**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

OALJ 18-16

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| DEPARTMENT OF VETERANS AFFAIRS<br>VETERANS AFFAIRS MEDICAL CENTER<br>DECATUR, GEORGIA<br><br>RESPONDENT<br><br>AND<br><br>NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2102<br><br>CHARGING PARTY | Case No. AT-CA-17-0545 |

Ayo A. Stone
For the General Counsel

Sophia E. Haynes
For the Respondent

LaTara Johnson-Taylor
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

## DECISION

## STATEMENT OF THE CASE

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

On June 22, 2017, the National Federation of Federal Employees, Local 2102 (the Union) filed an unfair labor practice (ULP) charge against the Department of Veterans Affairs, Veterans Affairs Medical Center, Decatur, Georgia (the Agency, Respondent, or Atlanta VA).

GC Ex. 1(a). On October 18, 2017, the Union filed an amended charge against the Agency. GC Ex. 1(b). After investigating the charge, the Regional Director of the FLRA's Atlanta Region issued

a Complaint and Notice of Hearing on November 15, 2017, on behalf of the General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5) and (8) of the Statute by failing to provide the Union information it had requested on March 9, 2017, and by failing to assert a reason for non-disclosure. GC Ex. 1(c). On December 11, 2017, the Respondent filed its Answer to the Complaint, in which it admitted some of the GC's allegations but denied violating the Statute.[1] GC Ex. 1(d).

A hearing was held in this matter on March 29, 2018, in Atlanta, Georgia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Based on my review of the entire record, including my observations of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute.

## FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The National Federation of Federal Employees (NFFE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide consolidated units of employees of the Department of Veterans Affairs (VA), which includes employees of the Respondent. The Union is an agent of NFFE for the purpose of representing the unit employees employed at the Respondent. GC Exs. 1(c) & 1(d).

The Agency administers a program, HUD-VASH, which provides vouchers to help veterans obtain housing. Social workers at the Agency manage the veterans' cases. Tr. 69. There are about 350 to 400 social workers in the bargaining unit, which is made up of about 1,200 professionals over all. *See* Tr. 68, 72. The HUD-VASH program operates within the Healthcare for Homeless Veterans (HCHV) program. Tr. 92.

As early as 2013, social workers came to Roosevelt Davis, a staff pharmacist and the Union's president, complaining that "[b]ullying, intimidation, retaliation, and fraud" were being carried out by management in the HUD-VASH program. Tr. 14, 16, 18-19.

These concerns came to a head in 2015. Calvin Scott, a social worker and the Union's vice president, testified that in August 2015, the Agency director of the HUD-VASH program (the HUD-VASH director) told social workers not to discharge veterans in the program until October 1, 2015, even though veterans were normally discharged within twenty-four hours.

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[1] Specifically, the Respondent admitted that the requested information: (1) was normally maintained by the Respondent in the regular course of business; (2) was reasonably available; and (3) was not guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. GC Exs. 1(c) & 1(d).

Tr. 66, 71-72-75. The HUD-VASH director's directive would make the Agency's performance metrics look better, but many social workers feared that the directive was unethical, if not fraudulent. Tr. 73-75. The directive thus presented a dilemma for the social workers: refuse to follow it and risk being disciplined, or follow it and risk losing one's license. Tr. 73-74.

The Agency received complaints from employees and the Union about these allegations. Tr. 42, 95, 126-27. In response, the director of the Atlanta VA, and a VA regional director based in Washington, D.C., convened an administrative investigation board (AIB or the Board) to investigate whether management was engaging in fraud, bullying, and harassment. *See* Tr. 24-25, 42-43, 78, 144. It is noteworthy that a VA regional director participated in convening the AIB as an indication of the seriousness of the matter, as most AIBs were convened internally by the Atlanta VA's director. *See* Tr. 88.

The role of the AIB was to hear testimony and makes findings and recommendations to the Agency. Tr. 64. The AIB could recommend that employees (whether managers, supervisors, or bargaining unit employees) be disciplined for misconduct, and the Agency could use the AIB's recommendations as a basis for imposing discipline on employees. *See* Tr. 64, 111-12, 114-15. Most of the AIB members were VA managers who were not associated directly with the Atlanta VA. *See* Tr. 26, 88.

The AIB held a hearing in April 2016. Tr. 35. Scott, and nine or ten other bargaining unit employees, testified before the AIB. Tr. 87. Davis took notes at the AIB hearing and served as a union representative for seven or eight of the bargaining unit employees who testified. Tr. 27, 32, 43, 87. Each witness's testimony was transcribed. *See* Jt. Ex. 5(c); Tr. 221, 235. Testimony before the AIB was mandatory. *See* Tr. 79-81.

Prior to their testimony, each AIB witness executed an Agency document advising them of their rights and responsibilities. It is undisputed that this document was identical in all relevant ways to Appendix J, titled "Sample Notice of Witness Obligations, Protections, and Privacy Act Matters," to VA Handbook 0700. Tr. 31; GC Ex. 3. (I will refer to the document as "Appendix J.") Appendix J informed employees that they would be "protected from reprisal" for providing truthful testimony before the AIB. GC Ex. 3. With respect to the Privacy Act, Appendix J states:

> PRINCIPAL PURPOSES FOR WHICH INFORMATION IS REQUESTED: To determine the facts of the matters investigated and any corrective action needed.
>
> ROUTINE USES: The information obtained from you may be included in systems of records, including, but not limited to, "Veteran, Employee, and Citizen Health Care Facility Investigation Records," 32VA00, and is subject to the routine uses of such systems. These uses may include internal administration of the Department of Veterans Affairs, correction of systemic problems, determination of liability for claims and benefits, administrative or disciplinary action, actions affecting professional licenses and employment, and provision of

> information about the matter investigated to other federal and state agencies, Congress, and the public.

GC Ex. 3 at J-1.

According to Davis, bargaining unit employees testified before the AIB about "harassment, bullying, [and] retaliation," and about how they were "really afraid of . . . the fraud thing because they were afraid for their licenses being taken away if they [submitted] to something." Tr. 32. Scott's AIB testimony pertained to the HUD-VASH Director's instructions in August 2015 regarding discharges. Tr. 83.

The AIB issued its Report of Investigation (AIB report) to the Agency on May 23, 2016. Jt. Ex. 5(a). The Agency did not release the AIB report, or any other AIB documents, to the Union or the public. Tr. 89. As I will explain more fully below, the Agency left the Union redacted copies of the AIB report, and other AIB documents at issue in our case, about a week before the hearing. The redacted documents provided to the Union were entered into evidence at the hearing. Tr. 54-55, 201.

Ten of the report's fifteen pages of the AIB report have redactions covering fifty to nearly one-hundred percent of the page, and the remaining pages have significant redactions as well. As such, it is impossible to fully and accurately describe the contents of the AIB report. Still, unredacted portions of the AIB report shed light on misconduct that was uncovered by the AIB. In this regard, the AIB report states:

> [A] hostile work environment does exist in the HUD-VASH Program. Furthermore, the hostile work environment is primarily the result of the actions and leadership [redacted].
>
> . . . .
>
> [Redacted] concluded that a culture of fear and/or threat to psychological safety does exist within the HCHV program. . . . The Board also believes it is highly likely that HCHV staff members have suffered, and will likely continue to suffer, from retaliatory action taken [redacted].
>
> . . . .
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> The Board also believes it is highly likely that . . . staff members have suffered, and will likely continue to suffer, from retaliatory action taken [redacted] . . . .
>
> [T]he Board concludes there was data manipulation at the end of FY 15 to meet FY 15 end-of-year performance goals, such that staff members were mandated to not discharge clinically appropriate veteran clients to meet such goals/measures.
>
> . . . .

> . . . [T]he Board determined that staff were kept in the program for longer than acceptable times to maintain staffing levels due to high turnover rate. . . .

Jt. Ex. 5(a) at 12-13.

The names of individuals – managers, supervisors, bargaining unit employees, and AIB members – are listed in the AIB report. Most names in the AIB report in evidence are redacted, though Scott's name and the name of one other AIB witness are unredacted. Tr. 119, 197, 201, 215-16; Jt. Ex. 5(a) at 2-3, 6. It is apparent that the testimony of the AIB witnesses was used to support the conclusions in the AIB report. *Id.*

The Office of Quality Management; Risk Management issued a memorandum (AIB recommendations memo) to the Atlanta VA director, on July 15, 2016. The AIB recommendations memo was based on findings in the AIB report and contains recommendations set forth in six paragraphs. Jt. Ex. 5(b) at 1. Three of the paragraphs were entirely redacted, and a fourth was partially redacted. The non-redacted paragraphs recommend training for managers and an action plan "to reverse the negative culture that currently exists within the HCHV program." *Id.*

In December 2016, a manager started sending Scott emails critical of his work. Tr. 84. In February 2017,[2] the HUD-VASH director told Scott that he would be detailed from the HUD-VASH program to the Community Resource and Referral Center (CRRC), another program within the HCHV program, until further notice because he was only in the office one day a week (he was on official time the other days), which confused the veterans who had Scott as their social worker. Tr. 68, 72, 92, 96. Scott believed, however, that the HUD-VASH director moved him to the CRRC based on unfounded criticisms of his work. *See* Tr. 84-85. Scott continues to work in the CRRC. Tr. 85.

Other bargaining unit employees continued to feel that they were being harassed after the AIB proceedings had concluded. Davis testified that employees "felt that there was no change. That the supervisor was still there harassing them and still retaliating against them." Tr. 61.

After the AIB proceedings, Davis asked Emanuel Lewis, the Agency's privacy officer at the time, about obtaining AIB-related documents. According to Davis, Lewis responded, "[I]f I do give it to you, it's going to be so redacted you're not going to know what it was." Tr. 34. Davis came away from the discussion thinking that there was "no sense in filing a [Freedom of Information Act (FOIA) request] because they['re] not going to give us what we need. It's going to be so redacted, meaning we can't read what we are going to be trying to accomplish." Tr. 34-35. Davis also asked Annette Walker, the Director of the Atlanta VA since September 2016, about the AIB's findings. According to Davis, Walker responded, in effect, "you all need to leave it alone," meaning, Davis said, that "it was a subject . . . that we shouldn't delve into." Tr. 34, 157.

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[2] All dates hereafter are in 2017, unless otherwise noted.

On March 9, Davis emailed Walker an information request pertaining to the AIB's investigation. Tr. 35; Jt. Ex. 1. (I will refer to this email as the "March 9 request," and I will refer to all of the Union's requests, including the March 9 request, as the Union's information request.)

Davis began by requesting copies of "the decision letter of the AIB" as well as "the transcript of the AIB" and the "recommendation by the AIB Committee." Jt. Ex. 1. (There is no dispute that the Union's request encompassed the AIB report and the AIB recommendations memo.) *See* Tr. 98. Davis added that the Union understood the AIB to involve an investigation of "potential wrongdoing by management and bargaining unit employees represented by the [U]nion. The wrongdoing was in the nature of bullying, intimidation, harassment and fraud." Jt. Ex. 1.

With respect to particularized need, Davis wrote:

> Particularized Need: This information is necessary to evaluate the actions and/or inaction[]s of the Agency in complying with law, rule, regulation, and contractual requirement. Specifically, the information may be necessary to defend employees represented by the union from potential discipline based on bullying, intimidation, harassment, fraud or other harassment. Conversely, the information may show that the Union need[s] to file a grievance against management based on harassment by agency managers or failure to prevent bullying, intimidation and harassment. The information will be used to determine if a grievance and/or other legal remedy is required to protect the rights of bargaining unit employees and/or the Union. Lastly, the information shall be utilized in such a fashion that the union will be able to make correct assertions concerning litigation in the matter. NFFE Local 2102 has an obligation under the law to perform representational duties for its bargaining unit employees. NFFE Local 2102 also has an obligation and a right to ensure compliance with the collective bargaining agreement with the Agency. As such, the information is necessary and needed for the union to have full and proper discussion, understanding, and negotiation of the subject within the scope of bargaining so defined herein.

*Id.* at 1-2.

With respect to the subject of "Privacy Concerns," Davis stated:

> The information is requested in unsanitized form . . . . NFFE contends the unsanitized information is to be correctly provided since such disclosure is clearly defined as serving the public interest. In any event, we need unsanitized

> information in order to understand what employees may have committed violations so as to properly defend them or allege violations by particular managers.

*Id.*[3] at 2.

Davis asked that the Agency provide the requested information by March 23. *Id.*

Officials in the Agency's Human Resources office, including Jacquese Thompson, a Labor and Employee Relations supervisor, were responsible for reviewing the requested information, which was maintained by the Agency. Tr. 108, 136, 160, 167, 172. It was Walker, however, who communicated with the Union about its information request.

On April 6, Scott sent Walker an email asking that the Agency respond to the Union's March 9 request. Jt. Ex. 2. Walker responded the next day, asking for clarification and adding that she had previously requested that the Union "specifically state what definitive information from the AIB is needed." *Id.* at 2. Later that day, Scott sent Walker an email indicating that the Union's March 9 request was designed to address the Agency's issues with earlier requests submitted by the Union. *Id.* In addition, Scott provided a copy of the Union's March 9 request. *See id.*

On April 24, Scott sent Walker an email asking her to "provide an update" on the status of the Union's March 9 request. *Id.*

At some point in April, Walker initiated a "climate assessment," a project that would "strengthen communications" and provide "additional training for both management and staff." Tr. 160-61. Subsequently, a climate assessment report was issued. Though the climate assessment report was generally positive, it also suggested that some employees felt there was "a culture of fear and intimidation" at the Agency. Resp. Ex. 2 at 26. Walker indicated that the climate assessment was carried out because issues that the Union had raised were "still . . . going on even after the AIB[]" had been concluded. Tr. 160.

On May 8, Walker sent Davis and Scott an email, stating:

> [T]he specified need request does not address which if any specific employee requested your intervention based upon the impact of the results of the AIB as it directly relates to them. If there is some specific employee issue that has occurred related to the outcome of the AIB please identify.

Jt. Ex. 3.

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[3] I consider "sanitized" to mean the same thing as "redacted," and "unsanitized" to mean the same thing as "unredacted."

On June 2, Davis sent Walker an email in response (the June 2 email), stating:

> Several employees who participated in the AIB and testified on the problems with the Homeless HUD-VASH program are requesting the results and recommendations of the AIB that they participated in. NFFE believe[s] the . . . info request had particularized need . . . Mr. Calvin Scott participated in the AIB and is requesting a copy to determine whether or not his [being] removed from the HUD-VASH program had anything to do with his testimony and outcome of the recommendation. . . .

*Id.*

On June 15, Davis sent Walker an email stating, "Second request." Jt. Ex. 4. Walker responded an hour later, stating: "Again, specifically state what aspects of the AIB recommendations are parties interested in seeing and for what reason(s)?" *Id.* Davis did not respond to Walker's June 15 email because, he testified, "I felt at that point that she was not going to give it to me . . . ." Tr. 52.

As noted above, the Union filed its initial ULP charge in this case on June 22. GC Ex. 1(a).

In January 2018, the Agency's legal counsel asked Shirley Hobson, a FOIA officer for the Agency, to take the Union's information request from the Agency's Human Resources office to the Agency's FOIA office. Hobson redacted a transcript of Scott's testimony before the AIB, a copy of the AIB report, and a copy of the AIB recommendations memo. Tr. 200-01. Unlike the AIB report and the AIB recommendations memo, which as indicated above were heavily redacted, the redactions were lighter for the transcript of Scott's AIB hearing testimony. While these redactions were used to conceal names, including the names of most of the AIB members, Scott's name was not redacted. Jt. Ex. 5(c).

Asked to explain her redaction method, Hobson testified that she redacted "all identifiers" and redacted substantive matters as well, even though this made it impossible to understand the full substance of the AIB report and the AIB recommendations memo. Tr. 199, 246; *see also* Jt. Exs. 5(a) & 5(b). Hobson redacted material so that "no one or the public would get the wrong impression," and she redacted details about "possible administrative action to be taken." Tr. 217. Hobson's redactions were based on her understanding of VA Policy 1605.1, which indicated that AIBs are "basically not releasable[]" and that "[i]f they are releasable they are heavily redacted."[4] Tr. 225. Hobson noted that the AIB documents included "allegations made by certain social workers stating that management had done certain things . . . and they were against federal guidelines." Tr. 213.

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[4] VA Handbook 1605.1 states that unions may request records under § 7114(b)(4) of the Statute, but that in some circumstances the disclosure of records may be prohibited by the Privacy Act. The handbook further states that once a union requests records, human resources management and the regional counsel's office must assign management officials to determine whether the records are exempt from release. Resp. Ex. 4 at 38-39.

Although the Union had not submitted a FOIA request, Hobson left copies of these redacted documents in the Union's office about a week before the hearing in this case. Tr. 193-94, 201-03, 237-38. Hobson slipped an envelope containing the documents under the door of the Union's office; she did not tell the Union in advance that she was going to provide these documents. Tr. 91. Asked why she provided a redacted transcript of Scott's AIB testimony, Hobson answered: "Mr. Scott has kind of like two roles here. Mr. Scott was serving as a social worker . . . Also, he was serving as a union official." Tr. 220.

The documents Hobson provided did not satisfy the Union's request, in part because the Union had specifically requested that the documents not be redacted. Tr. 98. In this regard, Scott testified that the redactions were so broad that "we couldn't really understand any of the stuff that was in there." Tr. 98-99. Scott added that the Agency failed to provide transcripts for all witnesses who testified before the AIB. Tr. 100. Hobson confirmed that she did not provide the Union transcripts of any other witness's AIB testimony. *See* Tr. 235.

Additional issues were elaborated at the hearing. With respect to particularized need, Walker was asked whether she was unclear what the Union meant when it asked the Agency for the "decision letter of the AIB." Walker answered: "I think I was clear on it." Tr. 172. In addition, Walker indicated that after the Union submitted the March 9 request, the Union established a particularized need "later," in the June 2 email, because there Davis "identified that he specifically wanted it to find out if Mr. Calvin Scott had suffered any repercussions as a result of [the] AIB." Tr. 169.

Thompson suggested that the Union did not need the requested information, as the Union did not file any grievances pertaining to the AIB investigation, and further, that no bargaining unit employees were disciplined as a result of the AIB investigation. *See* Tr. 112.

Davis countered that the Union did not know that bargaining unit employees would not be disciplined when it submitted the March 9 request to the Agency. Moreover, he explained, the Union still "[doesn't] know whether the employees were disciplined, . . . we don't know whether they were retaliated against. And some people still felt they were being retaliated against." Tr. 49. The Union feared that bargaining unit employees would face retaliation for their testimony. In this regard, Davis testified: "[E]ven after that AIB people came and felt that they were being retaliated against. How they know who was in there I don't know. But yet people come say they felt [that] they were still being retaliated against." Tr. 51. In addition, the Union wanted to know whether managers and supervisors were being disciplined, especially because the Union believed that all the issues bargaining unit employees might be facing arose from the misconduct of those in management. *See* Tr. 49, 51.

Hobson testified that the AIB-related documents in this case are part of a system of records under the Privacy Act. *See* Tr. 195. Davis similarly testified that Appendix J outlines "routine uses," and that it indicates that AIB-related documents are contained in a system of records, "32VA00." Tr. 45.

Walker indicated that her response to the Union was based on privacy-related concerns. Asked to explain why she believed the Union's March 9 request did not establish a particularized need, Walker ignored the issue of need and focused instead on privacy concerns, stating: "I think the un-sanitized form, the request for an un-sanitized form of the document was my first concern." Tr. 179-80. Walker also stated that she was "concern[ed]" about releasing information about an employee who was not a bargaining unit employee. Tr. 180. In addition, Walker testified that "it would not be reasonable to release to the Union what untoward outcomes may have happened to a management official" because "the Union can definitely be bullying and retaliate against management." Tr. 181. Walker indicated that redactions were necessary because there were recommendations for disciplinary actions. *Id.*

Similarly, Thompson testified that the Union's information request raised privacy concerns because there were "two management officials that were issued disciplinary action based off the AIB," and that "the AIB" was evidence used to discipline the two management officials. Tr. 113-14, 139. Asked whether there were concerns other than privacy concerns that would justify denying the Union's information request, Thompson answered, "Mainly the privacy concerns." Tr. 125.

Hobson believed that identifying those who testified before the AIB posed "significant" privacy concerns because it could lead to retaliation as well as to "harassment, intimidation [and] various other means of: I know who you are." Tr. 199. Further, Hobson testified that participants "on both sides," whether bargaining unit employees or managers, could face harassment if unredacted AIB documents were released. Tr. 208.

Hobson agreed that there would likely be a public interest in learning about the alleged misconduct investigated by the AIB. *Id.* She elaborated that "for the fraud issue . . . yes, the public should have [an] opportunity to know about that. But as far [as] the bullying and whatever all of that information that was redacted that information was – I was informed that was taken care of by our HR individual with the indicated management." Tr. 214. Hobson also believed that redactions were necessary to prevent those named from suffering embarrassment and retaliation. Tr. 239.

Hobson acknowledged that one reason the Agency did not want to provide the requested information was that the documents would reveal managerial misconduct that could be embarrassing to the Agency. Tr. 246.

Davis and Scott suggested that AIB witnesses had no expectation of privacy, as there was no indication that their testimony before the AIB would be confidential. Tr. 30, 81. With respect to the Union's right to obtain the requested information, Davis acknowledged that there was no Agency policy and no provision of the parties' collective bargaining agreement entitling him to copies of the AIB hearing transcript.[5] Tr. 44-45.

[5] The parties' collective bargaining agreement was not entered into evidence.

Walker suggested that the situation at the Agency had improved greatly after the AIB proceedings were held. Specifically, Walker testified that the HUD-VASH program scored 93 out of 100 on an employee satisfaction survey (the employee satisfaction survey) taken in August and released in December. Tr. 164-65; Resp. Exs. 1, 3. The survey consisted of sixty-six questions and asked employees about regular workplace matters, including workload, supervision, favoritism, workplace discrimination, training, and conflict resolution. Resp. Ex. 3.

Scott countered that the survey was not particularly meaningful, because: (1) it incorporated responses from all departments and thus diluted responses from employees who worked in the HUD-VASH program; (2) the questions were "general" that might not specifically capture the complaints investigated by the AIB; and (3) many of the employees currently working in the HUD-VASH program were new and might not have experienced the misconduct that longer-serving employees had experienced. *See* Tr. 103-04.

In addition, Scott and Davis suggested that employee morale was low, as evidenced by the fact that about forty social workers left the HUD-VASH program in the year surrounding the AIB proceedings, including about twenty employees who left after the AIB process had concluded. *See* Tr. 62-63, 87.

## POSITIONS OF THE PARTIES

### General Counsel

The GC argues that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to furnish the Union documents it requested in its March 9 request.[6] GC Br. at 7.

The GC contends that the Union established a particularized need for the requested information. *Id.* at 9. In this regard, the GC asserts that the Union requested copies of "the AIB decision letter . . . a transcript of the AIB proceeding[] and . . . the recommendations made by the AIB . . . ." *Id.* at 9-10. According to the GC, the Union explained that it needed the requested information to determine whether bargaining unit employees were accused of misconduct; whether bargaining unit employees were harmed by the misconduct of managers; and whether there was a need to file a grievance. *See id.* at 10.

With respect to the Respondent's claims that the AIB did not negatively affect bargaining unit employees, and that no grievances were filed with respect to the AIB, the GC asserts that: (1) the Respondent failed to raise these arguments at or near the time of the Union's March 9 request; (2) the Respondent's arguments do not refute the Union's explanation of need; and (3) the Union is entitled to determine for itself whether the AIB negatively affected bargaining unit employees. *Id.*

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[6] The General Counsel asserts that the requested information was "normally maintained" by the Respondent, was "reasonably available," and was not "guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining." GC Br. at 8-9, 11. Because the Respondent has already admitted these allegations (GC Exs. 1(c) & 1(d)), it is unnecessary to consider further.

The GC contends that Davis responded to Walker's reasonable requests for clarification. Further, the GC contends that Walker's professed confusion about the Union's information request was "feigned," and it suggests that there was no need for Davis to respond to the questions in Walker's June 15 email. *Id.* at 7, 11, 19.

Citing *Federal Aviation Admin.*, 55 FLRA 254 (1999) (*FAA*), for the proposition that an agency must raise countervailing anti-disclosure interests at or near the time of a request, the GC submits that the Respondent's anti-disclosure interests should not be considered, because the Respondent failed to raise those interests, including its Privacy Act arguments, at or near the time of the Union's information request. GC Br. at 19-20.

Even if the Respondent properly raised its Privacy Act concerns, the General Counsel asserts that the Privacy Act does not bar disclosure of the requested information. *Id.* at 11. As an initial matter, the GC contends that the Respondent has failed to demonstrate that the requested information is part of a system of records and thus has failed to demonstrate that the request information is subject to the requirements of the Privacy Act. In this regard, the GC cites *U.S. Dep't of Transp., FAA, Nat'l Aviation Support Facility, Atl. City Airport, N.J.*, 43 FLRA 191, 200 (1991) (*FAA NJ*), for the proposition that an agency bears the burden of establishing that a system of records exists for Privacy Act purposes. GC Br. at 12-13. As for what constitutes a "system of records," the GC cites a definition provided in the U.S. Office of Personnel Management's "System of Records Notice (SORN) Guide" (SORN Guide), which pertains to "records the OPM maintains."[7] *Id.* at 12.

Applying the SORN Guide's definition of a "system of records," the GC argues that the Respondent has failed to "establish or even assert" that the documents the Union requested are retrievable by name or any other personal identifiers, though the GC acknowledges that the Respondent was able to obtain Scott's AIB testimony. *Id.* at 13. The GC also argues that the Respondent has only offered an "assertion" that the requested information was part of a system of records. Therefore, the GC argues, the Respondent has "failed to meet its burden of proof" of establishing that the requested information was contained in a system of records. *Id.*

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[7] According to the GC, the SORN Guide states:

> To be considered a system of records within the meaning of the Privacy Act, records that OPM maintains must be retrieved by a person's name or other personal identifying information (referred to as a "personal identifier"). A personal identifier might include an individual's name, address, . . . social security number, . . . or any other unique identifier that can be linked to an individual. This means the requirements mandated by the Privacy Act are not applicable to OPM records unless the records are retrieved by a personal identifier.

GC Br. at 12 (quoting SORN Guide, https://www.opm.gov/information-management/privacy-policy/privacy-references/sornguide.pdf).

Assuming arguendo that the requested information is contained in a system of records, the GC contends that the requested information is disclosable. With respect to privacy interests, the GC acknowledges that "allegations of fraud and possible disciplinary action are contained" in the documents requested by the Union. *Id.* at 16. As such, the GC "concedes there is a privacy interest . . . under the circumstances of this case." *Id.* However, the GC argues that the value of this privacy interest is "questionable." *Id.* In this regard, the GC cites *FAA NJ*, 43 FLRA at 199, for the proposition that there is no "blanket" privacy interest with respect to hearing testimony. Rather, the GC argues, privacy interests must be based on "each aspect" of a hearing. GC Br. at 14. The GC adds that there is no expectation that a witness's testimony before an AIB will be confidential. *Id.*

The GC argues that it would be in the public interest to disclose the requested information, as it could shed light on "how our veterans are being served," how the Agency "fraudulently obtains and uses tax dollars," and how the Agency treats employees in its "effort to perpetuate this fraud." *Id.* at 17. In this connection, the GC cites *U.S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 471 (1995) (*DOL*), for the proposition that the public interest increases with the level of management involved. GC Br. at 17-18. The GC further contends that the public interest in exposing the Agency's misconduct, which was enabled by "high ranking officials," outweighs the privacy interests in this case. *Id.* at 18.

In making this argument, the GC acknowledges that *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669 (2012) (*BOP Marion*), has been cited for the proposition that the Privacy Act "prohibits the disclosure of documents relating to an administrative investigation of employees for misconduct when such disclosure would reveal the names of the investigated employees." GC Br. at 15. But *BOP Marion* is distinguishable, the GC argues, because in that case there was no indication that disclosing the requested information would be in the public interest. *Id.* at 15-16.

With respect to the remedy, the GC requests that the Respondent be ordered to furnish the Union the requested documents in an "un-redacted and un-sanitized" manner. *Id.* at 21.

**Respondent**

The Respondent contends that it did not violate the Statute. Resp. Br. at 1. In this regard, the Respondent asserts that the Union failed to establish a particularized need for the requested information, because: (1) no bargaining unit employees were disciplined and, therefore, no information was needed to defend bargaining unit employees from discipline; (2) the Union "satisfied its representational responsibilities" by virtue of the fact that Davis took notes while representing bargaining unit employees before the AIB; (3) a grievance regarding the AIB would be untimely, because the parties' collective bargaining agreement requires that a grievance be filed within thirty days of an incident; (4) the Union could have filed a grievance without having the AIB's recommendations or reports; (5) there has not been any "litigation" concerning bargaining unit employees and the AIB; and (6) the climate assessment and the employee

satisfaction survey demonstrate that issues that were the subject of the AIB's investigation have been "resolved." *Id.* at 8-9. The Respondent adds that it provided the Union redacted copies of Scott's testimony, the AIB report, and the AIB recommendation memo about a week before the hearing in this case. *Id.* at 14.

The Respondent cites *Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749, 756-57 (1997), for the proposition that privacy interests can be timely raised before an administrative law judge, and the Respondent argues that it timely raised its Privacy Act arguments at the hearing. Resp. Br. at 9-10. The Respondent contends that the Union's March 9 request implicates the privacy interests of the witnesses who testified before the AIB and the managers who were subject to discipline as a result of the AIB's investigation. *Id.* at 9. The Respondent further contends that these privacy interests outweigh the public interest in disclosure. *See id.* at 10.

The Respondent argues that disclosing the requested information would violate the Privacy Act. *Id.* at 11. In this regard, the Respondent asserts that the "undisputed testimony" indicates that the requested information is contained within a system of records. *Id.* (citing Tr. 45, 195). The Respondent adds that in *U.S. Dep't of VA, VA Med. Ctr., Dall., Tex.*, 51 FLRA 945 (1996) (*VA Dallas*), the Authority indicated that VA investigation records are contained in a system of records, namely, 32VA00. Resp. Br. at 12.

The Respondent contends that it is undisputed that disclosure of the requested information would implicate employee privacy interests, especially because two management officials were disciplined as a result of the AIB investigation, and because AIB witnesses were also named in the requested documents. *Id.* Citing Hobson's testimony, the Respondent argues that disclosing the unredacted documents could result in harassment, intimidation, and retaliation. *Id.* In addition, the Respondent cites *BOP Marion* for the proposition that the Privacy Act prohibits the disclosure of documents relating to an administrative investigation of employees for misconduct when such disclosure would reveal the names of the investigated employees. Resp. Br. at 12-13.

The Respondent "concedes that release of the [requested] information could shed light on the treatment of the Agency's employees and whether there was in fact fraud as alleged." *Id.* at 14. However, the Respondent argues that there is no public interest in disclosing the identities of individuals named in the requested documents. *Id.* The Respondent submits that these privacy interests outweigh any public interest in disclosure. *See id.* at 11, 14-16.

Additionally, the Respondent argues that disclosure is not authorized under the "routine use" exception. *Id.* at 15. In this regard, the Respondent asserts that the system of records that contains the requested information, 32VA00, does not include a routine use with respect to requests made by unions under § 7114(b)(4) of the Statute. *Id.* (citing Privacy Act Issuances, 1993 Comp., 32VA00 (Dec. 31, 1993); GC Ex. 3).

Finally, the Respondent argues that the redacted documents it provided to the Union just prior to the hearing "satisf[ied] the [U]nion's information request" while protecting privacy interests. *Id.* at 9.

## DISCUSSION

Section 7114(b)(4) of the Statute requires an agency, upon request and to the extent not prohibited by law, to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice, counsel, or training to management. 5 U.S.C. § 7114(b)(4); *U.S. DOJ, Fed. Bureau of Prisons, FCI, Fort Dix, N.J.*, 64 FLRA 106, 108 (2009). An agency that fails to comply with § 7114(b)(4) of the Statute commits a ULP in violation of § 7116(a)(1), (5) and (8) of the Statute. *See, e.g., Health Care Fin. Admin.*, 56 FLRA 503, 503 (2000).

It is undisputed that the Agency failed to provide the Union the information it had requested. *See* Tr. 235. The questions to be resolved are whether the Union established a particularized need for the requested information, and whether disclosure is prohibited by the Privacy Act.

The Union Established a Particularized Need for the Requested Information

In order for a union to demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4) of the Statute, it must establish a "particularized need" by articulating, with specificity, why it needs the requested information, including how it will use the information, and how its use of the information relates to the union's representational responsibilities under the Statute. *U.S. DOJ, Fed. BOP, FCI Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015) (*FCI Ray Brook*).

The union must articulate its interests in disclosure of the information at or near the time of the request, not for the first time at an unfair labor practice hearing. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 263 (2004) (*Randolph AFB*). However, in reviewing a union's information request, circumstances surrounding the request, like other relevant evidence, are appropriate to consider in evaluating the overall sufficiency of the request. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 & n.12 (1997) (*BOP Marion II*).

The Authority has found that a union establishes a particularized need where the union states that it needs the information: (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance. *FCI Ray Brook*, 68 FLRA at 496.

The Authority has found particularized need established where, for example, the union stated that it was requesting information to determine if complaints by employees about a current policy are "true and correct and to represent the employees in any rightful charges against the [a]gency." *U.S. Dep't of the Army, ACE, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004) (internal quotation marks omitted).

Further, the Authority has rejected claims that a union failed to articulate its need with requisite specificity, where the union's information request referenced a specific agency action and specified that the union needed the information to assess: (1) whether the agency violated established policies and (2) whether to file a grievance, even though the union did not explain exactly how the information would enable it to determine whether to file a grievance. *FCI Ray Brook*, 68 FLRA at 496.

The union's explanation of need must permit the agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information and, thus, must be more than a conclusory assertion. *Id.* For example, the Authority has indicated that it is not enough for a union to say that information is needed to "prepare" a grievance, *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 979-80 (2010), or to "pursue possible grievances and [EEO] complaints," *Dep't of HHS, Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1148 (1997) (*SSA N.Y.*).

However, a union's request need not be so specific as to reveal the union's strategies. *FCI Ray Brook*, 68 FLRA at 496. Also, in many cases, a union will not be aware of the contents of a requested document, and the degree of specificity required of a union must take that into account. *IRS, Wash., D.C.*, 50 FLRA 661, 670 n.13 (1995) (*IRS*). In addition, the question of whether requested information would accomplish the union's purpose is not determinative of whether the information is necessary within the meaning of the Statute. *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009) (*SSA*). Similarly, the Authority has stated that an agency's contention that a potential grievance is not grievable does not relieve the agency of its obligation to furnish requested data. *Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 39 FLRA 298, 309 (1991) (*SSA Balt.*). The Authority has also indicated that a union may establish a need for information pertaining to non-bargaining unit employees where, for example, the union seeks to compare the agency's treatment of the non-bargaining unit employee with the agency's treatment of the unit employee. *See IRS*, 50 FLRA at 671-73.

As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. *See, e.g.*, *FAA*, 55 FLRA at 260; *Soc. Sec. Admin., Balt., Md.*, 39 FLRA 650, 656 (1991). The agency must explain its anti-disclosure interests in more than a conclusory way, and the agency must raise these interests at or near the time of the union's request. *SSA*, 64 FLRA at 295-96. An agency may not wait until the hearing to argue that it fulfilled its statutory obligation by producing all of the requested information. *U.S. Dep't of the Navy, Naval Air Depot, Jacksonville, Fla.*, 63 FLRA 455, 463 (2007) (*Navy*). When an agency reasonably requests clarification of a union's information request, the union's failure to respond to the request is "taken into account" when determining whether the union established a particularized need for the requested information. *SSA*, 64 FLRA at 296-97; *cf. U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 51 FLRA 1391, 1396 (1996) (declining to find agency's requests for clarification were disingenuous or unreasonable).

In the case at bar, the Union met its burden. In the Union's March 9 request, Davis explained that the Union needed specific documents – unredacted copies of the AIB transcript, the AIB's recommendations and the AIB's decision letter – to serve two main purposes in connection with the AIB investigation: (1) to defend bargaining unit employees against "potential discipline" based on bullying, intimidation, harassment, or fraud; and (2) to determine whether to file a grievance on behalf of bargaining unit employees and/or the Union against management for its failure to prevent bullying, intimidation, and harassment. Davis explained that the requested information would enable the Union to have a correct understanding as to what the AIB uncovered and what repercussions might occur. And Davis indicated that the information would be used to ensure compliance with the parties' collective bargaining agreement. Jt. Ex. 1. By basing the request on the AIB investigation and by stating with specificity why the requested information was needed, including a determination as to whether to file a grievance, the Union established a particularized need for the requested information. *See FCI Ray Brook*, 68 FLRA at 496.

Furthermore, Davis satisfied his obligation to respond to Walker's reasonable requests for clarification. When Walker asked that the Union specify the exact information it needed, Davis provided Walker an additional copy of the Union's March 9 request, which highlighted the information sought by the Union. Jt. Ex. 2. And when Walker asked Davis to explain how the March 9 request pertained to specific employees, Davis replied that the Union needed the requested information to determine whether the Agency's decision to take Scott out of the HUD-VASH program and detail him to the CRRC "had anything to do with his testimony and outcome" of the AIB's investigation.[8] Jt. Ex. 3. Moreover, Davis indicated that these concerns were shared by other bargaining unit employees who testified before the AIB. *Id.* And it is clear from the record that employees would want to know this information, as some employees believed they worked in "a culture of fear and intimidation," and as some employees "felt that they were being retaliated against," in the year following the AIB's investigation. Resp. Ex. 2 at 26; Tr. 49, 160. By responding to Walker's reasonable requests for clarification, Davis amply enabled Walker and the Agency to make a reasoned judgment as to whether the Statute required it to furnish the requested information. *FCI Ray Brook*, 68 FLRA at 496. Indeed, Walker admitted as much at the hearing. *See* Tr. 169. Thompson similarly indicated that it was privacy, rather than the establishment of a particularized need, that was the basis for the Agency's refusal to provide the requested information. Tr. 125.

Further, it is apparent that the questions Walker posed in her June 15 email were not reasonable and thus did not require a response from Davis. In this regard, Walker's questions – what documents (or aspects of documents) the Union wanted and the reasons it wanted them – were already answered by the Union's March 9 request, and they were elaborated on in Davis's June 2 email. Because Walker's questions in her June 15 email were disingenuous attempts to stall rather than reasonable requests for clarification, Davis's failure to respond does not detract from the Union's need for the requested information.

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[8] Davis waited several weeks to respond to Walker's May 8, 2017, email, but there is no claim that Davis's June 2 response was untimely. *See* Resp. Br. at 8-10.

The Respondent's arguments to the contrary are unconvincing. The Respondent asserts that the Union did not need the requested information to defend bargaining unit employees from discipline because it turned out that no bargaining unit employees were disciplined. Similarly, the Respondent asserts that the Union did not need the requested information for the reason stated, because no grievances were filed with respect to the AIB. For the reasons below, these arguments fail.

First, the Union needed the requested information to assess the risk of "potential" discipline and to determine whether to file grievances. As such, the Union's need existed regardless of whether disciplinary action was ultimately taken and regardless of whether grievances were ultimately filed. Second, the Union's need is assessed at the time of the request, *see Randolph AFB*, 60 FLRA at 263; *BOP Marion II*, 52 FLRA at 1207 & n.12, not a year or more after the fact. And because the Union did not have the requested information, it had no way of knowing whether employees would be disciplined or whether grievances should be filed. *See IRS*, 50 FLRA at 670 n.13. Third, because the question of whether requested information would accomplish a union's purpose is not determinative of need, *SSA*, 64 FLRA at 296, the Union was entitled to information even if the premises of its request turned out to be unfounded. Likewise, because an agency's claim that a potential grievance is not grievable does not relieve the agency of its obligation to furnish requested data, *SSA Balt.*, 39 FLRA at 309, the Respondent's (unsupported) claim that a Union grievance would be untimely does not relieve the Respondent of providing the Union the requested information.

The Respondent asserts that the Union could have filed a grievance without the requested information and therefore did not "need" the requested information to file a grievance. But the Authority's definition of need is far broader. For example, information can be "needed" where, as here, it would enable a union to make an informed decision about whether to file a grievance in the first place. *SSA*, 64 FLRA at 296; *see also FCI Ray Brook*, 68 FLRA at 496 (indicating that information can be necessary to help parties sift out unmeritorious grievances). Accordingly, the Respondent's argument is unfounded.

The Respondent suggests that the Union did not need the requested information, because Davis took notes while representing many of the bargaining unit employees who testified before the AIB. But Davis's notes are not among the documents the Union requested. Rather, the Union requested the AIB transcript, the AIB report, and the AIB recommendations memo. Moreover, despite Davis's notes providing background information regarding their specific requests for information, a union's right to information is not dependent on whether the information is reasonably available from an alternative source. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 38 FLRA 3, 7 (1990). For these reasons, the Respondent's argument lacks merit.

The Respondent asserts that the climate assessment and the employee satisfaction survey indicate that employees are satisfied and that all issues pertaining to the AIB had been resolved, rendering the information request moot. However, the Union is free to disagree with the Agency's opinion of workplace morale, and the Union is entitled to obtain information to determine for itself whether complaints raised by employees warrant the filing of a meritorious grievance. *See SSA*, 64 FLRA at 296. Assuming that the climate assessment and the employee

satisfaction survey describe morale at the Agency accurately, those documents reveal that at least some employees were unsatisfied and might have depended on the Union obtaining the requested information. *See* Resp. Ex. 2 at 26. For these reasons, the Respondent's reliance on the climate assessment and the employee satisfaction survey are misplaced.

Finally, the Respondent argues that it provided the Union redacted copies of Scott's testimony, the AIB report, and the AIB recommendation memo the week before the hearing. However, the Respondent failed to provide a complete and unredacted copy of the AIB transcript and also failed to provide any unredacted documents. Furthermore, even if the documents had been responsive to the Union's request, the Respondent cannot escape liability by providing the requested documents a mere week before the hearing, long after the ULP charge was filed. *See Navy*, 63 FLRA at 463; *U.S. DOJ, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 467 (2006). Accordingly, the Respondent's argument is misplaced.

Based on the foregoing, I find that the Union clearly established a particularized need for the requested information. Accordingly, I now turn to the Respondent's claim that disclosing the requested information is prohibited under the Privacy Act.

Disclosure of the Requested Information Is Not Barred by the Privacy Act

As an initial matter, the GC asserts that the Respondent's Privacy Act claim should not be considered, because the Respondent failed to raise that claim at or near the time of the Union's information request. Although the Authority has required that an agency raise its anti-disclosure interests at or near the time of the information request, the Authority has, on occasion, addressed vague or belated anti-disclosure interests based on the Privacy Act. *See BOP Marion*, 66 FLRA at 673-74; *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91, 95 (2004) (*BOP FDC*). While it is true that the Respondent did not expressly or timely raise privacy-based objections to the Union at or near the time of the information request, it is fair to consider the Respondent's privacy-based claims here, both because the Union itself acknowledged "Privacy Concerns" in its March 9 request, and because the issue was fully and fairly litigated at the hearing. *See BOP Marion*, 66 FLRA at 673 (noting that the Authority considered a Privacy Act claim that was raised in the answer and argued at the hearing). Accordingly, I have considered the Respondent's Privacy Act claims.

In *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 345, 350 (1995) (*FAA NY*), the Authority set forth the analytical approach it follows when an agency argues that the Privacy Act prohibits disclosure of requested information because it would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6.[9] 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 violative nature and significance of those privacy interests. Privacy interests apply to managers and supervisors, as

[9] FOIA Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also FAA NY*, 50 FLRA at 342.

they are equally held by bargaining unit employees alike. *See Dep't of the Air Force, Scott AFB v. FLRA*, 956 F.2d 1223, 1225 (D.C. Cir. 1992). In considering whether information is disclosable, the Authority has stated that the "concern is not with the identifying information *per se*, but with the connection between such information and some other detail . . . which the individual would not wish to be publicly disclosed." *SSA N.Y.*, 52 FLRA at 1141. Examples of information for which employees can have significant privacy interests include disciplinary information, *VA Dallas*, 51 FLRA at 955, and performance data, *U.S. Dep't of the Air Force, 56th Support Grp., MacDill AFB, Fla.*, 51 FLRA 1144, 1152-53 (1996).

If an agency meets its initial burden of proof, 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 the public interest. *FAA NY*, 50 FLRA at 345. In that decision, 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 as to 'what their government is up to.'" *Id.* at 344. 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 regarding FOIA Exemption 6. *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 327 (2016).

Once the relevant interests are established, the Authority balances the privacy interest of employees against the public interest in disclosure. When the privacy interests outweigh the public interest, the Authority finds that disclosure of the requested information would result in a clearly unwarranted invasion of personal privacy under FOIA Exemption 6. And unless disclosure is permitted under another exception to the Privacy Act, the Authority concludes that the Privacy Act prohibits disclosure of the information and furnishing the information is prohibited by law within the meaning of § 7114(b)(4) of the Statute. *See BOP Marion*, 66 FLRA at 674. However, if the public interest outweighs the privacy interests, the requested information is disclosable so long as disclosure is not otherwise barred by the Privacy Act. *See BOP FDC*, 60 FLRA at 94-95.

Here, the Respondent has met its burden of showing that disclosure of the requested information would implicate significant privacy interests. First, the requested information – including the hearing transcripts, which are retrievable by name – was contained in a system of records, 32VA00. *See* Tr. 45, 193, 195; *see also* GC Ex. 3; *VA Dallas*, 51 FLRA at 953 (indicating that 32VA00 was a system of records). And because the records at issue in our case are maintained by the Agency, the GC's definition of a "system of records" is inapplicable, as it pertains only to records maintained by OPM, not the records at issue in our case, which are maintained by the Atlanta VA.

Second, disclosure would implicate privacy interests of employees, including managers and bargaining unit employees. While much of the substance of the requested information is unknown, it is clear enough that the requested documents contain the names of employees accused of serious misconduct. Indeed, two "management officials" were issued disciplinary action based on the allegations, findings, and recommendations contained in the requested documents. Tr. 139; Jt. Ex. 5(a) at 2-3, 12. Moreover, the GC concedes that "allegations of

fraud and possible disciplinary action are contained" in the requested documents, and that there is "a privacy interest . . . under the circumstances of this case." GC Br. at 16. And this is consistent with Authority precedent indicating that disclosure of unredacted documents relating to an administrative investigation of employees for misconduct is prohibited by the Privacy Act unless there is a greater public interest in disclosure. *See BOP Marion*, 66 FLRA at 674. Additionally, the Authority has found that a witness who testifies at a hearing can, in certain circumstances, have a privacy interest that would bar disclosure of the witness's testimony. *See FAA NJ*, 43 FLRA at 200.[10] Here, witnesses for both the GC and Respondent indicated that the AIB witnesses could fear retaliation if their identities were discovered, even though VA policy prohibits reprisal against AIB witnesses. *See* Tr. 49, 51, 199; GC Ex. 3. And it is a fair assumption that AIB witnesses would not want their allegations against coworkers and supervisors to be publicly disclosed. *See SSA NY*, 52 FLRA at 1141. While other privacy interests alleged at the hearing, including the claim by Walker and Hobson that managers might be bullied by bargaining unit employees, were unsupported (*see* Tr. 181, 208), the record does support the conclusion that disclosure of the requested information would implicate the privacy interests of the two management officials and of the employees who testified before the AIB.

Third, the Respondent has established that the privacy interests at stake are significant. The Authority has held that employees have significant privacy interests in disciplinary information because the release of that information can be "embarrassing and stigmatizing to the employee[s]." *VA Dallas*, 51 FLRA at 955. Moreover, the Authority has held that employees have a significant privacy interest in information concerning investigations of alleged patient abuse that do not lead to disciplinary actions, because such information may have an embarrassing and stigmatizing effect despite the fact that the employee is found to be innocent of the matter for which he or she is being investigated. *Id.* Based on this precedent, it is clear that the two management officials who were disciplined based on the findings and recommendations of the AIB have significant privacy interests with respect to the requested information. Likewise, the record indicates that the employees who testified before the AIB would have an interest in preventing disclosure, as doing so would make them less likely to be targets of retaliation. For these reasons, I find that disclosure would implicate significant privacy interests.

In arguing that the privacy interests at stake are not significant, the GC cites *FAA NJ*, 43 FLRA at 200. In that decision, the Authority held that an employee who was an EEO complainant had only a limited privacy interest in the disclosure of the transcript of his EEOC hearing, and that the record failed to demonstrate that witnesses at the EEOC hearing had any privacy interests. *Id.* Our case is distinguishable, both because the two management officials in our case have significant privacy interests in matters concerning their discipline for alleged misconduct, and because the record in our case provides ample evidence of the AIB witnesses' privacy interests. Accordingly, the GC's reliance on *FAA NJ* is misplaced.

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[10] While *FAA NJ* a precedent in all respects relevant to our case, it is no longer followed insofar as it considered the union's interest in disclosure when assessing the public's interest in disclosure. *See U.S. Dep't of the Air Force, 56th Support Grp., MacDill AFB, Fla.*, 51 FLRA 1144, 1153 (1996).

Two additional points appear to be noteworthy with respect to the GC's arguments regarding employee privacy interests. First, the GC has insisted, throughout the hearing and in its post-hearing brief, that it is only interested in receiving the requested documents in unredacted form. Tr. 98; Jt. Ex. 1; GC Br. at 21. As such, there is no basis for considering whether redacted versions of the requested documents should be disclosed. *See DOL*, 51 FLRA at 467-68 (declining to consider whether redacted documents should be disclosed, because that issue had not been fully and fairly litigated). Second, while it is appropriate in some circumstances to issue protective orders limiting the dissemination of requested information, the Authority has indicated that such measures do not permit disclosure if it would constitute a violation of the Privacy Act, since "information available to anyone is information available to everyone." *Dep't of the Air Force, Scott AFB, Ill.*, 51 FLRA 675, 686 & n.9 (1995) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989)) (alteration omitted).

Having found significant privacy interests, we now assess the significance of the public interest in disclosure.

There is no dispute that the public has an interest in learning whether agencies are engaged in waste, fraud, abuse, or other serious misconduct. In this regard, the Authority has indicated that there is a strong public interest in exposing fraud committed by management officials, especially when the fraudulent actions could have wide-ranging effects on the agency. *See U.S. Dep't of Transp., FAA, New Eng. Region, Burlington, Mass.*, 38 FLRA 1623, 1630-31 (1991) (public interest in disclosing redacted documents concerning disciplinary action taken against supervisors for alleged travel voucher falsification outweighed supervisors' privacy interests); *see also DOL*, 51 FLRA at 471 (indicating that the public interest increases with the level of management involved).

Here, there are strong indications that management officials at the Atlanta VA engaged in fraud and other serious misconduct, and there is a significant public interest in determining to what extent the Agency engaged in wrongful acts for the following reasons.

First, the Respondent has admitted that there is a public interest in disclosure. In its post-hearing brief, the Respondent conceded that disclosing the requested information could "shed light on the treatment of the Agency's employees and whether there was in fact fraud as alleged." Resp. Br. at 14. Likewise, Hobson acknowledged that there would likely be a public interest in learning about the alleged misconduct investigated by the AIB and uncovering possible harassment on the job site, intimidation, retaliation, and fraud. Tr. 213, 239.

Second, the redacted AIB report strongly suggests that Atlanta VA leadership engaged in fraud and other serious misconduct. Specifically, the AIB report indicates that Agency leadership: (1) engaged in data manipulation to achieve performance at the expense of veteran clients; and (2) created a hostile work environment, "a culture of fear and/or threat to psychological safety," and a workplace in which "retaliatory action" was regularly taken. That there was poor morale, as indicated by a "high turnover rate," suggests that employees may have been leaving to escape a fraudulent and unethical work environment. Jt. Ex. 5(a) at 12-13. Likewise, the unredacted portion of the AIB recommendations memo indicated that there was a

need to "reverse the negative culture that currently exists within the HCHV program." Jt. Ex. 5(b) at 1. The public has a paramount interest in accessing the unredacted documents to evaluate the extent of whether Agency management engaged in fraud and other misconduct of taxpayer funds to benefit the nation's veterans.

Third, witnesses for the GC and Respondent indicated that the requested information would reveal that Agency leaders engaged in fraud and other serious misconduct. For the GC, Scott testified that: the Agency's HUD-VASH director told all of the Agency's 350-400 social workers to improperly delay discharging veterans; that this directive would make the Agency's performance metrics look better than they actually were; that the directive required social workers to comply and risk discipline or comply and risk losing their licenses for unethical or fraudulent conduct; and the Agency may have retaliated against Scott for his AIB testimony.

Similarly, Davis indicated at the hearing that: social workers had complained about fraud and other misconduct by management in the HUD-VASH program; social workers testified at the AIB hearing about fraud and other serious misconduct, and about how they feared losing their professional licenses as a result of submitting to improper directives issued by management; and furthermore after the AIB proceedings, there was "no change," because a supervisor who had engaged in misconduct "was still there harassing them and still retaliating against them." Tr. 61. On the Respondent's side, Hobson testified that social workers alleged before the AIB that management had violated federal guidelines, and Thompson indicated that two management officials were disciplined for misconduct based on the AIB's findings and recommendations. Tr. 113-14, 139, 213.

Fourth, the record indicates that fraud and other misconduct may have been unusually broad in scope. In this regard, it is possible that wrongdoing was perpetrated by Agency officials who were in a high enough position to affect all of the Agency's 350-400 social workers. Such wrongdoing could have affected not only the Agency's social workers but also the many veterans they served. And it is likely that the alleged data manipulation concerning the discharge of these veterans may have significantly distorted the effectiveness and efficiency of the Atlanta VA and the VA as a whole. The fact that the AIB was convened in part by a VA regional director based in Washington, D.C., and the fact that most of the AIB members were from outside the Atlanta VA, further highlight the uniquely broad and significant extent of the alleged wrongdoing.

Given the likelihood the requested information has the potential to shed light on widespread fraud and other misconduct at the Atlanta VA, I find that there is a substantial public interest in disclosure. Further, while the privacy interests of the two management officials are significant, and while there is evidence supporting the conclusion that AIB witnesses have a privacy interest as well, these privacy interests are modest when compared to the substantial public interest in disclosure for the reasons elaborated herein. The public interest in disclosing the unredacted documents requested by the Union are especially strong, since it has been shown that the heavily redacted documents offered by the Agency would still leave the public in the dark as to exactly what the Agency was "up to." *See* Tr. 34; Jt. Exs 5(a) & 5(b). In addition to precisely detailing alleged fraud and other misconduct, requiring the Agency to disclose the documents in unredacted form would enable the identification of alleged wrongdoers and "further the public interest in ensuring that 'disciplinary measures imposed are adequate, and that

those who are accountable are dealt with in an appropriate manner.'" *Prison Legal News v. Samuels*, 787 F.3d 1142, 1151 (D.C. Cir. 2015) (internal quotation marks omitted). This is an especially important goal, in light of evidence indicating that misconduct continued to be problematic after the AIB proceedings.

A ruling requiring disclosure in our case is consistent with Authority precedent. For example, in *U.S. Dep't of Transp., Wash., D.C.*, 47 FLRA 110, 126 (1993), the Authority found that there was an overriding public interest in disclosing an unredacted list of names used by the agency for the random drug testing of its employees, as the requested information would open to public scrutiny what the agency is "up to" in administering its drug testing program. Similarly, in *FAA NJ*, the Authority indicated that the public interest served in disclosure outweighed privacy interests where the information would "open to public scrutiny the manner in which the [a]gency administers its selection process and whether the [a]gency's selection process is administered in a fair and evenhanded manner." 43 FLRA at 202-03 (citation omitted). That relatively high ranking management officials engaged in the alleged misconduct also supports disclosure, for the Authority has noted that "the level of responsibility held by a federal employee, as well as the activity for which such an employee has been censured, are appropriate considerations for determining the extent of the public's interest in knowing the identity of that censured employee." *DOL*, 51 FLRA at 471 (quoting *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984)).

Moreover, Authority decisions finding against disclosure are distinguishable. The Authority has found in some decisions that the privacy interest records relating to employee discipline and misconduct outweighed the public interest in disclosure. *See VA Dallas*, 51 FLRA at 946-47, 956, 962 (privacy interest in information concerning administratively investigated cases of patient abuse by bargaining unit employees in a form that includes employees' names outweighed public interest in shedding light on operations to ensure the proper care and treatment of members of the public who are patients of the medical facility); *U.S. DOJ, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584, 584, 589-90 (1995) (privacy interest in information pertaining to disciplinary actions of a named bargaining unit employee outweighed public interest in monitoring the manner in which the government disciplines federal employees and assesses the conduct of public servants); *DOL*, 51 FLRA at 462, 464, 471 (privacy interest in unredacted disciplinary suspension records of bargaining unit employees and non-unit employees outweighed public interest in monitoring and evaluating the conduct and performance of public officials); *U.S. Dep't of Veterans, Reg'l Office, St. Petersburg, Fla.*, 51 FLRA 530, 532, 536 (1995) (privacy interest in bargaining unit employee's unredacted last-chance agreement outweighed public interest in showing how employees with medical or handicapping conditions who are facing removal for performance reasons are accommodated).

However, the facts and circumstances in the decisions above are clearly differentiated from the facts and circumstances in the case at bar based upon my specific findings of facts herein warranting and justifying disclosure. The decisions referenced immediately above entailed relatively low levels of misconduct and, for the most part, misconduct committed by lower-ranking employees. By contrast, the alleged wrongdoing at issue in this case were committed by management officials with power over hundreds of its employees, and this alleged

wrongdoing affected those employees and hundreds, if not thousands, of veterans. Because the public interest in disclosure in the case at bar is far greater than the public interest in disclosure in the above-cited decisions, those decisions are distinguishable and do not compel a finding against disclosure.

Based on the foregoing, I find that the privacy interests in our case are outweighed by the public interest in disclosure. Therefore, disclosure is not prohibited by the Privacy Act.[11]

## CONCLUSION

The Union established a particularized need for the requested information, and disclosure of the requested information was not prohibited by the Privacy Act. Therefore, the Respondent was required to provide the Union the requested information under § 7114(b)(4) of the Statute. By failing to do so, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute.

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

## ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Veterans Affairs, Veterans Affairs Medical Center, Decatur, Georgia, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish information requested by the National Federation of Federal Employees, Local 2102 (the Union) on March 9, 2017.

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

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

(a) Furnish to the Union unredacted copies of the information the Union requested on March 9, 2017, including unredacted copies of the AIB hearing transcripts, the AIB report, and the AIB recommendations memo.

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[11] And in light of this finding, it is unnecessary to determine whether disclosure also is permitted within the "routine use" exception. *See FAA NJ*, 43 FLRA at 203. Even if routine use were considered, the routine uses listed for the requested information do not include disclosure to labor organizations. *See* GC Ex. 3. Moreover, the GC has not raised a "routine use" argument. Accordingly, there is no basis for finding the requested information disclosable under the routine use exception.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Decatur Georgia Medical Center, 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, the Notice shall be distributed electronically to all bargaining unit employees, on the same day, as the physical posting, through email, posting on an intranet or internet site, or other electronic means used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 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 compliance actions have been taken.

Issued, Washington, D.C., August 31, 2018

DAVID L. WELCH
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 Department of Veterans Affairs, Veterans Affairs Medical Center, Decatur, Georgia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to distribute and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail and refuse to furnish the information that was requested by the National Federation of Federal Employees, Local 2102 (the Union) on March 9, 2017.

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

**WE WILL**, furnish to the Union unredacted copies of the information the Union requested on March 9, 2017, including unredacted copies of the AIB hearing transcripts, the AIB report, and the AIB recommendations memo.

_____
(Respondent/Agency)

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

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

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