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

OALJ 16-38

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION DUBLIN, CALIFORNIA RESPONDENT	Case No. SF-CA-15-0693
AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3584, AFL-CIO CHARGING PARTY	

Yolanda C. Shepherd
For the General Counsel

Stuart Bauch
For the Respondent

Jose Lau
For the Union

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On June 25, 2015, the American Federation of Government Employees, Local 3584, AFL-CIO (Union), filed an unfair labor practice (ULP) charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California (Respondent). (G.C. Ex. 1(a)). On October 30, 2015, the Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to provide the Union

with information requested pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(b)). The Respondent timely filed an Answer to the Complaint on November 20, 2015, in which it admitted certain allegations, but denied that it violated the Statute. (G.C. Ex. 1(c)).

A hearing in this case was originally scheduled for January 27, 2016, at a place to be determined in San Francisco, California. (G.C. Ex. 1(b)). On January 19, 2016, the General Counsel filed a Motion to Change Date of Hearing and Pre-Hearing Conference. (G.C. Ex. 1(f)). The motion was granted and the hearing was rescheduled to March 16, 2016. (G.C. Ex. 1(g)). On February 24, 2016, the Respondent filed a Motion to Change Date of Hearing and Date of Pre-Hearing Conference. (G.C. Ex. 1(h)). The motion was granted and the hearing was rescheduled to April 26, 2016. (G.C. Ex. 1(i)).

On April 26, 2016, a hearing in this matter was held in San Francisco, California. During the hearing, upon request by the General Counsel, paragraph 8 of the Complaint was amended to state: "On April 29, 2015, and June 5th, 12th, and 19th, 2015, the Charging Party requested a list of Office of Internal Affairs referrals from January 1, 2014 to April 28, 2015, with the bargaining unit status of the employee who is on the referral list." (Tr. 9, 90-91).

The parties were afforded an opportunity to be represented and heard, examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel filed a timely post-hearing brief that was fully considered; the Respondent did not file a post-hearing brief.

FINDINGS OF FACT

The U.S. Department of Justice is an agency under 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(b) & 1(c)). At all times material, Kari Nelson held the position of Human Resources Manager at the Federal Correctional Institution in Dublin, California (FCI Dublin) and acted on behalf of the Respondent.

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4). (G.C. Exs. 1(b) & 1(c)). AFGE is the exclusive representative of units of employees appropriate for collective bargaining at the U.S. Department of Justice, Federal Bureau of Prisons. AFGE, Local 3584 is an agent of AFGE for the purpose of representing employees at FCI Dublin.

Employees have an obligation to report any violations of standards of conduct. (Tr. 79). The procedures for processing complaints about employees and conducting investigations are documented in Program Statement 1210.24. (G.C. Ex. 3). Typically, employees submit complaints about other employees to the Warden.[1] (Tr. 20). The Warden is required to refer any complaint to the Office of Internal Affairs (OIA). (Tr. 33-34; G.C. Ex. 3 at 7-8).[2] The OIA is a division of the Bureau of Prisons that is responsible for

[1] The Warden is also referred to as the CEO or Chief Executive Officer of the institution. (Tr. 20).
[2] Employees are permitted to refer matters directly to OIA. (Tr. 32).

conducting investigations of employees. (Tr. 16). After OIA receives the referral, it assigns a "referral number" to every case and then determines whether to conduct the investigation itself or to transfer the matter to the Office of the Inspector General or the local facility for investigation. (Tr. 38, 59-60; G.C. Ex. 3).[3]

In April of 2015, during the regular monthly Labor Management Relations (LMR) meeting, the Union expressed concerns that managers may be violating the Privacy Act and the Standards of Employee Conduct by exposing employee records to inmates and others and attempting to obtain private medical information from employees. (G.C. Ex. 2 at 5). The Union told the Respondent that it wanted managers referred to OIA and that the "OIA notification requirements are clearly defined in P.S. 1210.24 and P.S. 3420." (Tr. 15; G.C. Ex. 2 at 5). It also stated that "[a]ll staff fall under the Standards of Employee Conduct, management included. . . ." (G.C. Ex. 2 at 5).

On April 29, 2015, Edward Canales (E. Canales), the Union President, sent an information request to Charleston Iwuagwu, the Warden of FCI Dublin, requesting the following:

> A detailed list of all FCI Dublin case referrals to OIA on staff employed at FCI Dublin. The list should be for the period of 01-01-2014 to 04-28-2015. The list should include the bargaining status of the employee, the pay grade of the employee, the race of the employee, the gender of the employee. Also[,] the specific charge of the referral.

(Jt. Ex. 1).

In the section entitled "Particularized Need", E. Canales explained that the Union planned to "to compare the amount of referrals to OIA given to Non-Bargaining compared to Bargaining Employees." (Jt. Ex. 2 at 1-2). Also, he wanted to ensure that FCI Dublin was in "compliance with P.S. 1210.24 in reporting cases to OIA." Further, he explained that the Union would use this information to "determine if a grievance and/or unfair labor practice and/or other legal remedy is required to protect the rights of bargaining unit employees and/or the union." (*Id.*). In the section entitled "Public Interest", he stated that disclosure would allow the public to observe how "official time is granted" and would help determine if the Respondent was discriminating against employees "in the manner in which EEO Official [T]ime decisions are administered." (*Id. at 3*).

On May 15, 2015, Nelson responded by denying the information request because it considered the information "confidential" and it did not show a particularized need "as it directly related to a specific staff member." (Jt. Ex. 2 at 1-2). She concluded by offering to reconsider the request if the Union provided more specific information. Nelson testified that

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[3] All complaints receive a referral number. (Tr. 38). However, cases may also receive a separate case number. (Tr. 39). The case number is assigned by the group that conducts the actual investigation. For example, if the local facility conducts the investigation, then it will assign the case number. The Union seeks the referral number, not the case number. (Tr. 39, 42).

the information request's reference to official time was "confusing . . . ." (Tr. 72). However, she acknowledged that her May 15, 2015, response did not indicate that the information request was confusing. (Tr. 81). Indeed, she could not recall if she ever told the Union that the information request was confusing. (Tr. 82). Furthermore, she stated that she knew what the Union wanted and why the Union wanted it based on the information request. (Tr. 83).

Later, the parties discussed this information request for about two hours during the May 2015 LMR meeting. (Tr. 47; Jt. Ex. 3). According to Susan Canales (S. Canales), the Union Treasurer, the Respondent objected to disclosing the information because it believed that the Union could use the race and gender information to identify employees. (Tr. 47). The Union responded by asking the Respondent to give the Union whatever it could give. The Union also gave the Respondent an additional ten days to respond. S. Canales stated that she remembered this conversation because this is an on-going issue that is very important to bargaining unit employees. (Tr. 49-50). She also explained that LMR meeting minutes only include a portion of what was discussed because the LMR meetings could last for days and a verbatim transcript would be numerous pages. (Tr. 88). Nelson testified that the Union could have discussed the particularized need with her during the LMR meeting, but she could not remember. (Tr. 75). However, she thought that such information would have been included in the meeting minutes if it was discussed. (Tr. 76).

On June 5, 2015, according to E. Canales, he asked Nelson for an update on the information request during a break in negotiations over the local supplement. (Tr. 22). Nelson responded that she was trying to get the information.

On June 12, 2015, E. Canales sent an e-mail to Nelson stating that the Union needed this information to determine if FCI Dublin was imposing disparate treatment on union members and non-union members.[4] (Jt. Ex. 4). Later that day, E. Canales contacted Nelson again and reiterated why he needed this information. (Tr. 23). Nelson testified that the Union may have explained why it needed the information after May 15, 2015, but she could not remember. (Tr. 77).

On June 19, 2015, E. Canales sent an e-mail stating that he had not received a response yet. (Jt. Ex. 5). On June 23, 2015, Nelson responded that the Respondent had already given a response to the Union during the May 21, 2015, LMR meeting. (Jt. Ex. 6).

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[4] Although the Union used the terms "union members" and "non-union members" in this e-mail, it is clear that the Union actually meant bargaining unit and non-bargaining unit employees. The Union never requested information that would identify whether or not an employee was a dues-paying member of the Union. Instead, the Union requested information to compare whether bargaining unit employees were being treated the same as non-bargaining unit employees. (Jt. Ex. 1). Also, the Union repeatedly explained that it was concerned that bargaining unit employees were being treated differently than non-bargaining unit employees. (G.C. Ex. 2; Jt. Ex. 2). There is no evidence that this confused the Respondent.

The Union seeks a list of OIA referral numbers with the bargaining unit status of the employee referred to OIA. (Tr. 39, 42). Nelson acknowledged that such information would not contain any personally identifiable information such as employees' names. (Tr. 84). Nelson also stated that she could not recall if the Union ever told her that it would accept a list of referrals by bargaining unit status. (Tr. 85).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) alleges that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by refusing to provide the OIA referral list by bargaining unit status as requested by the Union.

First, the GC states that the Union established a particularized need for the OIA referral list with bargaining unit designations. (G.C. Br. at 9). Immediately before the information request, the Union had expressed concerns that managers were violating the privacy interests of employees and that the Respondent had an obligation to refer such matters to OIA. The Union's information request also states that it would use the information to determine if the Respondent was treating referrals concerning bargaining and non-bargaining unit employees differently. (*Id.* at 10).

Second, the GC states that the Respondent failed to offer any countervailing interest for refusing to disclose the bargaining unit status of the employees referred to OIA. (*Id.* at 15). It asserts that the Union asked the Respondent, during the May 2015 LMR meeting, to give the Union whatever it was willing to give and that the Respondent could fashion a response to avoid disclosure of any "confidential" information. (*Id.* at 15, 17).

Third, the GC states that the Respondent failed to establish that disclosure was prohibited by the Privacy Act. (*Id.* at 17-19). The GC contends that the Respondent failed to raise the Privacy Act as an affirmative defense in its Answer. Further, the GC argued that the Respondent never established that the information is contained in a system of records or that the information could be obtained using personal identifiers.

For a remedy, the GC requests an Order directing the Respondent to disclose a list of OIA referrals and the bargaining unit status of those employees referred to the OIA. (*Id.* at 21). Also, it seeks a notice, signed by the Warden, and posted on bulletin boards and e-mailed to bargaining unit employees at FCI Dublin.

ANALYSIS AND CONCLUSIONS

Section 7114(b)(4) of the Statute requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, information: (1) normally maintained by the agency in the regular course of business; (2) reasonably available and necessary for full and proper discussion,

understanding, and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.[5] 5 U.S.C. § 7114(b)(4).

In *IRS*, the Authority set forth the analysis for determining whether information is "necessary" under § 7114(b)(4) of the Statute. *IRS, Wash., D.C.*, 50 FLRA 661, 669-71 (1995). To demonstrate that information is "necessary," a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." (*Id.* at 669-70). A union's responsibility for articulating its interests requires more than a conclusory or bare assertion. (*Id.* at 670). The request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. (*Id*). If an agency denies an information request, it must "assert and establish any countervailing anti-disclosure interests." (*Id*). An agency does not satisfy its burden by making conclusory or bare assertions. (*Id*).

Under the Privacy Act, an agency is not required to disclose information if the disclosure would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Authority follows the following framework for analyzing such claims:

> 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 the 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. Although the parties bear the burdens set forth above, we will, where appropriate, consider matters that are otherwise apparent. Once the respective interests have been articulated, we will, as we have in the past, balance the privacy interests against the public interest.

U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y., 50 FLRA 338, 345 (1995) (footnote & citation omitted).

Particularized Need

In this case, the Union originally requested a list of OIA referrals with the bargaining unit status, race, gender, and pay status of the employee referred to OIA and the specifics of the charge. (Jt. Ex. 1). However, the Complaint, as amended, only alleges that the

[5] The Respondent admitted in its Answer to the Complaint that it normally maintains the information, the information is reasonably available, and that the information does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. (G.C. Exs. 1(b) & 1(c)).

Respondent failed to provide a list of OIA referrals with the bargaining unit status. (G.C. Ex. 1(b)). Therefore, I will only consider whether the Union established a particularized need for this information. *USDA, U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 46 FLRA 1375 (1993) (the Authority will not consider matters not raised in the complaint).

In its statement of particularized need, the Union explained that it wanted to compare the number of referrals of bargaining unit employees to the number of referrals of non-bargaining unit employees. (Jt. Ex. 1). It also stated that it wanted this information to make sure that the Respondent was complying with its obligation to refer matters to OIA as required by Position Statement 1210.24. Further, it would use this information to determine if a grievance, unfair labor practice charge, or other complaint should be filed.[6] The Authority considers the circumstances surrounding the information request, including discussions between the parties, when it determines whether the union has established a particularized need for information. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 n.12 (1997). In this case, shortly before the Union sent the information request, the Union told the Respondent that all employees "including management" are required to comply with the Standards of Employee Conduct and that it expected managers to be referred to OIA. (Tr. 15; G.C. Ex. 2 at 5). Therefore, the Respondent knew that the Union was focused on determining whether the Respondent was not treating managers the same as other employees.

The Union clearly explained why it wanted the information (to compare the number of referrals of bargaining unit employees to non-bargaining unit employees); how it would use the information (to ensure that the Respondent was not discriminating against bargaining unit employees in how it referred matters to OIA), and the connection between the uses and the union's representational responsibilities under the Statute (to file grievances, ULPs, or other types of complaints). Therefore, the Union established a particularized need for the OIA referral numbers and the bargaining unit status of the employees referred to OIA.

Privacy Act

Disclosure of the OIA referral numbers with the bargaining unit status of the employees referred to OIA would not violate the Privacy Act. The Respondent did not specifically mention the Privacy Act in the hearing but, in its Answer, the Respondent denied the GC's allegation that the information could be disclosed in accordance with the law. (G.C. Exs. 1(b) & 1(c)). To the extent that the Respondent intended to raise a countervailing interest, other than the Privacy Act, in avoiding disclosure, it failed to substantiate it. The Respondent only stated that it wanted to avoid disclosing information that would allow the

[6] Although the Union referred to "official time" in its section entitled "Public Interest" in the information request; there is no indication that this confused the Respondent. Nelson did not tell the Union that the information request confused her. (Tr. 81, 82). Indeed, she testified that she knew what information the Union wanted and why the Union wanted it. (Tr. 83).

Union to identify individuals referred to OIA. However, as discussed below, there is no evidence that the Union could use the list of OIA referral numbers with bargaining unit status to identify employees referred to OIA.

Nelson responded to the information request by stating that the information requested was "confidential . . . ." (Tr. 83). According to S. Canales, the Respondent told the Union what it meant by "confidential" during the May 2015 LMR meeting. (Tr. 47). The Respondent was concerned that if it provided all the information, specifically the race and gender of the employees, the Union would be able to identify the employees referred to OIA. The Union responded by asking the Respondent to give the Union whatever it was able to provide.

The Respondent challenged S. Canales's credibility at the hearing. First, it noted that some information was not included in the meeting minutes. (Tr. 76). However, S. Canales explained that the meeting minutes are only a summary of the parties' conversation. (Tr. 88). This is consistent with the record. The meeting minutes for the two-day meeting were only a little more than four pages long. (Jt. Ex. 3). Indeed, the meeting minutes only devoted one paragraph to the two-hour conversation regarding the information request. (Jt. Ex. 3; Tr. 47). Nelson also confirmed S. Canales's testimony that the Respondent was concerned that the Union would be able to identify individuals if the Respondent provided all the information the Union requested. (Tr. 81). The Respondent asked Nelson whether the Union ever told her that it would be willing to just accept the bargaining unit status. (Tr. 85). Nelson answered "I don't recall that conversation." (Tr. 85). Nelson repeatedly acknowledged that the Union may have discussed the information request with her, but she could not remember. (Tr. 72, 75, 77). S. Canales, on the other hand, had a very clear recollection of events because this matter was on-going and very important to the bargaining unit. (Tr. 50). Therefore, I find that S. Canales's testimony regarding the May 2015 LMR meeting is more credible.

The Union's open-ended offer to accept anything the Respondent was willing to give provided the Respondent with an opportunity to disclose information in a manner that would avoid any violation of the Privacy Act. The Respondent knew that the Union was focused on getting the bargaining unit information because it was the only piece of information that the Union specifically addressed in its particularized need statement. (Jt. Ex. 1). Also, the Respondent knew, based on its conversation during the April 2015 LMR meeting and the June 12, 2015, e-mail that the Union was concerned about the equitable treatment of bargaining unit and non-bargaining unit employees. (Tr. 15; G.C. Ex. 2 at 5; Jt. Ex. 4). Nelson acknowledged that the OIA referral numbers and the bargaining unit status did not contain any personally identifiable information. (Tr. 84). Also, there is no evidence that the Union could have used this limited information to identify individual employees.

Therefore, the Union's offer addressed the Respondent's concerns about employees' privacy.[7] Nonetheless, the Respondent chose not to accept this opportunity; instead, it simply repeated that it would not disclose the information without further explanation.

The Respondent has failed to offer any evidence that the disclosure of a list of the OIA referral numbers with the bargaining unit status of the employee referred to the OIA would violate the Privacy Act. As such, I find that the Respondent violated the Statute.

REMEDY

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

CONCLUSION

The Union established a particularized need for the OIA referral number and bargaining unit status of employees referred to the OIA. The Respondent did not offer any evidence that disclosure of this information would have violated the Privacy Act. Therefore, I find the Respondent's failure to furnish the requested information violated § 7116(a)(1), (5) and (8) of the Statute.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 3584, AFL-CIO (Union) with a list of the OIA referral numbers with the bargaining unit status of the employees referred to the OIA for the period of January 1, 2014 through April 28, 2015.

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[7] The Union's offer to accept less information distinguishes this case from other cases where the union failed to make accommodations to satisfy the agency's Privacy Act concerns. *See e.g., U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669 (2012) (finding that the agency did not violate the Statute by refusing to provide OIA, SIS, and FBI investigation reports because such information would have personally identifiable information).

(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 actions in order to effectuate the purposes and policies of the Statute:

(a) Furnish the Union with a list of the OIA referral numbers with the bargaining unit status of the employees referred to the OIA for the period of January 1, 2014 through April 28, 2015.

(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, Federal Correctional Institution in Dublin, California, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, on the same day, Notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, San Francisco Region, 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., August 8, 2016

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 3584, AFL-CIO (Union) with information requested on April 29, 2015, related to the Office of Internal Affairs (OIA) referrals.

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 a list of the OIA referral numbers with the bargaining unit status of the employees referred to the OIA for the period of January 1, 2014 through April 28, 2015.

_____
(Respondent/Agency)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (404) 331-5300.