69 FLRA No. 48

PENSION BENEFIT
GUARANTY CORPORATION
WASHINGTON, D.C.
(Respondent/Agency)

and

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Charging Party/Union)

WA-CA-13-0719

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DECISION AND ORDER

April 29, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union requested, under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute),[1] two groups of records from the Agency. The first concerned an employee's (the coworker's) performance evaluation and supporting documentation (the performance information), and the second was records of certain phone calls made by the grievant's supervisor outside of normal business hours (the phone logs). In the attached decision, a Federal Labor Relations Authority (FLRA) Administrative Law Judge (the Judge) determined that the Privacy Act[2] prohibited the disclosure of the coworker's performance information, but allowed the Agency to release the phone logs. The Judge therefore concluded that the Agency did not violate § 7114(b)(4) of the Statute by withholding the coworker's performance information, but that the Agency violated the Statute when it did not provide the phone logs.

This case presents us with three substantive questions. The first question is whether the Privacy Act prohibits the Agency from disclosing the coworker's performance information, under § 7114(b)(4) of the Statute. Because the coworker's privacy interests outweigh the public interest in disclosure, the answer is yes.

The second question is whether the Privacy Act prohibits the Agency from disclosing the supervisor's phone logs, under § 7114(b)(4) of the Statute. Because the Privacy Act's routine-use exception permits disclosure in this case, the answer is no.

The third question is whether the Judge erred in finding that the phone logs were reasonably available under § 7114(b)(4) of the Statute. Because the Agency failed to timely inform the Union of its view that the information was not reasonably available, it is not necessary to reach this question.

II. Background and Judge's Decision

A. Background

The Union submitted, to the Agency, an information request under § 7114(b)(4) of the Statute when the Agency failed to promote the grievant – a bargaining-unit employee in the Agency's Office of Information Technology (OIT) – to a General Schedule (GS)-11 career-ladder position. As relevant here, the Union requested two groups of records. The Union asserted that it needed the information to: assess the merits of grievances and arbitrations involving the grievant; proceed with arbitration; and respond to the Agency's defenses and arguments.[3] The Union later clarified its request in response to some of the Agency's objections.

The first group of records concerned the coworker, whom the Union claimed was "similarly situated" to the grievant.[4] The Union claimed that it needed the coworker's performance information to "show how terms and conditions of employment relevant to career[-]ladder promotions and evaluation of performance in the group under [the supervisor] were interpreted and applied,"[5] and to show the unlawful disparate treatment of the grievant.

The second group of records, the supervisor's phone logs, concerned telephone calls to the grievant and other OIT bargaining-unit employees outside normal business hours. The Union explained that it needed these phone logs to "compare how [the supervisor] behaved and conducted herself with respect to other OIT bargaining[-]unit employees and how she treated other bargaining[-]unit employees in comparison to

[1] 5 U.S.C. § 7114(b)(4).
[2] *Id.* § 552a.
[3] Judge's Decision at 4.
[4] *See id.* at 3 (identifying precise information requested by Union).
[5] *Id.* at 3-4 (quoting Agency's Mot. for Summ. J, Ex. B at 3).

[the grievant]."[6] The Union also stated that it needed the data to show that the supervisor "lack[ed] credibility."[7]

The Agency denied the request, asserting that the Union did not establish a particularized need for the information, and that its employees had "legitimate privacy interests" in the information contained in the phone logs.[8]

The Union responded that it needed the coworker's performance information because "there [we]re claims of discrimination and disparate impact."[9] Regarding the phone logs, the Union modified its request to limit the request to the supervisor's calls to five employees – the grievant, the coworker, and three other employees – identified by name and phone number. The Union asserted that there was no privacy issue because the telephone numbers were listed and known. The Union further asserted that the phone logs were necessary to compare "how [the supervisor] treated other bargaining[-]unit employees in comparison to [the grievant]" and "for purposes of showing that [the supervisor] lack[ed] credibility."[10] The Union also requested to meet with the Agency to discuss and clarify the requests.

The Agency did not reply, and the Union filed an unfair labor practice charge against the Agency. The FLRA's General Counsel (GC) issued a complaint, alleging that the Agency failed to meet with the Union concerning the requests as required by the Statute and, consequently, violated § 7116(a)(1), (5), and (8) of the Statute. Later, the GC amended the complaint to allege that the Agency failed to furnish the requested information and thereby violated § 7114(b)(4).

The Agency filed a motion for summary judgment, and the GC filed a combined opposition to the Agency's motion and cross-motion for summary judgment. The Union also filed an opposition to the Agency's summary-judgment motion, adopting, and agreeing with, the GC's motion.

B. Judge's Decision

As relevant here, the Agency argued that it did not violate the Statute because the Privacy Act prohibited it from providing the coworker's performance information. In this regard, the Agency argued that the information was contained in two Office of Personnel Management (OPM) systems of records (the OPM systems) – OPM/GOVT-1, which contains general personnel records, and OPM/GOVT-2, which contains employee performance records – and that the information is therefore protected by the Privacy Act.[11] The Agency further argued that (1) the coworker had a strong privacy interest in his performance information; (2) there was no public interest in the disclosure of the information; and (3) the information was not disclosable under the Privacy Act's routine-use exception.

The Agency likewise argued that it did not violate the Statute by withholding the phone logs. Specifically, the Agency argued that it timely informed the Union that the phone logs were "neither reasonably available nor normally maintained in the regular course of business."[12] The Agency also argued that the phone logs were contained within an Agency system of records – PBGC-11, which includes "records relating to the use of [Agency] telephones and [Agency]-issued portable electronic devices"[13] – and, therefore, were protected from disclosure by the Privacy Act.

Conversely, the GC argued that the Privacy Act did not prohibit disclosure of the coworker's performance information because the public interest in disclosing the information – to show how the Agency administers its performance appraisal system and to address claims of disparate treatment and violations of civil-rights laws – outweighed the coworker's privacy interests.[14] In addition, the Union contended that "it did not request data concerning [the coworker]'s performance rating, just data concerning his 'performance activities.'"[15]

As for the phone logs, the GC asserted that they were reasonably available, normally maintained, and that the Union established a particularized need for them.[16] In addition, the GC argued that disclosure of the records was permitted as a routine use.[17] The GC also claimed that the Agency violated the Statute by failing to respond to the Union's requests.

[6] *Id.* at 4 (quoting Agency's Mot. for Summ. J, Ex. B at 7).
[7] *Id.* (quoting Agency's Mot. for Summ. J, Ex. B at 7).
[8] *Id.* at 5.
[9] *Id.* at 6.
[10] *Id.* (quoting Agency's Mot. for Summ. J, Ex. D at 1).
[11] *Id.* at 8-9.
[12] *Id.* at 9.
[13] *See id.* at 15 (citing Privacy Act of 1974; Systems of Records, 77 Fed. Reg. 59,252, 59,255, 59,263 (Sept. 26, 2012) (Agency SORN)).
[14] *Id.* at 7.
[15] *Id.* at 10.
[16] *Id.* at 7.
[17] *Id.* at 7-8.

The Judge found that the GC did not dispute that the performance information concerned the coworker's performance evaluations, supporting documentation, and career-ladder promotion potential.[18] The Judge also found that the GC did not dispute the Agency's contention that the performance information constituted records that were subject to the Privacy Act because they were contained in one of the OPM systems.[19] The Judge then applied the Privacy-Act balancing test set forth by the Authority in *U.S. Department of Transportation, FAA, New York TRACON, Westbury, New York* (*FAA*)[20] to determine whether the coworker's privacy interests outweighed an identifiable public interest under the Freedom of Information Act (FOIA).[21]

The Judge first determined that the coworker had a "substantial privacy interest[]" in the performance information.[22] He agreed with the GC that there was a public interest in the disclosure of the information because it "furthers the public interest in knowing how 'public servants' are carrying out their [g]overnment functions."[23] But the Judge determined that the public interest in this case was less significant because this case involved the performance information of a single employee and that "such a small sample size would not provide the public with a meaningful view of how the [Agency] administers its performance appraisal system."[24] The Judge further found that "[e]ven if disclosure of . . . [the] performance . . . data would enhance the Union's ability to represent [the grievant] . . ., this interest is specific to the Union, not the general public."[25] He concluded that the coworker's privacy interest in nondisclosure outweighed the public interest in disclosure.[26] Accordingly, he found that the Agency was not required to provide the performance information and that therefore, it did not violate § 7114(b)(4) of the Statute by failing to provide the information.[27]

Regarding the phone logs, the Judge first found that the Union established a particularized need for them under the Statute. Addressing Privacy Act issues, the Judge rejected the Agency's argument that because the phone logs are in an Agency system of records the Privacy Act prevents their disclosure.[28] He found that the Privacy Act permits agencies to adopt routine uses that are consistent with the purposes for which the information is collected. The Judge found that the Agency's system of records incorporated a routine-use exception, General Routine Use G8 (Routine Use G8), which authorizes "disclos[ure] to an official of a labor organization . . . when necessary for the labor organization to perform properly its duties as the collective[-]bargaining representative of . . . employees in the bargaining unit."[29] And the Judge determined that the Union "need[ed] the [phone logs] . . . so that it [could] properly represent [the grievant]."[30] Therefore, the Judge concluded, Routine Use G8 permitted disclosure of the phone logs to the Union.[31]

The Judge also rejected the Agency's argument that the phone logs were not reasonably available or normally maintained. The Judge determined that the Agency failed to communicate these anti-disclosure interests to the Union at or near the time of the Union's request. Rather, the Judge found that the Agency did not inform the Union of its claim that the phone logs were not reasonably available or normally maintained until its prehearing disclosure, over a year later. Nonetheless, he found that the Agency failed to establish that most of the phone logs are not reasonably available or normally maintained.[32] Although the Judge concluded that the Agency violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute when it did not provide the phone logs to the Union,[33] he found that information reflecting calls from the supervisor's home telephone number to Agency employees was not normally maintained by the Agency, so the Agency had no duty to give that information to the Union.[34]

Finally, the Judge determined that the Agency violated § 7116(a)(1), (5), and (8) the Statute by failing to reply to the Union's second information request or meet with the Union to discuss its requests.[35]

The Agency and the Union filed exceptions to the Judge's decision. The Agency filed an opposition to the Union's exceptions, and the GC and the Union filed oppositions to the Agency's exceptions. The Agency does not except to the Judge's finding that the Agency violated § 7116(a)(1), (5), and (8) the Statute by failing to reply to the Union's second information request or meet with the Union to discuss its requests.

[18] *Id.* at 11.
[19] *Id.* at 12.
[20] 50 FLRA 338, 345 (1995).
[21] 5 U.S.C. § 552(b)(6).
[22] Judge's Decision at 12.
[23] *Id.*
[24] *Id.* at 12-13; *see also id.* at 7.
[25] *Id.* at 13.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 14-15.
[29] *Id.* at 15 (citing Agency SORN, 77 Fed. Reg. at 59,255, 59,263).
[30] *Id.*
[31] *Id.*
[32] *Id.* at 15-17.
[33] *Id.* at 17.
[34] *Id.* at 15.
[35] *Id.* at 18.

III. Preliminary Matters: Section 2429.5 of the Authority's Regulations bars two of the Union's contrary-to-law exceptions.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence, arguments, or issues "that could have been, but were not, presented in the proceedings before the . . . Administrative Law Judge."[36]

The Union argues that the performance information is disclosable under routine-use exceptions applicable to the OPM systems of records.[37] Although the Agency argued before the Judge that the OPM routine uses did not permit disclosure,[38] neither the GC nor the Union argued, as the Union does here, that the performance information was disclosable under the OPM routine-use exceptions. As the GC or the Union could have done so, but did not, § 2429.5 bars this argument, and we do not consider it.[39]

The Union also argues that the decision incorrectly characterizes all the requested data pertaining to the coworker as "performance evaluation data."[40] According to the Union, the Judge wrongly applied the Privacy Act because much of the information sought is work product, accomplishments, activities, and assignments that are not contained in the OPM systems of records.[41]

The record, however, indicates that neither the GC nor the Union argued before the Judge that the requested information was not in a system of records. First, the Judge specifically found that the GC did "not dispute the [Agency's] contention that [the coworker's] performance evaluation and supporting materials fall under" one of the OPM systems.[42] And the record supports this finding.[43] Second, the GC also argued that the performance information was disclosable under the Privacy Act,[44] which only applies to information contained in a system of records.[45] The Union agreed with, and adopted, the GC's position and arguments.[46]

Also, the Union did not argue before the Judge that most of the requested information is not in a system of records. Although, in its opposition to the Agency's motion for summary judgment, the Union distinguished the coworker's "performance rating" from his "performance activities," the Union never claimed that the "performance rating" was contained in a system of records, but "performance activities" were not.[47] As the Union could have raised this argument before the Judge, but did not, § 2429.5 bars this argument, and we do not consider it.[48]

Additionally, the GC asserts that the Agency cannot now argue that the Judge, when he applied the Agency's Routine Use G8, should have applied the two-part analysis that the Authority applies when determining whether information is disclosable under certain OPM routine uses.[49] The record indicates that the GC argued before the Judge that a specific routine use under the Agency's system of records permitted disclosure of the phone logs.[50] But the Judge determined that a different routine use – Routine Use G8 – applied.[51] Because neither the GC nor the Union argued, before the Judge, that Routine Use G8 applied, there is no basis for concluding that the Agency should have known to raise its argument regarding Routine Use G8 before the Judge.[52] Accordingly, § 2429.5 does not prevent the Agency from raising it now.

Last, the Agency contends that the Union did not argue before the Judge that there is a public interest in disclosure of the performance information in order to "know of potential violations of civil[-]rights laws."[53] But the GC argued that the Union needed the information to establish a violation of civil-rights laws, for which there is a strong public interest in disclosure.[54] Because the record shows that this argument was raised before the Judge, we reject the Agency's contention, and we consider the Union's argument in reaching our decision.

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[36] 5 C.F.R.§ 2429.5; *see also, e.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 672 (2012) (*BOP*).
[37] Union's Exceptions at 12-13.
[38] Judge's Decision at 9.
[39] *BOP*, 66 FLRA at 672.
[40] Union's Exceptions at 8-10.
[41] *Id.*
[42] Judge's Decision at 12.
[43] *See* GC's Opp'n & Cross-Mot. for Summ. J. at 2 (not challenging Agency's Ex. A, an index identifying documents at issue and stating they are contained in a system of records).
[44] *Id.* at 8.
[45] 5 U.S.C. § 552a(b).
[46] Union's Opp'n to Mot. for Summ. J. at 1.
[47] *Id.*
[48] *BOP*, 66 FLRA at 672; *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 673 (2015) (finding that § 2429.5 prohibits agency from making argument before Authority that is inconsistent with argument before arbitrator).
[49] GC's Opp'n to Agency's Exceptions at 10-11.
[50] GC's Opp'n & Cross-Mot. for Summ. J. at 13-14.
[51] Judge's Decision at 15.
[52] *See U.S. Dep't of Transp., FAA*, 68 FLRA 905, 907 (2015) (finding that union did not request the specific relief to which agency excepted); *U.S. Dep't of the Navy Supervisor of Shipbuilding Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 745 (2002) (finding that where issue – arbitrator's interpretation of parties' agreement – arose from award, agency had no basis for raising argument prior to award).
[53] Agency's Opp'n to Union's Exceptions at 9.
[54] Judge's Decision at 7.

IV. Analysis and Conclusions

As relevant here, § 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, information: (1) which is normally maintained by the agency in the regular course of business; and (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.[55] If the Privacy Act prohibits the disclosure of a record, then disclosure is prohibited by law within the meaning of § 7114(b)(4).[56]

The Privacy Act generally prohibits the disclosure of any record concerning an individual if that record is contained in a system of records – i.e., a system that allows information to be retrieved by name – and the individual to whom that record pertains has not consented to the disclosure.[57] But there are exceptions to the Privacy Act's rule on nondisclosure, two of which – FOIA Exemption 6 and the routine-use exception – are relevant in this case.

A. The Agency did not violate the Statute by withholding the performance information because the Privacy Act prohibits its disclosure.

The Judge determined that subsection (b)(2) of the Privacy Act did not permit disclosure of the coworker's performance information and that therefore, the Agency did not violate the Statute by not providing the data to the Union.[58] The Union argues that the Judge erred in concluding that the Privacy Act prohibited disclosure.[59]

Subsection (b)(2) of the Privacy Act clarifies that the Privacy Act is subject to FOIA.[60] FOIA broadly requires the disclosure of government records, but contains an exemption (FOIA Exemption 6) for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[61]

In *FAA*, the Authority set forth the analytic approach for assessing whether disclosing information requested under § 7114(b)(4) would constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6 and, therefore, would be prohibited by the Privacy Act.[62] The Authority held that an agency asserting that the Privacy Act bars disclosure must demonstrate: (1) that the information sought is contained in a system of records within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests.[63] The Authority has repeatedly held that employees have a significant privacy interest in their performance data.[64] If the agency makes the requisite showings, the burden shifts to the GC to: (1) identify a public interest cognizable under FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest.[65]

In *FAA*, the Authority held that the only relevant public interest considered in this context is the extent to which the requested disclosure would shed light on an agency's performance of its statutory duties, or otherwise inform citizens concerning the activities of the government; i.e., what their government "is up to."[66] More particularly, the Authority held that the public interest in collective bargaining embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute and in expediting grievances, is not considered in the analysis.[67]

Although the Judge acknowledged the value of having the data available to the Union to use in the discharge of its representational duties, he determined that those interests were not cognizable under FOIA Exemption 6.[68] Moreover, he concluded that the public interest in knowing how the Agency administers its performance-appraisal system is diminished where, as here, the matter involved only one employee, and the interest was specific to the Union, not the general public.[69] Therefore, he found that FOIA Exemption 6 did not apply.[70]

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[55] 5 U.S.C. § 7114(b)(4).
[56] *FAA*, 50 FLRA at 346.
[57] 5 U.S.C. § 552a(b).
[58] Judge's Decision at 12-13.
[59] Union's Exceptions at 13.
[60] 5 U.S.C. § 552a(b)(2); *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 272, 274 (2015) (citing § 552a(b)(2)).
[61] 5 U.S.C. § 552(b)(6).
[62] 50 FLRA at 345.
[63] *Id.*
[64] *Id.* at 346-47; *U.S. Dep't of the Air Force, 56th Support Group, MacDill Air Force Base, Fla.*, 51 FLRA 1144, 1152-54 (1996) (*MacDill*); *U.S. EEOC*, 51 FLRA 248, 255 (1995).
[65] *FAA*, 50 FLRA at 345.
[66] *Id.* at 343-44.
[67] *MacDill*, 51 FLRA at 1151 (explaining *FAA*); *U.S. Dep't of VA, VA Med. Ctr., Dall., Tex.*, 51 FLRA 945, 954 (1996) (*VA*) (same).
[68] Judge's Decision at 13.
[69] *Id.* at 12-13.
[70] *Id.*

The Union argues that the Privacy Act does not prohibit disclosure of the coworker's performance information, under these circumstances, because the Union requested sanitized data.[71] The Union also argues that it is not interested in the coworker's "performance evaluation,"[72] but only his "career[-]ladder[-]promotion information,"[73] such as his work product and accomplishments, to determine how the Agency applied the career-ladder criteria for promotion.[74] And the Union contends that the information is essential to prove disparate treatment.[75]

We conclude that the Judge correctly applied the Privacy Act's balancing test. The Authority previously has held that the public interest in promoting fair and equitable treatment of employees does not outweigh an employee's significant privacy interest in the nondisclosure of the employee's performance evaluations and supporting documents in a way that is identifiable to the employee.[76] The Authority has also held that employees' privacy interests in not having their performance-evaluation information disclosed extend not only to the appraisal itself, but also to the employee's work product, accomplishments, and activities.[77] The Authority has also found that, although disclosure may enhance a union's ability to advance a grievance concerning discriminatory treatment, this interest is specific to the union and is not considered in the balancing test under FOIA Exemption 6.[78] Finally, where the requested data involves, as here, a single employee, the Authority has found that it is not possible to sanitize the information sufficiently to protect the identity and privacy interests of that employee.[79]

The Union requested information related to only one employee, due to concerns that it has about only one supervisor. Thus, the Union fails to demonstrate that disclosure enhances the public's ability to determine how the Agency administers its performance-appraisal system as a general matter, rather than how the Agency administered it in this particular case.[80]

As discussed above, sanitization would not mitigate the coworker's privacy interests. The request concerns only one employee, the coworker. Thus, even if the Agency were to remove personal identifiers from the coworker's performance information, it would still be possible to determine that the information pertained to the coworker.[81]

Consistent with Authority precedent, we find that the disclosure of the performance information would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6. Therefore, absent a cognizable claim that any other exceptions to the Privacy Act apply, we find that the Privacy Act prohibits the disclosure of the requested data.

Accordingly, we find that the Agency did not violate § 7114(b)(4) of the Statute by failing to provide the performance information.[82]

B. The Agency violated the Statute by withholding the phone logs.

1. The Privacy Act permits disclosure of the phone logs under the routine-use exception.

The Judge found that the Union established a particularized need for the phone logs under § 7114(b)(4) of the Statute, and that Routine Use G8 permitted disclosure of the phone logs.[83] The Agency does not dispute that the Union established a particularized need for the phone logs,[84] but it argues that the Judge erred in finding that the routine-use exception applies.[85]

Subsection (b)(3) of the Privacy Act permits disclosure of information "for a routine use."[86] A "routine use" is "the use of [a] record for a purpose which is compatible with the purpose for which it was collected."[87]

[71] Union's Exceptions at 14-15.
[72] *Id.* at 8.
[73] *Id.* at 14.
[74] *See id.* at 2, 8, 14-15.
[75] *Id.* at 14.
[76] *MacDill*, 51 FLRA at 1153-54; *VA*, 51 FLRA at 955-56.
[77] *See EEOC, Phx. Dist., Phx., Ariz.*, 51 FLRA 75, 80-81 (1995) (*EEOC*).
[78] *See id.* at 82.
[79] *FAA, N.Y. TRACON, Westbury, N.Y.*, 51 FLRA 115, 122-23 (1995) (*N.Y. TRACON*).
[80] *See MacDill*, 51 FLRA at 1153-54 (finding that the while disclosure may enhance union's ability to determine whether union officials were discriminated against, this interest is specific to the union and not considered under FOIA Exemption 6).
[81] *See N.Y. TRACON*, 51 FLRA at 122 ("because the agreement was requested for only one name-identified employee, it is not possible to redact the document to protect the identity of the individual whose privacy is at stake").
[82] *See VA*, 51 FLRA at 955-56 (finding that public interest in information concerning whether agency treats similarly situated employees equally in accordance with law does not outweigh employee privacy interest).
[83] Judge's Decision 14-15.
[84] *See* Agency's Exceptions at 11-14 (arguing that phone logs are not reasonably available but not challenging Judge's finding that phone logs are necessary under the Statute).
[85] *Id.* at 8-11.
[86] 5 U.S.C. § 552a(b)(3).
[87] *Id.* § 552a(a)(7).

The phone logs are in PBGC-11, an Agency system of records.[88] PBGC-11's Routine Use G8[89] provides that "[a] record from this system of records may be disclosed to . . . a labor organization . . . when *necessary* for the labor organization to perform properly its duties."[90] Applying "the plain language" of Routine Use G8, the Judge found that this exception authorized disclosure because the Union established that "it[] *need[ed]* . . . [the phone logs] . . . so that it [could] properly represent [the grievant] in a grievance and arbitration."[91]

The Agency argues that the Judge erred when he found that Routine Use G8 authorizes disclosure of the phone logs. The Agency claims that the Judge "should have performed a two-step analysis that the [Authority] generally requires" when the Authority determines whether OPM routine uses, similar to Routine Use G8, authorize the disclosure of information to a labor organization.[92] Under that analysis, information is disclosable to labor-organization officials only if it is both "*relevant* and *necessary* to their duties of exclusive representation."[93]

The case law on which the Agency relies is arguably distinguishable. That case law, and the requirement to analyze both the "relevance" of requested information, and the "necessity" for its disclosure, pertain specifically to information contained in two OPM systems of records mentioned previously, OPM/GOVT-1 and OPM/GOVT-2.[94] Unlike Routine Use G8, which simply requires disclosure to labor-organization officials of "necessary" information,[95] OPM's systems require disclosable information to be both "relevant" and "necessary."[96] Indeed, it is unclear whether the relevant-and-necessary test proposed by the Agency continues to apply, even to requests for information contained in the OPM systems, because that test was based on an OPM interpretation contained in a now-expired Federal Personnel Manual (FPM) Letter.[97]

However, even assuming the applicability of the two-step analysis proposed by the Agency, we find that the phone logs are disclosable. Under Authority precedent interpreting the OPM routine uses, information is "relevant" if it bears "a traceable, logical, and significant connection to the express purpose to be served" by the request.[98] And information is "necessary" if there are "no adequate alternative means or sources for satisfying the union's informational needs."[99] Regarding the relevance of the phone logs, as the Judge found, the Union "needed the information . . . to use as evidence in a grievance and arbitration on behalf of [the grievant] . . . (1) to show how [the grievant's supervisor] treated [the grievant] compared to other . . . employees [in the grievant's unit]; and (2) to use as evidence in the grievance proceedings to show that [the grievant's supervisor] lacked credibility."[100] Accordingly, we find that the phone logs are "relevant" to the Union's representational duties.

We also find the phone logs to be "necessary." Regarding alternative means or sources for satisfying the Union's need for the phone-log information, the Agency proposes that "the Union could have supplied waivers . . . [from] the five individuals"[101] identified in the Union's information request or "could have asked these employees to supply any instances when they either called or were called by [the supervisor]."[102] But even if the Union had obtained authorizations, the Agency would still provide the information in the form requested by the Union. And with respect to employee-provided data, such information would likely be far less reliable than information obtained from the Agency's phone logs. Thus, the Agency has not shown that adequate alternative means or sources exist for satisfying the Union's informational needs. Accordingly, we find that even applying the two-step analysis the Agency proposes, the phone logs are disclosable under Routine Use G8.

We therefore find that the Privacy Act's routine-use exception permits disclosure of the phone logs. Because the information is disclosable as a routine use, there is no need to address the Agency's argument that the release of the phone logs would constitute a clearly unwarranted invasion of personal privacy under FOIA Exemption 6.[103] Accordingly, we find that the Privacy Act does not prohibit the Agency from providing the phone logs to the Union.

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[88] Judge's Decision at 14.
[89] *Id.* at 15; *see also* Agency's Exceptions at 8.
[90] Judge's Decision at 15 (emphasis added) (quoting Agency SORN, 77 Fed. Reg. at 59,255, 59,263)).
[91] *Id.* (emphasis added).
[92] Agency's Exceptions at 8 (citing *U.S. Dep't of the Interior, Bureau of Mines, Pittsburgh Research Ctr.*, 51 FLRA 276, 284 (1995) (*Pittsburgh Research*)).
[93] *See Pittsburgh Research*, 51 FLRA at 283.
[94] *Id.* at 284-86
[95] Agency SORN, 77 Fed. Reg. at 59,255.
[96] Privacy Act of 1974; Publication of Notice of Systems of Records, 71 Fed. Reg. 35,342, 35,344, 35,348 (June 19, 2006).
[97] *See U.S. Dep't of Transp., FAA, Little Rock, Ark.*, 51 FLRA 216, 226 n.10 (1995) ("The consequence, if any, of the abolishment of the FPM Letter in cases arising after [the letter's expiration], is not at issue in this case.").
[98] *Bureau of Indian Affairs, Uintah & Ouray Area Office, Ft. Duchesne, Utah*, 52 FLRA 629, 635 (1996) (*Indian Affairs*).
[99] *Id.*
[100] Judge's Decision at 14.
[101] Agency's Exceptions at 9.
[102] *Id.* at 11.
[103] *Indian Affairs*, 52 FLRA at 639.

2. The Agency failed to timely raise an anti-disclosure interest concerning the phone logs.

The Agency contends that the phone logs are not reasonably available.[104] The Judge found that the Agency did not communicate this anti-disclosure interest to the Union until the Agency filed its prehearing disclosure, over a year after the Union requested the information.[105] The Agency does not dispute this finding.[106] An agency denying a request for information under § 7114(b)(4) must assert and establish any anti-disclosure interests at or near the time of the union's request.[107] Conclusory or bare assertions do not satisfy the agency's burden.[108] An agency also fails to timely raise an anti-disclosure interest when the agency could have raised that anti-disclosure interest any time after receiving the request, but does so for the first time in its answer to the complaint.[109]

The Agency does not challenge the Judge's conclusion that it did not inform the Union that it believed the requested information was not reasonably available at the time that the information was requested. Accordingly, it is not necessary for us to consider the Agency's argument that the Judge erred when he nonetheless concluded that the Agency failed to demonstrate that the phone logs were not reasonably available.[110]

Moreover, even if the Agency had informed the Union, at the time of the request, that the phone logs were not reasonably available, the Agency does not show how much time or resources would be required to retrieve the data. For example, the Agency claims that determining which calls took place outside normal working hours "would take an exorbitant amount of time"[111] because the Agency would have to "cross-match" the call data against employees' time and attendance records.[112] But the Agency does not provide even a rough estimate of the number of calls that would have to be checked against other records to comply with the request. Accordingly, the Agency has not substantiated its claim that the phone logs are not reasonably available.[113]

Based on the foregoing, we find that the Agency violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by failing to disclose the phone logs.

As noted previously, the Agency does not except to the Judge's finding that the Agency violated § 7116(a)(1), (5), and (8) the Statute by failing to reply to the Union's second information request or meet with the Union to discuss its requests. Accordingly, we adopt the Judge's finding in this regard without precedential significance under § 2423.41 of the Authority's Regulations.[114]

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[115] and § 7118 of the Statute,[116] we order the Agency to:

1. Cease and desist from:

(a) Failing or refusing to furnish to the Union data reflecting telephone calls from the supervisor on her Agency-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

(b) Refusing to respond to the Union's July 19, 2013, request to meet and discuss the June 11, 2013, information request.

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

[104] Agency's Exceptions at 11.
[105] Judge's Decision at 15.
[106] *See* Agency's Exceptions at 11.
[107] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 496 (2015) (*Ray Brook*); *U.S. DOJ INS, W. Reg'l Office Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 659-60 (2003) (*DOJ*).
[108] *Ray Brook*, 68 FLRA at 496 (quoting *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 670 (1995)).
[109] *See DOJ*, 58 FLRA at 659-60.
[110] *See id.* at 660.
[111] Agency Exceptions at 11.
[112] *Id.* at 12.
[113] *See Fed. BOP, Wash., D.C. & Fed. BOP, S. Cent. Region, Dall., Tex. & Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 55 FLRA 1250, 1255 (2000) (Member Cabaniss dissenting) ("vague and conclusory opinion [that] d[id] nothing to illuminate how much time and resources would be required to locate the data" insufficient to establish that information was not reasonably available).
[114] 5 C.F.R. § 2423.41; *U. S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 568 (2014) (Member Pizzella dissenting).
[115] 5 C.F.R. § 2423.41(c).
[116] 5 U.S.C. § 7118.

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

(a) Furnish the Union with data reflecting telephone calls from the supervisor on her Agency-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

(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 FLRA. Upon receipt of such forms, they shall be signed by the Agency, and shall be posted and maintained for sixty 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, 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 § 2423.4 l (e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that the Pension Benefit Guaranty Corporation (PBGC), Washington, D.C., violated the Federal Service Labor-Management Relations Statute (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 Independent Union of Pension Employees for Democracy and Justice (Union) with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the Office of Information Technology (OIT) employees listed in the Union's email of July 19, 2013.

WE WILL NOT refuse to respond to the Union's July 19, 2013, request to meet and discuss the June 11, 2013, information request.

WE WILL furnish the Union with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

_____
(Agency)

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

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

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

Office of Administrative Law Judges

PENSION BENEFIT GUARANTY CORPORATION
WASHINGTON, D.C.
RESPONDENT

AND

INDEPENDENT UNION OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
CHARGING PARTY

Case No. WA-CA-13-0719

Brent S. Hudspeth
For the General Counsel

Paul Chalmers
Kimberlee Gee
Adrienne Boone
Raymond Forster
For the Respondent

Stuart Bernsen
For the Union

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON
MOTION FOR SUMMARY JUDGMENT

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 September 6, 2013, the Independent Union of Pension Employees for Democracy and Justice (Union) filed an unfair labor practice (ULP) charge against the Pension Benefit Guaranty Corporation, Washington, D.C. (Respondent) with the Regional Director of the Washington Region of the FLRA. Shortly thereafter, on September 12, 2013, the Washington Regional Director transferred the charge to the Atlanta Region. After investigating the ULP charge, the Atlanta Regional Director issued a Complaint and Notice of Hearing on June 4, 2014, alleging that the Respondent failed to meet with the Union's representative concerning information requested under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute) and thereby violated § 7116(a)(1), (5) and (8) of the Statute. Subsequently, on June 20, 2014, the Atlanta Regional Director amended the Complaint to add a charge that the Respondent failed to furnish information requested pursuant to § 7114(b)(4) of the Statute and thereby violated § 7116(a)(1), (5) and (8) of the Statute. The Respondent timely filed an Answer denying the allegations of the amended Complaint.

On September 5, 2014, the Respondent filed a Motion for Summary Judgment (MSJ) and included Exhibits A-F. (R. Exs. A-F). The General Counsel filed an Opposition to Respondent's Motion for Summary Judgment and Cross-Motion for Summary Judgment with three exhibits. (G.C. Exs. 1-3). The General Counsel agreed that Respondent's Exhibits B, C, and D were sufficient to establish the entire record and did not dispute the validity of Respondent's Exhibits A and E. The Union filed an Opposition to Respondent's Motion for Summary Judgment. The Respondent subsequently filed an Opposition to the General Counsel's Motion for Summary Judgment. On September 12, 2014, the scheduled hearing in this matter was indefinitely postponed.

Having carefully reviewed the pleadings, exhibits, and briefs submitted by the parties, I have determined that this decision is issued without a hearing, pursuant to 5 C.F.R. § 2423.27. The Authority has held that motions for summary judgment filed under that section serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedures. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. (*Id.*). Based upon the stipulated record and attached exhibits, I find that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute when it failed to furnish certain information requested and respond to the Union's request for a meeting pursuant to § 7114(b)(4) of the Statute, and make the following findings of fact, conclusions and recommendations in support of that determination.

FINDINGS OF FACT

On or about September 6, 2013, the Union filed an unfair labor practice charge in Case No. WA-CA-13-0719. (G.C. Ex. 1).

The Pension Benefit Guaranty Corporation, Washington, D.C., is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Ex. 2).

The Independent Union of Pension Employees for Democracy and Justice (Union) 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 at the Respondent. (*Id.*).

On June 11, 2013, Union president Stuart Bernsen submitted an information request to the Respondent seeking data that the Union asserted was necessary for pending grievances and arbitrations involving Teresa Torres, a bargaining unit employee represented by the Union. (R. Ex. B). The Union requested over twenty items of data, however only two groups of information are at issue in this case. The first group of information concerned another employee whom the Union contended was similarly situated to Torres, and thus a candidate for comparison. (*Id.*). Eleven of the items of data sought by the Union referred to this other employee.

The Union requested the following information:

1. All data that refer or relate to any career ladder promotion or potential career ladder promotion for Teresa Torres and Jeremy Royal to the GS-11 level.
2. All data that refer, relate to, concern or address Teresa Torres' and Jeremy Royal's readiness or lack of readiness for a GS-11 promotion.
3. All data that refer, relate to or concern Teresa Torres' and Jeremy Royal's work assignments, work accomplished, performance and work activities.
4. All data that refer, relate to, concern, mention or indicate in any way Ms. Torres' and Mr. Royal's ability or lack of ability to perform GS-11 duties or at the GS-11 level.
5. All data that refer, relate to, concern, mention or indicate in any way whether Ms. Torres' and Mr. Royal demonstrated the ability to perform GS-11 duties or at the GS-11 level.
6. All data, including, for example, emails and written communications, between Cheryl Ringel[*] and Jeremy Royal, concerning Mr. Royal's work assignments, work product, tasks, projects, deadlines and accomplishments.
7. All data, including, for example, emails and written communications, between Nicole Queen and Jeremy Royal, concerning Mr. Royal's work assignments, work product, tasks, projects, deadlines and accomplishments.
8. All data, including, for example, emails and written communications, by any OIT employee(s) concerning Jeremy Royal's work assignments, work product, tasks, projects, deadlines and accomplishments.
9. All data, including emails and written communications, concerning 120 day performance reviews for Ms. Torres and Jeremy Royal.
10. All data, including emails and written communications, concerning the FY 2011 and 2012 performance evaluations and performance appraisals for Ms. Torres and Mr. Royal.

(*Id.* at 3-5).

The Union stated that it needed the above-mentioned data concerning Royal because he was a "comparator" and was "similarly situated" to Torres. (*Id.*). The Union explained that Royal was a GS-9 at the same time as Torres and had the same supervisor (Cheryl Ringel), position description and performance plan. (*Id.*). The Union stated it also needed the data to "show how terms and conditions of employment relevant to career ladder promotions and evaluation of performance in the group under Ms. Ringel were interpreted and applied to GS-9 and GS-11 employees." (*Id.*). Lastly, the Union contended it needed the data concerning Royal for purposes of showing that there was disparate treatment based upon race, color, sex, age and protected EEO activity. (*Id.*).

The second group of information sought by the Union included:

> All data, including emails, complaints, and telephone call logs, that indicate calls by Cheryl Ringel to Teresa Torres, Jeremy Royal, Nicholas Hampton and other OIT employees outside normal business hours. Include calls from Ms. Ringel's office phone, home phone and Blackberry to Ms. Torres, Mr. Royal and Mr. Hampton to their home telephone numbers or to their PBGC Blackberry's. Include calls made to Ms. Torres PBGC Blackberry: (240) 533-7960.

(*Id.* at 7).

[*] In both the Complaint and Amended Complaint, the General Counsel misspelled Cheryl Ringel's last name as "Ringer". Therefore I am correcting the record to reflect the correct spelling of "Ringel".

The Union asserted it needed this information to "compare how Ms. Ringel behaved and conducted herself with respect to other OIT bargaining unit employees and how she treated other bargaining unit employees in comparison to Ms. Torres." (*Id.*). The Union also stated it needed the data to show that Ringel "lacks credibility." (*Id.*).

In a section titled, "Particularized Needs, Uses and, Connections Between Needs and Representational Responsibilities," the Union stated that it needed the data for the prosecution and advancement of grievances and arbitrations involving Torres. (*Id.* at 1). The Union stated that the issues in the grievances and arbitrations included the Respondent's failure to promote Torres in March 2012 and thereafter to the GS-11 level career ladder position, Torres' performance evaluation for FY 2012 and ongoing denial of telework, violations of civil rights laws, and hostile and retaliatory work environment. The Union stated it needed the information requested so it could: evaluate and assess the merits of the grievances and arbitrations, proceed with the arbitrations, present its case and prevail, and respond to and defend against the employer's assertions and arguments. The Union asserted that it required the data concerning Jeremy Royal because he was a "comparator and a similarly situated employee for purposes of showing the terms and conditions that applied and for showing disparate treatment." (*Id.*).

The Union requested data from March 27, 2011, to the present. (*Id*.). It stated Torres started at the GS-9 position on that date and therefore "facts and data about her performance and demonstrated abilities since that date are necessary to address the issue of her career ladder promotion, including her performance and ability to perform." (*Id.*). The Union indicated that information from that date was necessary "for issues involving Ms. Torres' performance evaluation since she received Level 4 (Exceeds) ratings for March 27, 2011, to March 27, 2012, but her supervisor changed her assessment of Ms. Torres' performance after March 27, 2012." (*Id.*). The Union stated it needed data from October 1, 2012, because "the denial of the career ladder promotion and denial of telework are ongoing." (*Id.*). Finally, the Union maintained it needed information relating to hostile and retaliatory work environment from March 27, 2011 to present because the hostility and retaliation were ongoing and continual. (*Id.*).

The Union stated in its letter that it was "willing to meet to discuss this data request, and to clarify requests, to simplify them if appropriate, and to resolve any issues." (*Id.*).

The Respondent replied to the Union's letter on July 16, 2013. (R. Ex. C). It first summarized the Union's asserted reasons for requesting the information. (*Id.*). It then set out a series of general objections to the Union's requests, indicating that many of the individual requests "are so vague and general that the Agency cannot determine what specific data is requested, what search is required, and whether final, responsive, non-privileged data exist." (*Id.*).

The Respondent objected to the Union's "generalized assertions of need and insufficient statements of intended use." (*Id.*). According to the Respondent, "the lack of specificity in the [r]equest does not permit the Agency to make a reasoned judgment as to whether the data must be disclosed under the Statute," and cited *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661 (1995) (*IRS Kan. City*). The Respondent stated that the "Union's failure to articulate a specific statement of need and intended use for much of the data requested, and its reliance on the same list of boilerplate bases for each of the 26 individual requests does not satisfy the particularity requirements of § 7114(b)(4) and CBA Article 8, Section 2." (*Id.*). The Respondent also stated the Union's request did not support the contention that Royal was an appropriate comparator or satisfied the particularized need standard with regard to Royal. (*Id.*). The Respondent stated it was not providing the data concerning Royal but invited the Union to submit clarification regarding its requests and particularized need. (*Id.*).

The Respondent then replied to the individual requests by the Union. The Respondent provided documents or replied that documents did not exist in response to each of the Union's requests except for those concerning Royal and the request regarding phone calls by Ringel. (*Id.*). With respect to the items of information regarding Royal, the Respondent replied to all eleven requests that the Union did not meet its particularized need, and denied these requests. (*Id.*). The Respondent replied to the Union's request for data showing calls by Ringel to Torres and other employees by stating that the "Union has not demonstrated a particularized need sufficient to overcome the employees' legitimate privacy interests," and denied the request. (*Id.*).

The Respondent ended its letter by stating it was a "partial response" and invited the Union to "submit a more precise description of data sought or explain in greater detail the Union's particularized need regarding this response." (*Id.*).

On July 19, 2013, Bernsen emailed the Respondent in response to the letter. (R. Ex. D). Bernsen wrote that the "Union would like to meet with the Employer to go over defects and deficiencies in the

response and to clarify any questions the Employer has," and asked the Respondent when it would be available to meet. (*Id.*). Bernsen then addressed two of the Respondent's objections to the Union's requests. Regarding the information concerning Royal, Bernsen wrote that the Respondent incorrectly contended that Royal was not a comparator to Torres. (*Id.*). Bernsen stated "the Employer acknowledges that the Union explained that Mr. Royal had the same grade, same position, same supervisor, same performance standards, same career ladder, same time frame." (*Id.*). Bernsen explained that "the Union needs the information because there are claims of discrimination and disparate treatment." (*Id.*). He added that "there are claims concerning how the factors pertaining to career ladder promotions were being interpreted and applied by the supervisor, by OIT and by HRD." (*Id.*).

Regarding the records of telephone calls by Ringel to Torres and others, Bernsen stated the Union supplemented and modified its request include: "[a]ll data, including emails, complaints, and telephone call logs, that indicate calls by Cheryl Ringel to any of the following outside normal business hours:

> Nicole Queen 202.292.9007 (c) & 301.868.0089 (h)
> Nick Hampton 202-292-0991 (c)
> Jeremy Royal 732 428-7706 (c) & 703 635 7978 (h)
> Elizabeth Magargel 202-299-8511 (c) & 571-216-8387 (h)
> Teresa Torres 240-533-7960 (c)

Bernsen wrote that there was no privacy issue because: "(1) the telephone numbers are listed and known, (2) the Union is only seeking 'metadata,' and (3) the Union needs the information because there are issues concerning comparing how Ms. Ringel behaved and conducted herself with respect to other OIT bargaining unit employees and how she treated other bargaining unit employees in comparison to Ms. Torres." (*Id.*). Bernsen stated the Union also needed the information "for purposes of showing that Ms. Ringel lacks credibility – *especially since Ms. Ringel has responded to grievances by denying that she called Ms. Torres or others*." (*Id.*).

The Union received no reply to this email from the Respondent.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the information concerning Royal and telephone calls by Ringel requested by the Union on June 11, 2013, met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to furnish this information violated § 7116(a)(1), (5) and (8) of the Statute.

The GC contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The GC asserts that *IRS Kan. City*, is applicable to the instant case. In *IRS Kan. City*, the authority held that the union established a particularized need for performance appraisal documents of a non-bargaining unit employee who had the same position description, performed the same work, was subject to the same job elements and performance standards and reported to the same supervisor as the grievant who alleged disparate treatment on the basis of his union activity. 50 FLRA at 662. The Authority reasoned in *IRS Kan. City* that the union needed the non-unit employee's performance appraisal so that it could effectively evaluate whether the agency applied "performance standards and elements without regard to unit status." (*Id.* at 672). The GC asserts that the Union in the present case needs Royal's performance appraisal documents to show disparate treatment because he was a similarly situated employee to Torres with the same grade, position, supervisor, performance standards, career ladder and timeframe. Thus the Union here has given the same reasons provided by the union in *IRS Kan. City* where the Authority found a particularized need.

The GC asserts that the performance appraisal data concerning Royal is disclosable under the Privacy Act. The GC argues that the public interest in disclosing Royal's performance appraisal data outweighs his privacy interest in the information. The GC cites *EEOC, Phx. Dist., Phx., Ariz.*, 51 FLRA 75 (1995) (*EEOC Phoenix*), to argue that the Authority has found a strong public interest in disclosure of unsanitized performance reviews to show how the agency administers its performance appraisal system. According to the GC, the fact that the Union requested the data for use in a grievance concerning an employee's claims of disparate treatment, violations of civil rights laws, and retaliatory work environment, demonstrates a strong public interest in disclosing the information. The GC argues that not allowing disclosure would hamper the Union's ability to represent a bargaining unit employee and ignore the

strong public interest at issue, thus the public interest in disclosure outweighs the employee's privacy interest in the performance appraisal data.

The GC contends the Union established a particularized need for the information regarding telephone calls by Ringel to bargaining unit employees. Like the performance appraisal data, the GC asserts the Union needs the telephone information in connection with Torres' grievance involving claims of disparate treatment. The GC contends the telephone data may show that Ringel contacted Torres a disproportionate number of times, thus showing that the Respondent treated Torres differently from other employees.

The GC maintains the telephone records are reasonably available, normally maintained and can be disclosed under the Privacy Act. The GC points out that the Respondent only made general objections that information was not reasonably available or not normally maintained in its response to the Union, but did not make these objections specifically regarding the telephone data. In addition, the Respondent stated that "some" of the data was not normally maintained, which implies the rest of the data was normally maintained by the Respondent but was not provided to the Union. The GC argues that the Respondent did not raise the issue of having to manually correlate the telephone logs with employees' timesheets in order to figure out whether calls were made outside normal business hours until its MSJ was filed. The Respondent also did not object to the period of time covered by the Union's request at or near the time the request was made.

The GC rejects the Respondent's claim that its telephone logs are covered by a System of Records Notice, PBGC-11 (G.C. Ex. 3) and is thus protected under the Privacy Act. The GC observes that the purpose of this document includes, "monitoring telephone usage by PBGC employees and other covered individuals . . . ." (*Id.*). The GC also points out the document specifies that records from PBGC-11 may be disclosed to "officials of a labor organization representing PBGC employees to determine individual responsibility for telephone calls." (*Id.*). The GC argues that the terms of PBGC-11 itself allow disclosure of the telephone records to the Union in this case.

The GC argues the Respondent committed a separate violation of the Statute by failing to respond to the Union's July 19, 2013, email, which provided clarification of its requests and asked to meet with the Respondent regarding the requests. The GC points out the Respondent replied to the Union's original information request by stating that its letter was a "partial response and invited the Union to submit a more precise description of data sought or explain in greater detail the Union's particularized need." (R. Ex. C). The GC argues the Union did just that in its July 19, 2013, email. The GC asserts the Respondent's failure to reply to this request violated the Statute.

The GC rejects the Respondent's defense that the complaint did not adequately identify the data the Respondent allegedly failed to provide. The GC argues the amended Complaint refers to the date of the communication from the Union and requested information concerning Jeremy Royal. The GC contends the Respondent could easily figure out what information was at issue by reading the correspondence identified in the amended Complaint. The GC also rejects the Respondent's contention that the allegation of the Respondent's failure to reply to the Union is moot. The GC argues the Respondent did not establish the existence of its mootness claim.

The GC requests that an order be issued requiring the Respondent to provide the requested information or meet with the Union about the data request if some of the information does not have to be disclosed, issue a cease and desist order and to post a notice to all employees informing them that it violated § 7116(a)(1), (5) and (8) of the Statute.

Respondent

The Respondent contends that the data requested by the Union regarding Royal's performance ratings and other performance appraisals are protected from disclosure by the Privacy Act. The Respondent argues the data concerning Royal is contained in a system of records and that Royal has a strong privacy interest in the data, which is not outweighed by the public interest in disclosure. The Respondent cites the Authority's holding in *TRACON*, where the Authority found that performance appraisals of Federal employees are contained in a system of records. *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338 (1995) (*TRACON*). The Respondent maintains the information concerning Royal is clearly part of a system of records under the Privacy Act. The Respondent points to System of Record Notices (SORNS) issued by OPM, which specifically state that employee appraisal documents and career ladder recommendations are considered part of government wide systems of records and therefore protected from disclosure by the Privacy Act.

The Respondent argues that Royal has strong privacy interests in his performance appraisal data. The Respondent asserts the Authority held in *TRACON* that employees have significant privacy interests in performance appraisal data because they are likely to contain information that is highly sensitive to employees. 50 FLRA at 346.

The Respondent contends there is no public interest supporting disclosure of Royal's performance appraisal data. The Respondent argues the only relevant public interest to be considered by the Authority under FOIA Exemption 6 is the extent to which disclosure would shed light on the agency's performance of its statutory duties. 50 FLRA at 343 (citing *U.S. DOD v. FLRA*, 114 U.S. 1006, 1013-14 (1994)). The Respondent contends the use of Royal's performance data as evidence in a grievance is relevant only to the Union's interest in representing a bargaining unit employee and is not a pertinent public interest.

The Respondent submits that Royal's performance appraisal documents may not be disclosed under OPM's routine use exception (e). OPM Privacy Act of 1974; Pub. of Notices of Sys. of Records and Proposed New Routine Uses, 57 Fed. Reg. 35710 (Aug. 10, 1992). The Respondent contends that the GC has not shown that the documents are "relevant" or "necessary" as required under OPM/GOVT-1 and OPM/GOVT-2 routine use statements.

With respect to the telephone records requested by the Union, the Respondent contends that information is neither reasonably available nor normally maintained in the regular course of business. The Respondent maintains that it does not keep records of Ringel's or any other employee's home phone calls and thus those are not reasonably available. With respect to the agency's telephone records, the Respondent contends it employs a gliding schedule which means employees work different hours. The Respondent would have to manually correlate employees' timesheets with the telephone logs to determine whether calls were made outside normal business hours. The Respondent also points out that the Union requested telephone data covering more than a two year period. The Respondent contends that it would have to expend an excessive amount of effort to compile the information and thus the information is not reasonably available. The Respondent also argues that as to a portion of the telephone data requested by the Union, the Respondent does not keep a log of calls made from any employee's personal phone number to someone else's personal phone, thus that information is not normally maintained by the Respondent.

The Respondent contends that it sufficiently alerted the Union and GC to these objections regarding the data requests. The Respondent asserts that it made general objections in its reply that the data requested was overly general and vague such that it could not assess what it would need to do to determine if responsive data existed. The Respondent asserts this reply captured that the requested data was not reasonably available and not kept in the regular course of business. The Respondent also argues that it reserved the right in its reply to raise additional objections and that it raised the objections before a hearing took place.

The Respondent asserts the Union did not identify a particularized need for the telephone data. The Respondent contends the Union's stated reason for needing the data, to assess a manager's credibility, is not sufficient to justify the data requests.

The Respondent argues the telephone call data is also protected from disclosure by the Privacy Act. The Respondent contends that the System of Records Notice issued by PBGC (PBGC-11) covers records showing calls placed to or from PBGC telephones or mobile devices. PBGC, Privacy Act of 1974, Sys. of Records, 77 Fed. Reg. 59263 (Sept. 26, 2012). The Respondent asserts the purpose of PBGC-11 is to protect the privacy interest of the person being called and thus these records are covered by the Privacy Act. The Respondent argues the Union could use less obtrusive means of obtaining the data by asking the bargaining unit employees at issue to search their home phone records for calls from the Agency made after hours.

The Respondent submits that the complaint did not adequately identify the data the Respondent allegedly failed to disclose. The Respondent asserts the requests at issue were overly broad and vague and therefore it was not able to determine what data was sought in the first place.

Lastly, the Respondent argues that any claim regarding its alleged failure to meet with the Union is moot because the Respondent offered to meet several times and the Union allegedly refused.

Charging Party

The Union agrees with and adopts the GC's Opposition and MSJ. The Union adds that it did not request data concerning Royal's performance rating, just data concerning his "performance activities." The Union also asserts that the documents concerning Royal can be disclosed because the Union was representing him at the time. The Union objects to the Respondent's use of Vincent Carter's affidavit because Carter is a bargaining unit employee and the Respondent conducted a formal meeting with him, but never notified the Union or gave it an opportunity to be present. The Union contends that it did not waive its interest in meeting the Respondent over its request and that such statements made during settlement discussions are privileged and confidential.

ANALYSIS AND CONCLUSIONS

As a preliminary matter, the Respondent contends that the Complaint fails to state a claim upon which relief can be granted because it allegedly did not specify what data the Respondent failed to furnish. The purpose of a complaint is to put a respondent on notice of the basis of the charges against it, though the Authority does not judge the sufficiency of that notice by rigid pleading requirements. *AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996). The Authority has noted that "[w]hat constitutes adequate notice will depend on the circumstances of each case." (*Id.*).

The Respondent clearly had adequate notice of the charges against it. The Amended Complaint specifically referenced the items of information in the June 11, 2013, communication that the Respondent allegedly failed to furnish. The Amended Complaint referred to "data concerning Jeremy Royal" and "data . . . that indicate calls by [supervisor] Cheryl Ringe[l] to Teresa Torres." The Respondent only had to refer to that communication to figure out which items of data were at issue in the Complaint. The Respondent obviously had the correspondence referred to in the Complaint since the Respondent produced it as an exhibit attached to its MSJ. (R. Ex. B). The Respondent also produced and referred to the Union's email of July 19, 2013, which provided clarification of the Union's information request. (R. Ex. D). Furthermore, the Respondent's actions show that it understood what data was being requested. The Respondent assembled an index of documents it asserted were responsive to the information requests concerning Royal but that were protected from disclosure by the Privacy Act. (R. Ex. A). With respect to the telephone call data, the Respondent produced an affidavit from one of its IT specialists detailing how that information would have to be collected. (R. Ex. E). Thus it is clear that the Respondent knew what information was requested and therefore what conduct was at issue. The Respondent was also able to present defenses to the charges. The Respondent's defense that the Complaint failed to state a claim is thus rejected.

FAILURE TO FURNISH INFORMATION

Jeremy Royal's Performance Evaluation Data

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

The GC contends that the requests for information concerning Royal meet the requirements of § 7114(b)(4) and Respondent's refusal to furnish the information to the Union violated § 7116(a)(1), (5) and (8) of the Statute. The Respondent maintains, and the General Counsel does not dispute, that the data requested concerning Royal included his performance evaluations, supporting documentation for those evaluations, and career ladder promotion potential. (R. Ex. A). The Respondent argues that this information is protected from disclosure by the Privacy Act. Neither the GC nor the Union sought or produced a release from Royal consenting to the release of this material, even though it would have negated any Privacy Act limitations.

In *TRACON*, the Authority set forth an analytical framework for balancing an agency's Privacy Act defense against the right of a union to obtain information necessary to the performance of its representational duties. 50 FLRA at 345. According to that framework, an agency seeking to withhold records must meet the same requirements as applied to requests under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Specifically, when an agency contends that the requested information falls under FOIA Exemption 6 as set forth in 5 U.S.C. § 552(b)(6), it has 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 meets its burden, the General Counsel must then: (1) identify a public interest that is cognizable under FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest.

The General Counsel does not dispute the Respondent's contention that Royal's performance evaluation and supporting materials fall under either: OPM System of Records Notices OPM/GOVT-1, General Personnel Records, 71 Fed. Reg. 35342 (June 19, 2006); or OPM/GOVT-2, Employee Performance File System of Records, 71 Fed. Reg. 35347 (June 19, 2006), and thus are part of a system of records under the Privacy Act. Therefore, I find that the data concerning Royal's performance evaluations and supporting documentation requested by the Union applies to information that is maintained in a system of records subject to the Privacy Act.

As to Royal's privacy interest in the information, the Authority held in *TRACON* and other cases that employees have significant privacy interests in information, including performance appraisals and supporting documentation, that reveal supervisory assessments of their work performance. 50 FLRA at 346-37; *see also U.S. EEOC*, 51 FLRA 248, 255 (1995) (*EEOC*); *U.S. Dep't of VA Med. Ctr., Veterans Canteen Serv., Newington, Conn.*, 51 FLRA 147 (1995) (*Veterans Canteen*); *EEOC Phoenix*, 51 FLRA at 75. The Authority has recognized in these, and other cases, that employee privacy interests extend to favorable, as well as unfavorable performance appraisals and ratings. *EEOC*, 51 FLRA at 255. In this case there is no dispute that the information requested concerning Royal includes his performance appraisals along with supporting documentation. (R. Ex. A). Therefore, I find that Royal has substantial privacy interests in this information.

The Authority examines the public interest in disclosure of the information in terms of the extent to which disclosure of the information would shed light on the agency's performance of its statutory duties or otherwise inform citizens as to what their Government "is up to." *TRACON*, 50 FLRA at 344 (quoting *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). I agree with the General Counsel that there is a public interest in disclosure of Royal's performance evaluation information. The Authority has held there is a public interest in disclosure of performance evaluation data because it would permit review of the manner in which the agency administers it performance appraisal system and shed light on the ability of employees to perform their duties, which furthers the public interest in knowing how "public servants" are carrying out their Government functions. *EEOC Phoenix*, 51 FLRA at 75; *U.S. Dep't of the Air Force, 56th Support Grp., MacDill AFB, Fla.*, 51 FLRA 1144, 1153 (1996) (*MacDill*); *EEOC*, 51 FLRA at 254-55. However, in this case, the public interest in Royal's performance evaluation data is less significant than in the cases cited by the GC. In those cases, information was requested regarding groups of employees assigned to particular units or sections of the agency. Here, performance data concerning just a single employee would be disclosed and such a small sample size would not provide the public with a meaningful view of how the Respondent administers its performance appraisal system or of its employees' abilities to perform their duties. Thus, the public interest in disclosure of the information is diminished.

The Authority has found in numerous cases that employees' privacy interests in performance evaluation information outweigh the public interest in such data with employees' names included. *EEOC Phoenix*, 51 FLRA at 75; *MacDill*, 51 FLRA at 1153; *EEOC*, 51 FLRA at 255; *U.S. DOJ, Office of Justice Programs*, 50 FLRA 472 (1995). In this case it is not possible to effectively redact the employee's name to protect his privacy since the information requested concerns a single employee identified by name in the request. *TRACON*, 51 FLRA at 122 (because information was requested for only one name-identified employee, it is not possible to protect the identity of the individual whose privacy is at stake); s*ee also U.S. Dep't of VA, Reg'l Office, St. Petersburg, Fla.*, 51 FLRA 530, 537 (1995); *U.S. DOJ, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584, 590 (1995).

Even if disclosure of Royal's performance appraisal data would enhance the Union's ability to represent Torres in a grievance, this interest is specific to the Union, not the general public. *MacDill*, 51 FLRA at 1153 ("[F]or purposes of information requests involving the FOIA, the Statute gives unions no special status vis-a-vis other requesters."). The General Counsel and Union have not demonstrated how the release of a single employee's performance appraisal data would provide the public with a meaningful understanding of how the Respondent administers its performance appraisal system or carries out its statutory duties. Therefore, I conclude that the public interest in disclosure of Royal's performance evaluation data is outweighed by Royal's legitimate privacy interest in the information, which cannot be adequately protected with redaction. Accordingly, I find the disclosure of that information would result in a clearly unwarranted invasion of personal privacy, within the meaning of FOIA Exemption 6, and, thus, is prohibited by the Privacy Act. Therefore, the Respondent was not required to provide the Union with the information requested concerning Royal pursuant to § 7114(b)(4) of the Statute and its failure to do so did not violate the Statute.

Telephone Call Data

The second group of information requested by the Union included data reflecting calls by Ringel to Torres and other OIT employees. As stated above, under § 7114(b)(4) of the Statute, an agency has a duty to furnish, upon the request of the exclusive representative, information that is normally maintained by the agency 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.

In order for a union to invoke its right to information under § 7114(b)(4) of the Statute, it must establish a particularized need by articulating, with specificity, why it needs the information as well as a statement of the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute, *IRS Kan. City*, 50 FLRA at 669. 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.*). Once the union adequately states its particularized need, it falls to the agency either to provide the information or to tell the union why it will not do so.

In this case, the Union provided clarification to its original request for information and asked for the Respondent to provide it with information showing phone calls made by Ringel to Torres and four other OIT employees identified in the Union's email on July 19, 2013. (R. Ex. D). I find that the Union established a particularized need for this information. The Union stated why it needed the information: to use as evidence in a grievance and arbitration on behalf of Torres. The Union went so far as to tell the Respondent exactly how it would use the information: (1) to show how Ringel treated Torres compared to other OIT employees; and (2) to use as evidence in the grievance proceedings to show that Ringel lacked credibility, since Ringel claimed in response to Torres' grievance that she did not call Torres or others after normal business hours. (R. Ex. C, D). The Union's need for the telephone data should have been readily apparent to the Respondent. The Respondent has acknowledged it maintains telephone call data that logs when an employee places an outgoing call on a PBGC telephone or mobile device. (R. Ex. E). The Respondent tracks employees' incoming and outgoing calls by his or her office phone number extension and number of his or her PBGC issued Blackberry. (*Id.*). The Union could use this data to show whether Ringel placed calls to Torres and other OIT employees outside of their normal work schedules, which could be used as evidence in Torres' grievance that she was subject to disparate treatment and a hostile work environment. The Union established a connection between its use of the information (to use as evidence in a grievance) and its representational responsibility (to represent a bargaining unit employee in a grievance) under the Statute. The Authority has held that a union established a particularized need for requested information when the union needed the information 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). The Union more than adequately established a particularized need for the telephone data reflecting phone calls made by Ringel from her PBGC office phone and Blackberry to Torres and other OIT employees outside normal business hours.

An agency denying a request for information under § 7114(b)(4) must assert and establish any countervailing anti-disclosure interests. Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying "no." *IRS Kan. City*, 50 FLRA at 670. Here, the Respondent denied the Union's request for the telephone data and stated that "the Union has not demonstrated a particularized need sufficient to overcome the employees' legitimate privacy interests." (R. Ex. C at 7). As stated above, I have found that the Union has demonstrated a particularized need for the information. The question is whether the Union's particularized need is outweighed by the employees' privacy interest in the information. The Respondent argues that the telephone call data is protected from disclosure under the Privacy Act. Specifically, the Respondent argues that the telephone call data is contained in a system of records which is covered by PBGC-11, a system of records notice (SORN) issued by the Respondent. 77 Fed. Reg. 59263. The Respondent contends that PBGC-11 is designed to preserve the privacy interest of the person being called and that the Union has not articulated a public interest supporting disclosure of information from this system.

The Privacy Act authorizes the Respondent to adopt routine uses that are consistent with the purpose for which information is collected. 5 U.S.C. § 552a(a)(7) and (b)(3). OMB, in its initial Privacy Act guidance, also recognized routine uses that are necessary and proper for the efficient conduct of the government and in the best interest of both the individual and the public. 40 Fed. Reg. 28948, 28953 (July 9, 1975). A review of PBGC-11 shows that categories of records in the system includes "records relating to the use of PBGC telephones and PBGC-issued portable electronic devices to place toll calls and receive calls." 77 Fed. Reg. 59263. PBGC-11 also incorporates certain routine uses, which permits disclosure of information contained in the system of

records in specified situations. Among the routine uses that apply to information contained in the system of records covered by PBGC-11 is General Routine Use G8, which provides that "[a] record from this system of records may be disclosed to an official of a labor organization recognized under 5 U.S.C. Chapter 71 when necessary for the labor organization to perform properly its duties as the collective bargaining representative of PBGC employees in the bargaining unit." 77 Fed. Reg. 59255, 59263 (Sept. 26, 2012). In this case, the Union, a labor organization recognized under 5 U.S.C. Chapter 71, has shown its need for telephone call data contained in a system of records covered by PBGC-11 so that it can properly represent a PBGC bargaining unit employee in a grievance and arbitration. The Respondent offers no argument or interpretation of the regulation establishing that the General Routine Use G8 does not apply to the Union's request for telephone data in this case. Instead, the plain language of PBGC-11 supports the GC's contention that the telephone call data is not protected from disclosure. Therefore, I find that PBGC-11 does not prevent disclosure of information showing telephone calls made by Ringel via PBGC office phone or Blackberry to Torres and other OIT employees after normal business hours.

The Respondent also contends that the data showing calls made by Ringel to Torres and other OIT employees is not reasonably available or normally maintained. As an initial matter I agree with the Respondent that a portion of the data, specifically information reflecting calls from Ringel's home phone number to OIT employees, is not normally maintained by the Respondent and thus it has no duty to furnish that information to the Union. *See U.S. Dep't of the Treasury, IRS*, 63 FLRA 664 (2009) (information is not "normally maintained" by agency where information is within its custody or control).

With respect to data reflecting calls by Ringel from her work phone and Blackberry to OIT employees, the Respondent contends this information is not reasonably available. However, the Respondent did not communicate this objection until its prehearing disclosure. An agency must raise its anti-disclosure interests when the union requests the information. *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91, 93 (2004). The only objection the Respondent made with respect to the telephone data request was that "the Union has not demonstrated a particularized need sufficient to overcome the employees' legitimate privacy interests." (R. Ex. C). The Respondent contends one of its general objections, that the requests were so vague and broad "that the Agency cannot determine what specific data is requested, what search is required, and whether final, responsive, non-privileged data exists," was sufficient to notify the Union that the phone records were not reasonably available. (*Id.* at 1). As discussed above, it is clear what information the Union was seeking in its information request and subsequent clarification; data reflecting phone calls from Ringel to Torres and other OIT employees outside normal business hours. I find the Respondent's objection itself to be ambiguous and conclusory. *See IRS Kan. City*, 50 FLRA at 671-72 (An agency is responsible for establishing anti-disclosure interests to the Union and must do so in more than a conclusory or general way). The Union made twenty-six individual requests for data. The Respondent's general objections did not provide the Union a way to determine which objection applied to each data request. Regardless, the Union provided clarification of its request for telephone call data and listed the specific OIT employees along with their phone numbers for which it required telephone call data. The Respondent never replied to this communication. Thus I find the Respondent failed to state that the telephone information was not reasonably available at or near the time of the information request.

Moreover, the Respondent has not shown that the information is not reasonably available. Data is "reasonably available" if it is available through means that are not "extreme or excessive . . . ." *Dep't of HHS, SSA*, 36 FLRA 943, 950 (1990) (*SSA*). The Respondent has not shown that it would have to utilize extreme or excessive means to obtain the requested telephone data. The Respondent provided an affidavit from one its IT Specialists demonstrating the means through which the data showing phone calls made from PBGC telephones and mobile devices could be located and retrieved. (R. Ex. E). The affidavit indicates that the Respondent maintains data tracking when incoming calls are received and outgoing calls are made. (*Id.*). The Respondent tracks employees' incoming and outgoing calls by his or her office phone number and PBGC issued Blackberry. (*Id.*). In order to gather data showing calls made by Ringel outside normal business hours to the five OIT employees specified by the Union, the Respondent has to go through Ringel's phone records for the relevant time period, identify calls made to those employees, and correlate when the calls were made with the employees' time and attendance records. The Respondent has not contended that it does not have access to the phone records or time and attendance records it would need to complete this process. The Respondent has also not presented evidence or attempted to quantify the amount of time required or costs associated with retrieving this information. The Authority has held that information may be reasonably available even where the agency has to spend a significant amount of time and/or money to produce the information. *See e.g., SSA*, 36 FLRA at 950-51 (information reasonably available where it would take agency three weeks to retrieve); *Dep't of the Air Force*,

Headquarters, Air Force Logistics Command, Wright–Patterson AFB, Ohio, 28 FLRA 306 (1987), *rev'd as to other matters sub nom. FLRA v. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright–Patterson AFB, Ohio*, No. 87–1387 (D.C. Cir. Aug. 9, 1990) (information also was found to be reasonably available where it would take an agency three to four weeks to write a new computer program that would be needed to retrieve the data); *U.S. DOJ, INS, Border Patrol, El Paso, Tex.*, 37 FLRA 1310, 1323–24 (1990) (data consisting of approximately 5,000 documents maintained in different sections and offices of the agency was reasonably available).

In the case cited by the Respondent where the Authority held that information was not reasonably available, the agency had shown that the request encompassed 5,000-6,000 documents that were stored in various locations across the country and internationally. *DOJ, U.S. INS, U.S. Border Patrol, El Paso, Tex. v. FLRA*, 991 F.2d 285 (5th Cir. 1993) (*DOJ*). The Respondent has not shown that the amount of information requested here approaches the volume of information sought in *DOJ*. The Respondent has not adequately explained why it would be difficult to retrieve the telephone call data from the archives or the OIT employees' time and attendance records for the relevant period. Here, the Union sought records reflecting calls made outside normal business hours by one supervisor to five specific employees over a two year period. Although the Respondent contends it would take an enormous amount of time and effort to produce the information, the Respondent did not produce evidence demonstrating how much time and/or resources would be required to attain the requested call data. Given its superior knowledge of the costs and burdens required to retrieve the data in question, the Respondent should have produced evidence of the costs and burdens required to retrieve this data. *See Fed. BOP, Wash., D.C.*, 55 FLRA 1250, 1255 (2000) (citing *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985). Since the Respondent has not shown that it would be excessively burdensome for it to compile the information, I find the data showing calls from Ringel to the OIT employees outside normal business hours is reasonably available.

As discussed above, the Respondent has and maintains information reflecting phone calls from PBGC office telephones and Blackberries. The Respondent also has access to OIT employees' time and attendance records. Therefore I find that that the Respondent normally maintains information showing phone calls made by Ringel on her PBGC-issued office phone and Blackberry to the five OIT employees listed by the Union. *See Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 1277, 1285 (1990) (information is "normally maintained" if an agency has and maintains the information).

I conclude that the information showing calls from Ringel from her PBGC office phone and Blackberry to Torres and other OIT employees after normal business hours is normally maintained, reasonably available and necessary § 7114(b)(4) of the Statute. Thus, the Respondent violated the Statute by failing to furnish this information to the Union.

FAILURE TO RESPOND

The Respondent committed a separate violation of the Statute when it failed to meet with the Union or respond to its request for a meeting concerning the information requests. An agency's failure to respond to an information request violates § 7116(a)(1), (5) and (8). *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326 (1987); *Veterans Admin., Wash., D.C.*, 28 FLRA 260 (1987). A timely reply to a union's information request is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining. *SSA, Balt., Md.*, 60 FLRA 674, 679 (2005). The Authority interprets § 7114(b)(4) to require parties to interact for the purpose of communicating and accommodating each other's interests in disclosure of information. *IRS Kan. City*, 50 FLRA at 670.

Here the Union submitted a detailed request for information to the Respondent. The Respondent replied a month later, furnishing some of the information but denying the Union's requests for the items of information at issue here. In its initial reply, the Respondent "invite[d] the Union to submit clarification regarding its requests and particularized need." (R. Ex. C at 2). The Respondent stated its reply was a "partial response to the Union's data request," and invited the Union "to submit a more precise description of data sought or explain in greater detail the Union's particularized need regarding this response." (*Id.* at 7). The Union accepted this offer and sent an email to the Respondent providing clarification of its information requests. (R. Ex. D). The Union asked to meet with the Respondent to go over any issues and clarify any questions regarding the information requests. (*Id.*). The Respondent did not reply to this email, did not meet with the Union and did not provide the information to the Union. The Respondent's silence toward the Union stifled the communication and exchange of interests in disclosure of information between the parties that is required by the Statute. *IRS Kan. City*, 50 FLRA at 670. Under the circumstances here, the Respondent was required to furnish a reply or meet with the Union in response to the Union's July 19, 2013, email.

The Respondent contends the charge regarding its failure to respond is moot because the Union allegedly turned down several offers to meet regarding the

information request. A dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome. *DOJ*, 991 F.2d at 289 (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The Supreme Court has held that the burden of demonstrating mootness "is a heavy one." *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The party urging mootness meets its burden of demonstrating that neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law, upon satisfaction of two conditions: (1) that "there is no reasonable expectation . . . that the alleged violation will recur,"; and (2) "interim relief or events have completely [or] irrevocably eradicated the effects of the alleged violation." *U.S. Small Bus. Admin.*, 55 FLRA 179, 183 (1999). The Respondent has not met the burden of demonstrating this issue is moot. The Respondent has not shown that the Union unequivocally relinquished its right to meet with the Respondent regarding the information request. The Union's information request concerns a grievance, which alleges ongoing violations by the Respondent. The Respondent has not produced any evidence demonstrating that the Union no longer needs this information to pursue the grievance. The Respondent's failure to meet with the Union regarding the information request is therefore not moot.

Based on the record evidence, I find that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to reply to or meet with the Union in response to the Union's email of July 19, 2013, and by failing to furnish the telephone data requested by the Union.

Accordingly, I recommend that the Authority grant the Respondent's Motion for Summary Judgment in part, regarding the Respondent's failure to furnish Royal's performance evaluation information and grant the General Counsel's Motion for Summary Judgment in part, regarding the Respondent's failure to furnish telephone call data requested by the Union and the Respondent's failure to respond to the Union's request for a meeting.

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 ordered that the Pension Benefit Guaranty Corporation, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the Independent Union of Pension Employees for Democracy and Justice (Union) with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

(b) Refusing to respond to the Union's July 19, 2013, request to meet and discuss the June 11, 2013, information request.

(c) 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 Independent Union of Pension Employees for Democracy and Justice with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

(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 Pension Benefit Guaranty Corporation Director, 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, 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, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 3, 2015

_____

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Pension Benefit Guaranty Corporation, Washington, D.C., 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 or refuse to furnish the Independent Union of Pension Employees for Democracy and Justice (Union) with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

WE WILL NOT refuse to respond to the Union's July 19, 2013, request to meet and discuss the June 11, 2013, information request.

WE WILL furnish the Union with data reflecting telephone calls from Cheryl Ringel on her PBGC-issued office phone and Blackberry to the phone numbers of the OIT employees listed in the Union's email of July 19, 2013.

_____
(Agency/Activity)

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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA, 30303, and whose telephone number is: 404-331-5300.