent asserted that the Privacy Act, 5 U.S.C. § 552a, prohibited disclosure of these reports because "other inmates and staff members were involved in these investigations." *Id.* at 9 (quoting GC Ex. 11 at 4). As to the FBI reports, the Respondent also asserted that it did "not have control or release authority over FBI investigations." *Id.* at 4 (quoting GC's Ex. 11 at 3).

The Union filed a charge, and the GC issued a complaint, which alleged that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute when it failed to furnish the requested information. *Id.* at 1.

III. Judge's Decision

The Judge first addressed whether the Union established a particularized need for the requested information and found that the Union had explained that it needed the information in order to fulfill its representational duties to determine: (1) whether the Respondent had violated any policies, procedures, or the CBA; and (2) the reasons for the Respondent's treatment of the grievant. The Judge also found that the Union had explained that the information was needed to provide support for a pending grievance and to show that the Respondent violated Article 6 of the CBA. *Id.* at 9-13, 15. Based on these findings, the Judge determined that the Union's request explained why it needed the requested information, how it would use the information, and the connection between this use and its representational responsibilities. *Id.* Accordingly, he concluded that the Union established a particularized need for all the information. *Id.* at 15.

In view of this conclusion, it was not necessary for the Judge to address the Respondent's claim that there can be no statutory violation where a union has established a particularized need for only some, but not all, requested information. Nevertheless, the Judge rejected the Respondent's claim. *Id.* at 6-7.

The Judge next addressed the Privacy Act. *Id.* at 9. He stated that, under Authority precedent, 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 exemption 6 of FOIA,[4] the agency bears the burden of demonstrating: (1) that the requested information is contained in a system of records under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature

[3] The Judge found that the OIA did not conduct a second investigation, but that the Respondent violated the Statute because it failed to inform the Union of that fact or the fact that the requested information did not exist. Judge's Decision at 14. The Respondent does not except to these findings. Accordingly, we adopt the Judge's finding of a violation, without precedential significance, *see* 5 C.F.R. § 2423.41(a), and include it in the order and notice.

[4] Exemption 6 of the FOIA provides that information contained in "personnel and medical files and similar files" may be withheld if disclosure of the information would result in a "clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6).

and significance of those privacy interests. *Id.* (citing *U.S. DOT, FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338 (1995) (*FAA*)). Applying that framework, he found that the Respondent's reply to the information request had "failed to comply with the third requirement . . . and was a mere conclusory invocation of the Privacy Act made with no discussion or explanation of the privacy concerns that needed to be weighed." *Id.* According to the Judge, this did not adequately raise the issue of the Privacy Act "at or near the time of the Union's request." *Id.* at 10 (citing *U.S. DOJ, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91 (2004) (*Fed. Det. Ctr.*)). Based on this determination, the Judge found that the Respondent improperly failed to furnish the Union with the SIS, OIA, and FBI reports. In so finding, he did not resolve whether the Privacy Act prohibited disclosure of these reports. *See id.*

For all these reasons, the Judge concluded that the Respondent violated § 7116(a)(1), (5), and (8) when it failed to furnish the requested information that existed. He recommended, among other things, that the Authority direct the Respondent to furnish the requested existing information. *Id.* at 15-16.

IV. Positions of the Parties

A. Respondent's Exceptions

The Respondent contends that the Judge erred in finding that the Union articulated a particularized need for any of the requested information. In this regard, the Respondent maintains that, prior to the hearing, the grievant had filed a FOIA request and had received all of the information to which he was legally entitled. Exceptions at 10 n.2. In addition, the Respondent claims that the Union "failed to explain with specificity why it needed the information for the underlying grievance." *Id.* at 8. According to the Respondent, the Union's claim that the information would show a violation of Article 6, Section (b)(2) and (3) of the CBA was not sufficiently specific and did not explain how the information would show such a violation. *Id.* at 8-12. The Respondent also asserts that the Union failed to establish how it would use the information and the connection between those uses and the Union's representational responsibilities under the Statute. The Respondent claims that the Union's explanation that the requested information would support the pending grievance was too conclusory. *Id.* at 9. Further, the Respondent argues that there can be no statutory violation where a union has established a particularized need for only some, but not all, of its requested information.

Alternatively, the Respondent contends that furnishing the SIS, OIA, and FBI reports is "prohibited by law" within the meaning of § 7114(b)(4). *Id.* at 12. The Respondent alleges that the Privacy Act prohibits disclosure of these reports because it would result in a clearly unwarranted invasion of the personal privacy of the correctional staff who were also subjects of the investigations. *Id.* at 13. Specifically, the Respondent argues that disclosure would implicate the privacy interests of at least nine employees who also were investigated for misconduct and that these privacy interests are significant. *Id.* at 14. The Respondent further argues that the GC has neither identified a public interest under FOIA nor demonstrated how disclosure of the requested information would serve the public interest. *Id.*

The Respondent also claims that the Privacy Act and exemption 7 of FOIA[5] further support its refusal to disclose these reports because the information contained in the reports was compiled for law-enforcement purposes. *Id.* at 15. Finally, the Respondent contends that it properly refused to furnish the FBI reports because the Respondent does not normally maintain these records in the regular course of business and they are not reasonably available as required by § 7114(b)(4). *Id.*

B. GC's Opposition[6]

The GC contends that the Judge did not err in concluding that the Union established a particularized need for all the requested information. Opp'n at 5-11. The GC asserts that the information was essential to the Union's investigation, understanding, and evaluation of the Respondent's treatment of the grievant, and was necessary in order for the Union to determine whether to further pursue the grievance and, if so, to provide support for the grievance at arbitration. *Id.* at 7-10.

The GC further contends that the Judge properly found that the Respondent did not establish that the Privacy Act prohibited disclosure of the SIS, OIA, and FBI reports. *Id.* at 11-12. The GC asserts that the Respondent's denial of the Union's information request provided no details of any claimed privacy interests or the nature and significance of those interests. *Id.* at 12. Finally, the GC contends that the Judge did not err by finding that the Respondent was obligated to furnish the FBI reports because the Respondent normally maintained

[5] The pertinent section of the Privacy Act permits an agency to exempt from disclosure "investigatory material compiled for law enforcement purposes." 5 U.S.C. § 552a(k)(2). Exemption 7 of FOIA exempts specified "records or information compiled for law enforcement purposes[.]" 5 U.S.C. § 552(b)(7).

[6] The GC contends in its opposition that § 2429.5 of the Authority's Regulations bars the Respondent's argument pertaining to information compiled for law-enforcement purposes because the Respondent did not present that argument to the Judge. Opp'n at 12 n.7. As discussed *infra*, it is unnecessary to resolve the GC's contention.

these reports, and they were reasonably available. *Id.* at 13-14.

V. Preliminary Issue

Under § 2429.5 of the Authority's Regulations,[7] the Authority will not consider any arguments that could have been, but were not, presented to the administrative law judge. 5 C.F.R. § 2429.5. To the extent that the Respondent is arguing in its exceptions that the requested information was not necessary because the grievant had received information through his FOIA request, *see* Exceptions at 10 n.2, there is no indication that the Respondent presented this argument to the Judge. As the Respondent could have done so, but did not, § 2429.5 bars the argument. *See U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 259 (2011). Accordingly, we do not consider this argument.

VI. Analysis and Conclusions

A. The Judge did not err when he found that the Union established a particularized need for all the requested information.

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, as relevant here, the requested information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]"[8] 5 U.S.C. § 7114(b)(4). To demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4), 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, Wash., D.C.*, 50 FLRA 661, 669 (1995) (Member Talkin concurring) (*IRS*). The union's articulation 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. *Id.* at 670.

The agency is responsible for establishing any countervailing, anti-disclosure interests and must do so in more than a conclusory way. *E.g., SSA*, 64 FLRA 293, 295-96 (2009). Such interests must be raised at or near the time of the union's request. *Id.* at 296.

The Authority has held that unions established a particularized need for requested information when the unions needed the information: (1) to assess whether to file a grievance, *U.S. DOT, FAA, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1068 (1996); (2) in connection with a pending grievance, *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004); (3) to determine how to support and pursue a grievance, *IRS*, 50 FLRA at 672; and (4) to assess whether to arbitrate or settle a pending grievance, *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 682-83 (1995) (*Scott AFB*), *aff'd sub nom., Dep't of the Air Force, Scott Air Force Base, Ill. v. FLRA*, 104 F.3d 1396 (D.C. Cir. 1997). The Authority has found that the need for information to assess whether to arbitrate a pending grievance was "evident" because of the financial commitment a union must make when it decides to arbitrate a grievance. *Id.* at 683. The Authority also has emphasized that such information is necessary because arbitration can function properly only when the grievance procedures leading to it are able to sift out unmeritorious grievances. *Id.* at 683 n.5 (citing *NLRB v. Acme Indus.*, 385 U.S. 432, 438 (1967)).

Consistent with these considerations, the Authority found that a union established a particularized need for requested information when it explained why it needed the information (to ascertain whether there was disparate treatment of an employee), how it would be used (to determine the appropriateness of a penalty), and the connection between the uses and the union's representational responsibilities under the Statute (to represent an employee in a grievance). *IRS, Austin Dist. Office, Austin, Tex.*, 51 FLRA 1166, 1178-79 (1996) (*IRS, Austin*).

Moreover, the Authority specifically has rejected a respondent's claim that a union failed to "articulate its need with requisite specificity" when the union's information request: (1) referenced a specific agency action; and (2) specified that the information was needed to assess whether the respondent violated established policies and whether to file a grievance, even though it did not explain fully how the information would enable it to determine whether to file a grievance. *Health Care Fin. Admin.*, 56 FLRA 503, 506-07 (2000) (*HCFA*). In addition, the Authority has held that a union's citation of specific CBA provisions served to notify the agency that the requested information was necessary for the union to administer and enforce the

[7] Section 2429.5 provides, in pertinent part, that the "Authority will not consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . Administrative Law Judge . . . ."

[8] The requested information also must be: (1) normally maintained by the agency in the regular course of business; (2) reasonably available; and (3) not guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. 5 U.S.C. § 7114(b)(4). These requirements are not in dispute here.

CBA and articulated with specificity why the information was needed, including how the information would be used, and the connection between those uses and the union's representational responsibilities under the Statute. *Library of Congress*, 63 FLRA 515, 519 (2009).

Here, the Judge made the following factual findings to which no party excepts. The Union's information request was filed in conjunction with the filing of a grievance on behalf of the grievant, and the request referenced a specific agency action and cited specific provisions of the CBA. In particular, the grievance alleged that: (1) the Respondent's placement of the grievant on home leave violated Article 6, Section (b)(2) and (3) of the CBA by treating the grievant unfairly and inequitably and by retaliating against him for his union activities; and (2) the Respondent violated Article 30, Section (d)(2) by failing to timely notify the grievant of the Respondent's decision not to take disciplinary action against the grievant. As to all of the requested information, the Union articulated a need to assess the Respondent's treatment of the grievant and to assess whether to arbitrate the grievance, and – if it chose to do so – to support the grievance at arbitration. The Union explained that the information was necessary for it to fulfill its representational duties because it would permit the Union to determine the Respondent's reasons for placing the grievant under investigation and then on home duty, and to assess whether the Respondent followed its policies in doing so. The Union further explained that the information was necessary for it to fulfill its representational duties because it would permit the Union to assess its allegations in the pending grievance.

The Judge's unexcepted-to factual findings and the precedent set forth above support a conclusion that the Respondent has not demonstrated that the Judge erred when he found that the Union had established a particularized need for all of the requested information. The factual findings support the Judge's determinations that the Union explained why it needed the information (to assess whether the Respondent acted properly in placing the grievant on home leave), how it would use the information (to assess its pending grievance alleging violations of specific provisions of the CBA), and the connection between the uses and its representational responsibilities under the Statute (to represent the grievant at arbitration of the grievance if arbitration is determined to be warranted). These determinations, and the precedent set forth above, support the Judge's conclusions that the Union established particularized need for all the requested information. *See, e.g., IRS, Austin*, 51 FLRA at 1178. Accordingly, we deny the Respondent's exception to the Judge's finding of particularized need. As such, it is unnecessary to resolve the Respondent's claim that there can be no statutory violation where a union established a particularized need for only some, but not all, of its requested information.

B. The Privacy Act prohibits disclosure of the SIS, OIA, and FBI reports.

In deciding that the Respondent violated the Statute when it failed to furnish the SIS, OIA, and FBI reports, the Judge assessed whether, "at or near the time of the Union's request," the Respondent had adequately met its burdens under *FAA*, 50 FLRA at 345. Judge's Decision at 10. He did not resolve whether the Privacy Act prohibited disclosure of the disputed reports or whether furnishing the reports was "prohibited by law" within the meaning of § 7114(b)(4).

We find that the Respondent's statements in its reply to the Union's request were adequate to require the Judge to resolve that issue. In this connection, the Authority has addressed the merits of a "prohibited by law" claim when a respondent's reply to a union summarily cited the Privacy Act. *See IRS, Austin*, 51 FLRA at 1168, 1176-77; *cf. U.S. Dep't of the Air Force, Air Force Acad., Colo. Springs, Colo.*, 59 FLRA 888, 893 (2004) (then-Member Pope dissenting on another matter) (Authority addressed the merits of a "prohibited by law" claim when a respondent's reply to a union summarily cited an agency regulation). Similarly, the Authority has addressed and resolved Privacy Act allegations based on a respondent's claim in its answer to the complaint that the information "may not be available in accordance with the Privacy Act," and when "throughout the proceeding [it] invoked the Privacy Act as a basis for not disclosing the requested information in an unsanitized form."[9] *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Dallas, Tex.*, 51 FLRA 945, 952, 961 (1996) (*VAMC*). The Authority also has addressed and resolved Privacy Act allegations based on a respondent's invoking "prior to the [j]udge's decision . . . Privacy Act concerns" and presenting testimony at the hearing connecting the requested information and the Privacy Act. *See Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749, 756-57 (1997). The *FAA* framework does not establish the burdens that a respondent must meet in its reply to a union's information request; it is about the burdens that an agency must meet before the *Authority*, as evidenced by the fact that it discusses shifting the burden to the GC. *See FAA*, 50 FLRA at 345.

Here, it is not disputed that the Judge found that the Respondent claimed in its reply to the information

[9] We note that, in this case, the Union did not request sanitized reports and there is no claim that, at or near the time of its request, the Union informed the Respondent that it would accept sanitized reports.

request that the Privacy Act prohibits disclosure of the specified reports. In addition, unlike *Fed Det. Ctr.*, where the respondent raised the Privacy Act for the first time in its post-hearing brief to the Judge, the Respondent referenced its reply in its answer to the complaint and invoked the Privacy Act throughout the proceedings before the Judge. The Respondent also presented testimony at the hearing invoking the Privacy Act, *see* Tr. at 59, and the GC acknowledged and disputed the Privacy Act claim, *see* GC's Post-Hr'g Br. at 20-21. And in its arguments and presentation of testimony, the Respondent made clear its position that the Privacy Act prohibited disclosure of the reports because disclosure would reveal the names of the correctional officers who, in addition to the grievant, were investigated for misconduct. *See* Tr. at 51. It also is clear that, in the ULP proceedings before the Judge, the Union and the GC understood that the Respondent's position regarding the Privacy Act was based on a claim that the reports named those other employees who were investigated for misconduct. *See* GC's Post-Hr'g Br. at 21-22 (discussing a sanitized format of the specified reports).

These unexcepted-to facts, the record before the Authority, and the above-cited precedent support a conclusion that the Respondent adequately raised the Privacy Act and presented for decision by the Judge whether the Privacy Act prohibited disclosure of the disputed reports, with employees' names included. *See AAFES*, 53 FLRA at 757.

Accordingly, the Judge was required to address whether the Privacy Act prohibits disclosure of the specified reports, with employees' names included. The Judge did not do so. As the record is sufficient, we resolve that issue here.

As noted by the Judge, *FAA* sets forth the analytical approach the Authority follows when a respondent 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. In particular, such respondent is required to demonstrate: (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. *FAA*, 50 FLRA at 345. 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 that public interest. *Id.* And the only public interests that the Authority considers are the extent to which disclosure would shed light on the respondent's performance of its statutory duties or would inform citizens about the activities of the Federal Government. As relevant here, the Authority does not consider the public interests in collective bargaining and in expediting grievances that are embodied in the Statute, and does not consider the public interest specific to a union in fulfilling its obligations under the Statute. *Id.* at 343. In this regard, Supreme Court precedent holds that all FOIA requestors have an equal right to information and that the identity of the requesting party has no bearing on the merits of the request. *Id.* (citing *U.S. DOD v. FLRA*, 510 U.S. 487 (1994); *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)).

Once the relevant interests are established, the Authority balances the privacy interests 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. *Id.* at 346. 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). *Id.*

The Authority has held that the Privacy Act prohibits disclosure of documents relating to an administrative investigation of employees for misconduct when such disclosure would have revealed the names of the investigated employees. *VAMC*, 51 FLRA at 955-56. Specifically, the Authority determined that disclosure of the documents would have resulted in a clearly unwarranted invasion of personal privacy within the meaning of FOIA exemption 6. *Id.* Although the Authority found that the public interest would be served by disclosing the names, the Authority determined that the personal privacy interests outweighed the service to the public interest. *Id.*

Here, it is not disputed that the SIS, OIA, and FBI reports would disclose the names of employees other than the grievant who were investigated for misconduct. Further, it is not disputed that the GC has not identified any cognizable public interests to be served by disclosure of these employees' names, e.g., the extent to which disclosure would shed light on the Respondent's performance of its statutory duties or would inform citizens about the activities of the Federal Government. *FAA*, 50 FLRA at 345-46. Balancing the privacy interests of the other investigated employees against the unarticulated public interest in disclosure of their names, we find that the privacy interests outweigh the public interest.

Based on the foregoing, we conclude that disclosure of the SIS, OIA, and FBI reports, with employees' names included, would result in a clearly

unwarranted invasion of personal privacy within the meaning of FOIA exemption 6.

For the Privacy Act to prohibit disclosure of the reports, the reports must also be contained in a system of records. *Id.* at 345. The Judge did not decide that issue. But the Respondent asserted to the Judge that the SIS, OIA, and FBI reports requested by the Union are contained in a system of records within the meaning of the Privacy Act. Respondent's Post-Hr'g Br. at 14. The GC did not dispute before the Judge, and does not dispute before the Authority, that the reports are contained in a system of records. *See* GC's Post-Hr'g Br. at 21; Opp'n at 12. Accordingly, we conclude that the requested information is contained in a system of records within the meaning of the Privacy Act.

In accordance with these conclusions, we further conclude that the Privacy Act prohibits disclosure of the SIS, OIA, and FBI reports, with names included, and that, as a result, furnishing these reports is "prohibited by law." 5 U.S.C. § 7114(b)(4). Thus, we find that the Respondent did not violate the Statute when it failed to furnish these reports. As such, it is unnecessary to resolve the Respondent's argument that § 552a(k)(2) and exemption 7 to FOIA support the refusal to furnish the reports, and it also is unnecessary to resolve whether § 2429.5 bars that argument. In addition, it is unnecessary to resolve the Respondent's claim that it did not maintain the requested FBI reports in the regular course of business and that they were not reasonably available.

VII. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the Union with: (1) a copy of the standard form that OIA used to summarize the basic information relating to its investigation of the grievant; (2) all statements by any person that resulted in the grievant's interview and subsequent investigation by the FBI; (3) all documents that the Respondent relied on to place the grievant on home leave; and (4) all documents that the Respondent used to justify the investigation of the grievant.

(b) Failing and refusing to inform the Union that OIA reports and documents regarding a purported "second investigation" did not exist.

(c) In any like or related manner, interfering with, restraining, or coercing its 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) Furnish the Union with copies of: (1) the standard form that OIA used to summarize the basic information relating to its investigation of the grievant; (2) all statements by any person that resulted in the grievant's interview and subsequent investigation by the FBI; (3) all documents that the Respondent relied on to place the grievant on home leave; and (4) all documents that the Respondent used to justify the investigation of the grievant.

(b) Post at all facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Warden, U.S. Penitentiary, Marion, Illinois, and shall be posted and maintained for 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) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS ALSO ORDERED that the remaining allegations of the complaint be, and they hereby are, dismissed.

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, United States Penitentiary, Marion, Illinois, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the American Federation of Government Employees, Local 2343 (the Union) with the following information requested on July 3, 2008, relating to the decision to place a particular employee on home-duty status in 2006: (1) a copy of the standard form that the Office of Internal Affairs (OIA) used to summarize the basic information relating to its investigation of the employee; (2) all statements by any person that resulted in the employee's interview and subsequent investigation by the Federal Bureau of Investigation (FBI); (3) all documents that we relied on to place the employee on home leave; and (4) all documents that we used to justify the investigation of the employee.

WE WILL NOT fail or refuse to inform the Union that OIA reports and documents regarding a purported "second investigation" did not exist.

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

WE WILL furnish the Union with copies of: (1) the standard form that OIA used to summarize the basic information relating to its investigation of the employee; (2) all statements by any person that resulted in the employee's interview and subsequent investigation by the FBI; (3) all documents that we relied on to place the employee on home leave; and (4) all documents that we used to justify the investigation of the employee.

_____
(Warden, U.S. Penitentiary, Marion, Illinois)

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

This Notice must remain posted for 60 consecutive days from the date of the 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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312) 886-3465.

Office of Administrative Law Judges

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
MARION, ILLINOIS
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2343
(Charging Party)

CH-CA-08-0601

Gary W. Stokes, Esq.
For the General Counsel

Scot L. Gulick, Esq.
For the Respondent

Greg Shadowens
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 (Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2343, AFL-CIO (Union), a Complaint was issued by the Regional Director of the Chicago Regional Office. The complaint alleges that the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (Respondent) violated § 7116(a)(1), (5) and (8) of the Statute when it failed to furnish information requested pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(c)). The Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(d)). On January 27, 2010, Respondent filed a petition to revoke a subpoena *duces tecum* issued to Lisa Hollingsworth, warden of the U.S. Penitentiary, Marion, Illinois and the motion was granted during a prehearing conference as noted at the hearing. (Tr. 8).

A hearing was held in Benton, Illinois on February 4, 2010, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

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

FINDINGS OF FACT

The Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (Respondent/BOP), is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(c) and 1(d)).

The American Federation of Government Employees, Local 2343, AFL-CIO (AFGE/Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining. (G.C. Exs. 1(c) and 1(d)).

On May 17, 2006, Elmer Eugene (Gene) Langheld, a correctional treatment specialist (case manager) at the U.S. Penitentiary in Marion, Illinois and a member of the bargaining unit represented by the Union was assigned to his home address as a duty station Monday through Friday with a tour of duty from 7:30 a.m. to 4:00 p.m. (G.C. Ex. 3). His work at home duty station remained effective until August 16, 2006, when his duty location was changed to the U.S. Penitentiary, Marion, Illinois, where he was assigned to work as a correctional treatment specialist (case manager) at the Federal Prison Camp with a tour of duty from 8:00 a.m. to 4:00 p.m. (G.C. Ex. 4).

On February 28, 2008, Greg Shadowens, President of AFGE 2343 and the representative for Langheld, filed a grievance over Langheld's "placement on 'home-duty' status and the subsequent assignments . . ." (G.C. Ex. 6). On March 27, 2008, the Respondent denied the grievance (G.C. Ex. 7). On May 22, 2008, Greg Shadowens as president of AFGE Local 2343, invoked arbitration on the grievance and appointed Langheld, who was a union steward, as the Union's representative on the matter.

On July 3, 2008, Langheld, as union steward, submitted to the Respondent a request for information pursuant to 5 U.S.C. § 7114(b)(4) seeking:

1. All S.I.S. (Special Investigative Supervisor) reports with summaries relating to the staff assault on October 3, 2005 . . . to include any subsequent S.I.S. investigations and summaries relating to alleged staff misconduct during the incident. Additionally, copies are requested of any documents relating to Grievant Langheld in these investigations.

2. A copy of Bureau of Prisons form BP-S716.012, resulting in Grievant Langheld's investigatory interview with the agency's O.I.A. (Office of Internal Affairs) conducted on April 20, 2006.

3. All O.I.A. reports and documents related to the above referenced October 3, 2005, incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

4. All sworn statements, complaints, or allegations made by any person, employee of the agency, or inmate confined within the agency, resulting in Grievant Langheld's interview with F.B.I. authorities on or about May 16, 2006, and subsequent placement under F.B.I. investigation.
5. Cop[ies] of all F.B.I. reports, statements, interviews, investigations, conclusions, or summaries released/forwarded to the Bureau of Prisons during the course of the FBI investigation and at the conclusion of the FBI investigation relating to Grievant Langheld.

6. Copy of the policy authorizing Grievant Langheld's placement on Home Duty status and all correspondence/documents used in placing Grievant Langheld on Home Duty status on May 17, 2006. Specifically, these documents need to include any written justification/request submitted to the Department of Justice.

7. Cop[ies] of all O.I.A. reports and documents related to the second investigation of the above referenced incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

8. Copies of any other documents, reports, recordings, statements, affidavits, or allegations utilized by the agency in their justification for placing Grievant Langheld under prolonged investigation beginning as early as April 20, 2006 through January 24, 2008. (G.C. Ex. 9).

In making the request, Langheld provided nearly three pages explaining why the Union wanted each numerated request as well as indicating that the information was "needed by the Union to fulfill our representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of Grievant Langheld in an investigatory process, in direct violation of the contract between the parties." (G.C. Ex. 9). When the request for information was submitted, the only grievance to which Langheld was a grievant was the February 28, 2008, grievance upon which the Union invoked arbitration. (G.C. Ex. 16; Tr. 29).

The request explained that the information was needed to "determine how best [to] prepare and argue its case before the deciding official" and to determine "if any actions should be reported to an outside agency for a full investigation." (G.C. Ex. 9).

On July 24, 2008, the Respondent answered the request for information with a five page explanation of its denial, responding to each numerated request. (G.C. Ex. 11).

In response to Item 1, the Respondent asserted that no particularized need had been articulated because the request failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. Finally, the agency asserted that release of the information was prohibited by the Privacy Act, that it could impact ongoing investigations and disciplinary actions, and that it was not routinely released for preparation of third party hearings where the grievant was not disciplined as the result of the investigation.

In response to Item 2, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. Finally, the agency asserted that release of the information was inconsistent with its right to

determine internal security and that the grievant was not disciplined as the result of the investigation.

In response to Item 3, the Respondent repeated the justifications set forth to Item 1.

In response to Item 4, the Respondent repeated the justifications set forth to Item 1 while adding its right to determine internal security as another reason for not providing the information.

In response to Item 5, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited its right to determine internal security, noted that the grievant was not disciplined, and stated the Respondent did not have control or release authority over FBI investigations. The Respondent further asserted that a release of the information would violate the Privacy Act and could impact ongoing investigations and disciplinary actions.

In response to Item 6, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited its right to determine internal security and noted that the grievant was not disciplined as a result of the investigation.

In response to Item 7, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited the right to determine internal security, noted that the grievant was not disciplined, and stated that release of the requested information would violate the Privacy Act and could impact ongoing investigations and disciplinary actions. Finally, the Respondent asserted that the information was not routinely released for preparation of third party hearings where the grievant was not disciplined as the result of the investigation.

In response to Item 8, the Respondent repeated the justifications set forth to Items 1, 3, 4, 5 & 7.

While the Respondent refused to release any information pursuant to the Union's information request, it did release information related to Item 6 in response to a request Langheld made under the Freedom of Information Act (FOIA). Pursuant to Langheld's FOIA request, the Respondent provided its own employee with a policy memorandum related to Home Duty/Administrative Leave and a completed form submitted as justification for assigning Langheld to Home Duty/Administrative Leave in excess of ten days. (G.C. Ex. 17).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the information requested by the Union met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to furnish this information violated the Statute.

The General Counsel contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. The General Counsel asserts that the Union stated a particularized need for the eight items of information it requested, that the Union needs the information to prepare for an arbitration hearing on grievance filed over the actions taken by the Respondent as a result of the investigation, and that the Respondent's refusal to provide the information violated § 7116(a)(1)(5) and (8) of the Statute. As a result, the General Counsel requests that an order be issued and that Respondent post a notice to all employees.

Respondent

The Respondent contends that the refusal to provide any information in response to the eight items requested was justified and not a violation of the Statute because no particularized need was established for any of the eight items, some of the items were subject to the Privacy Act, some were subject to its right to determine internal security, some were not under its control, and finally, that information related to investigations was not routinely released for third party hearing preparation when the requestor was not disciplined as a result of the investigation.

ANALYSIS AND CONCLUSIONS

Under the Statute, an agency must furnish information requested by an exclusive representative if it is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, 5 U.S.C. § 7114(b)(4)(B). In this case, the eight items of information requested by

the Union were sought to prepare for an arbitration hearing resulting from an employee grievance filed under the collective bargaining agreement. Thus, the information was for a subject within the scope of collective bargaining. However, a union must also demonstrate that the information is "necessary" before an agency is required to come forward with counter veiling interests that would militate against furnishing such information. *National Labor Relations Board*, 60 FLRA 576 (2005).

Particularized Need

To demonstrate that requested 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, Wash., D.C.*, 50 FLRA 661, 669 (1995)(*IRS*). The union's responsibility for articulating its interests in the request requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute. *Id.* at 670. Further, the union is required to explain the scope of its request, including the temporal aspects of its request. *U.S. Customs Serv., S. Cent. Region, New Orleans Dist., New Orleans, L.A.*, 53 FLRA 789, 799 (1997)(*Customs Service*). Thus, if a union requests information from multiple years and fails to articulate with requisite specificity why it needs information relating to that extended period, then the Authority will not find a violation of the Statute for failure to provide the information. *See U.S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 476-77 (1995)(*DOL*).

The request the Union submitted to the Respondent on July 3, 2008, asked for eight distinct documents or categories of information and the first question that must be answered is whether a failure to establish a particularized need for any one of the eight items obviated the Respondent's obligation to provide any of the requested information or if the particularized need for each item must be assessed independently from the others. In *U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 795 (2005)(*Dep't of the AF*), the Authority considered a case wherein an ALJ found the union had established a particularized need for some items in a request but not for others, and concluded that the agency violated the Statute by not providing the items for which a particularized need was established. Upon review of the ALJ decision, the Authority rejected the judge's determination and dismissed the complaint, holding that "where a union fails to establish its need for all the information requested, a respondent is not required to provide the requested information, even if the union has established a need for '*some*' of the information", citing *DOL*, 51 FLRA at 476. Thus, at first glance, it would appear that a union needs to establish a particularized need for each item requested or the agency is at liberty to reject the entire request. However, upon appeal of *Dep't of the AF*, the 10th Circuit Court of Appeals held that the Authority's application of particularized need to excuse disclosure of any information when particularized need was established for some items, but not for others was incorrect, indicating that such an interpretation of § 7114(b) contradicted the plain language of the Statute and was not supported by the FLRA's own precedent. *AFGE, Local 2263 v. FLRA*, 454 F.3d 1101 (10th Cir. 2006).

It should be noted that while the Authority cited *DOL* in support of its decision in *Dep't of the AF*, a review of *DOL* demonstrates that the partial nature of the particularized need presented in that case actually related to a period of time covering a single request rather than multiple items. In *DOL*, the Authority concluded that while the union may have stated a particularized need for the requested documents over some period of time, it had not stated a particularized need for the entire period of time set forth in the request. Thus, the Authority concluded that the agency had no obligation under the Statute to provide the documents requested for some smaller period of time. Therefore, the "*some*" that was present in *DOL* related to the period of time for which documents were requested and not to different items within a single request.

Aside from being flatly rejected by the Tenth Circuit, further reason for not applying the precedent of *Dep't of the AF* in this case is provided by the Authority's own precedent, wherein it found a violation of § 7114(b) when particularized need was established for some items within a single request while determining that a particularized need was not provided for other items within the same request. *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 58 FLRA 656 (2003)(*DOJ, INS*); *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Forrest City, Ark.*, 57 FLRA 808 (2002)(*Forrest City*). In the *Forrest City* case, it was the Authority who did the parsing, ruling that particularized need was established for only two of three items in an information request after the ALJ had found a particularized need for all three items requested. *Id.* at 812-13. While *DOJ, INS* and *Forrest City* were decided only a few years before *Dep't of the AF*, the latter decision provided no discussion of why, less than two years after *DOJ, INS* and three years after *Forrest City*, the failure to establish a particularized need for a single item in a request for information now excused an agency from providing any information in response to a request. Given the Tenth Circuit's ruling and the prior

precedent established by the Authority in *DOJ, INS* and *Forrest City*, I find that contrary to *Dep't of the AF*, the failure to state a particularized need for a single item within a request for information is not fatal to the entire request and that each item within a request should be reviewed independently to determine if a particularized need was established for that item. Having concluded that the failure to state a particularized need for some items in a request does not excuse an Agency from providing information pursuant to a request wherein a particularized need is established for other items, a discussion of each item in the Union's request is appropriate.

Item 1

> All S.I.S. (Special Investigative Supervisor) reports with summaries relating to the staff assault on October 3, 2005 . . . to include any subsequent S.I.S. investigations and summaries relating to alleged staff misconduct during the incident. Additionally, copies are requested of any documents relating to Grievant Langheld in these investigations.

In support of its request for SIS reports related to the October 3, 2005, assault that prompted the agency to place Langheld on administrative leave to work at home, the Union indicated that it needed the reports to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that the documents or lack of documents would reflect the Agency's behavior during the grievance time frames and would support the grievant's position at a third party hearing. The Union indicated that it wanted these reports to determine what allegations were made against the grievant at the onset of the investigation and whether any conclusions or recommendations were made to the Marion administration to continue or pursue disciplinary action against the grievant, indicating that the reports would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement.

In rejecting the Union's request for Item 1, the Respondent indicated that the request failed to state a particularized need by failing to explain with specificity why the Union needed this information. The Respondent determined that the assertion that the documents would show a violation of Article 6 was not specific and that the Union did not explain how the information requested will show that the Agency violated the agreement. The Respondent then claimed that the request did not explain how the Union would use the information and failed to establish a connection between the use and the Union's representational responsibilities under the Statute. The Respondent also indicated that providing the information would violate the Privacy Act because other inmates and staff members were involved in the investigations, that release of the reports could potentially impact ongoing investigations and disciplinary actions and that the reports were not routinely released for preparation of third party hearings where the grievant was not disciplined as a result of the investigation.

First, it should be noted that the Respondent's reply to the information request made no request for clarification or explanation and is best described as a flat and total denial. Just as a union must articulate its interest in the requested information with more than a conclusory assertion, an agency is responsible for establishing any counter veiling anti-disclosure interest in more than a conclusory way. *IRS*, 50 FLRA at 669. In short, the analytical framework set forth in *IRS* requires parties to articulate and exchange their respective interests in disclosing information for several important purposes. *Id.* at 670. It "facilitates and encourages the amicable settlements of disputes" and, thereby, effectuates the purposes and policies of the Statute. *Id.* (quoting 5 U.S.C. § 7101(a)(1)(C)). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. *Id.* In addition, it 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. *Id.* at 670-71.

After considering the Union's request and the Respondent's reply, it is clear that the Union made a good faith effort to comply with the requirements of *IRS* and in reply the Respondent provided conclusory boilerplate that demonstrates a fundamental failure to comply with the requirements of *IRS*. The Union's request explained why it needed the SIS reports, how it would use those reports and the connection between that use and its representational responsibilities. Given the explicit and detailed nature of the Union's request, the Respondent's reply was little more than a laundry list of potential justifications for non-disclosure that might apply to any case with no application to the facts presented by this particular request. In fact, the reply to Item 1 was internally inconsistent as it asserted a failure to show how the information would be used while also acknowledging that a third party hearing was going to take place. This reply represents the mindless stonewalling *IRS* is intended to eliminate and is the opposite of the consideration and accommodation of interests that leads to exchanges of information and settlement of disputes. In this case, the Union provided the Respondent with ample basis for making a reasoned

judgment as to whether the disclosure of the information was required under the Statute and thus, the Respondent's claim that a particularized need was not provided for Item 1 is without merit.

The Respondent also asserted that disclosure of the requested SIS reports "would be a violation of the Privacy Act in that other inmates and staff members were involved in the investigations." I find that this justification is nothing more than a conclusory statement that does not satisfy the requirements set forth in *IRS*. The Authority has held that when an agency defends a refusal to furnish requested information on the basis that disclosure is prohibited by the Privacy Act because it would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6, the agency bears the burden of demonstrating: (1) that the information requested is contained in a "system of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency makes those requisite showings, the burden shifts to the General Counsel to: (1) identify a public interest that is cognizable under the FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest. Once the respective interests are articulated, the Authority balances the privacy interests against the public interest. *U.S. Dep't of Transp., FAA, New York TRACON, Westbury, N.Y.*, 50 FLRA 338 (1995)(*FAA*).

In *FAA*, the Authority found that an agency was in the best position to articulate the privacy interests of its employees and to come forward with information that the records sought were contained within a system of records. Furthermore, and consistent with *IRS*, the nature and significance of those privacy interests can be expressed at the same time the agency determines that they justify the non-disclosure of information. In this case, and without determining if the Respondent's reply actually established that the SIS reports were contained in a system of records subject to the Privacy Act, it is clear that the Respondent provided no explanation of the significance of the privacy interests they were protecting by not providing the requested SIS reports. At the very least, Respondent's reply failed to comply with the third requirement of the framework set forth in *FAA* and was a mere conclusory invocation of the Privacy Act made with no discussion or explanation of the privacy concerns that needed to be weighed. Had the Respondent explained its concern, it is possible that the parties could have achieved a resolution by agreeing to sanitize the documents of any Privacy Act material. Of course, the Respondent could have offered such a solution on its own, but the mutual resolution envisioned by *IRS* was not what the Respondent had in mind. The Respondent intended to deny all of the items requested and its reply used any and every potential excuse to justify the refusal.

It did not matter if the reason made no sense, completely ignored information in the request, or was inconsistent with an argument it made only a few sentences earlier. Making a good faith effort to find a way to satisfy its obligation under the Statute that also protected its interest in employee privacy was not the message sent by the Respondent's reply, nor did it evidence any intent to make a reasoned judgment. Because the Respondent made only a conclusory argument based upon the Privacy Act, I find that the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the Union's request. *U.S. Dep't of Justice, FBOP, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91 (2004).

Item 2

> A copy of Bureau of Prisons form BP-S716.012, resulting in Grievant Langheld's investigatory interview with the agency's O.I.A. (Office of Internal Affairs) conducted on April 20, 2006.

In addition to indicating that the form would assist the Union in fulfilling its representational duty to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process, the Union also indicated that the document would reflect the Agency's behavior during the grievance time frames and would support the grievant's position at a third party hearing. In support of its request for this form, the Union indicated that it needed the form to determine the Agency's rationale for placing Langheld under investigation by the OIA and that it would show that the agency violated Article 6 of the master agreement.

In rejecting the Union's request for Item 2, the Respondent indicated that the request failed to state a particularized need by failing to explain with specificity why the Union needed the information. The Respondent determined that the assertion that the documents would show a violation of Article 6 was not specific and that the Union did not explain how the information requested will show that the Agency violated the agreement. The Respondent then claimed that the request did not explain how the Union would use the information and failed to establish a connection between the use and the Union's representational responsibilities under the Statute. The Respondent also indicated that providing the information would violate its right to determine internal security and noted the fact that the grievant was not disciplined as a result of the investigation.

I find that the Respondent's justification for nondisclosure on the basis of particularized need must be rejected for the same reasons it was rejected in Item 1. Basically, the Respondent's reply is nothing but a list of reasons a request could fail to state particularize need, with no explanation of how they applied in this case and in complete disregard of the facts actually present. Furthermore, the argument that releasing a form it generated in the course of an investigation that resulted in an employee being placed on administrative leave would violate its right to determine internal security was not explained and is without merit. As for the argument that no discipline resulted, nothing in § 7114(b) of the Statute limits information requests to grievances or arbitrations over disciplinary actions. In fact, the grievance and arbitration for which the information was requested was filed because the Union believes the grievant was improperly subjected to an administrative action when he was placed on administrative leave without justification. The fact that the requested form contained no information that would support a disciplinary action lends itself to the possibility that it would not justify placing the grievant on administrative leave for sixty days either, which is the Union's contention in the grievance and arbitration.

Item 3

> All O.I.A. reports and documents related to the above referenced October 3, 2005, incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

In support of the request for OIA reports and documents related to the October 3, 2005, assault that prompted the agency to place Langheld on administrative leave to work at home, the Union indicated that it needed the reports to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that the information contained therein resulted in the grievant being interviewed and investigated by the Federal Bureau of Investigation (FBI) and would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 3, the Respondent simply referred to the reasons it provided for refusing to provide the information requested in Item 1, and my determinations with respect to those justifications set forth above apply equally to the Respondent's arguments concerning Item 3. The Union established a particularized need for these reports and documents and the Respondent did not adequately raise a counter veiling anti-disclosure interest at or near the time of the Union's request on the basis of the Privacy Act.

Item 4

> All sworn statements, complaints, or allegations made by any person, employee of the agency, or inmate confined within the agency, resulting in Grievant Langheld's interview with F.B.I. authorities on or about May 16, 2006, and subsequent placement under F.B.I. investigation.

In support of its request for sworn statements, complaints, or allegations that resulted in the grievant being interviewed and investigated by the FBI, the Union indicated that it needed the information to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that it needed the information to determine what information or evidence the agency used as a basis for placing the grievant on "home duty" status and that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request set forth in Item 4, the Respondent again cited the justification provided in response to Item 1, while also citing its right to determine internal security and again noted that the grievant was not disciplined as a result of the investigation.

I find that the justifications offered by the Respondent in response to Item 4, were without merit for the same reasons provided in my discussion of Items 1 and 2. The Union stated a particularized need for the this information and the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the Union's request on the basis of the Privacy Act, its right to determine internal security under § 7106 (a)(1), or the fact that it did not discipline the grievant.

Item 5

> Copies of all F.B.I. reports, statements, interviews, investigations, conclusions or summaries released/forwarded to the Bureau of Prisons during the course of the FBI investigation and at the conclusion of the FBI investigation relating to Grievant Langheld.

In support of its request for FBI reports, statements, interviews, investigations, conclusions or summaries released/forwarded to the Respondent, the Union indicated that it needed the information to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that it needed the information to determine what information the agency received from the FBI and used as a basis for placing the grievant under a prolonged investigation and asserted that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 5, the Respondent rolled all of its prior reasons into one while adding an additional justification related to its lack of control or release authority for FBI investigations.

For the reasons set forth in the discussion of prior items set forth above, I reject the Respondent's justifications related to particularized need, the Privacy Act, internal security, and the absence of a disciplinary action. With respect to the Respondent's argument concerning control and release authority for documents generated by the FBI, I find that the request only sought documents which the FBI had released or forwarded to the Respondent, thus, they were within the custody and control of the Respondent and under *IRS*, the Respondent was obligated to furnish the information within its custody and control when a valid and legally sufficient request was made pursuant to § 7114(b) unless a counterveiling anti-disclosure interest was raised at or near the time of the request. Merely asserting conclusions, without explaining how such an interest applied to the information requested is not sufficient. *IRS*, 50 FLRA at 669. Therefore, I find that all of the justifications provided by the Respondent in reply to Item 5 are without merit.

Item 6

> Copy of the policy authorizing Grievant Langheld's placement on Home Duty status and all correspondence/documents used in placing Grievant Langheld on Home Duty status on May 17, 2006. Specifically, these documents need to include any written justification/request submitted to the Department of Justice.

In support of its request for the Respondent's policy on administrative leave/home duty and any correspondence including any justification or request used to place the grievant in that status, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine what justification the agency had for taking the administrative action and asserted that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 6, the Respondent again indicated that the necessary elements of a particularized need had not been established, that disclosure would violate its right to determine internal security and again noted that the grievant had not been disciplined.

For the reasons set forth in the discussion of the Items 1 through 5 above, I find that the Respondent's justifications for not providing the information requested by Item 6 are without merit because the Union provided a particularized need for the information and the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the request on the basis of its right to determine internal security under § 7106 (a)(1), or the fact that it did not discipline the grievant. Given that this request sought nothing more than a copy of the agency's policy and documents related to the grievant being placed on home duty/administrative leave, the Respondent's denial of this basic request provides a further evidence that the Respondent had no intention to make a good faith effort to comply with its obligations under § 7114(b) and the precedent of the *IRS* case.

Item 7

> Copy of all O.I.A. reports and documents related to the second investigation of the above referenced incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

In support of its request for OIA reports and documents related to a second investigation of the grievant's involvement in the October 2005 incident, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine whether there was a second investigation and when the grievant ceased to be a subject of the investigation. The Union stated that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 7, the Respondent again lumped all of its arguments together, indicating that the necessary elements of a particularized need had not been established, that disclosure would violate its right to determine internal security, that disclosure would violate the Privacy Act and again noted that the grievant had not been disciplined and asserted that the information was not routinely released for preparation of third party hearings when no discipline was imposed as a result of the investigation.

Aside from acknowledging that the Union had indicated how it would use the information after making a declaration to the contrary only a few sentences earlier, it was established at the hearing that no second investigation was ever conducted. Thus, no OIA reports or documents related to a second investigation were in existence at the time the Respondent denied the request. (Tr. 29). 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.

Instead of giving the Union a general laundry list of potential reasons for not disclosing information it maintained, the Respondent should have informed the Union that information from a second investigation did not exist, thus, it was not maintained or reasonably available to the Respondent. However, compliance with § 7114(b)(4) and the requirements of *IRS* was not what the Respondent intended. The Respondent intended to deny every item in the request and put little thought into it, choosing instead to offer a smorgasbord of justifications for each item with no concern about whether they actually applied. Because the Respondent did not tell the Union that the information sought by Item 7 did not exist, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute even if legitimate reasons for denying the other seven items in the request had been articulated in their reply.

Item 8

> Copies of any other documents, reports, recordings, statements, affidavits, or allegations utilized by the agency in their justification for placing Grievant Langheld under prolonged investigation beginning as early as April 20, 2006 through January 24, 2008.

In support of its request for other documents, reports, recordings, statements, affidavits, or allegations used by the Respondent to justify the placement of the grievant under prolonged investigation, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine whether there was any additional information or documentation used by the agency, and stated that they would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 8, the Respondent cited its responses to Items 1, 3, 4, 5 & 7, with no explanation for how the justifications offered for those items applied to the information sought by this request.

For the reasons set forth in the discussion of the other items above, I find that the Respondent's justifications for not providing the information requested by Item 8 are without merit because the Union stated a particularized need for the information and the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the request. The request sought information relied upon by the Respondent to take administrative action against a grievant who had an arbitration hearing pending over that administrative action. The fact that it was an administrative action rather than a disciplinary action for which the Respondent routinely released the type of information that was requested is a distinction without merit under § 7114(b)(4) of the Statute. The grievance and arbitration hearing were within the scope of the collective bargaining agreement and the Respondent had an obligation under § 7114(b)(4) to provide information legitimately requested pursuant to that section even if it did not routinely provide such information when a disciplinary action had not been taken. (Tr. 59).

CONCLUSION

I find that the Union provided a particularized need for each of the eight items it sought in the information request dated July 3, 2008, and the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the request that would justify its refusal to provide any of the information requested. Thus, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by not providing the information requested in Items 1, 2, 3, 4, 5, 6 & 8, and by not informing the Union that the information requested in Item 7 did not exist.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois, shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, Local 2343, AFL-CIO (Union) with: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

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

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

(a) Furnish the Union with copies of: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

(b) Post at all 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, U.S. Penitentiary, Marion, Illinois, and shall be posted and maintained for 60 consecutive days, and shall be posted and maintained for 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) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued Washington, D.C., September 28, 2011.

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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 U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois, 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 or refuse to furnish as requested, the American Federation of Government Employees, Local 2343, AFL-CIO (Union), with the documents requested on July 3, 2008, relating to the decision to place Elmer (Gene) Langheld on home duty status during the Summer of 2006.

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

WE WILL, furnish the Union with: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

_____
(Agency/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: 312-886-3465.