United States of America
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-01

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DUBLIN, CALIFORNIA
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3584, AFL-CIO
(Charging Party)

SF-CA-22-0323

John Richter
For the General Counsel

Nicole McFarland
For the Respondent

Edward Canales
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION

In this case, the Union made an information request under the Statute for sanitized copies of the Agency's referral forms to the Office of Internal Affairs of bargaining-unit and non-bargaining-unit staff misconduct for a particular period of time. It did so because, based on its information that Agency management was not referring or timely referring non-bargaining-unit staff misconduct the Union and others had reported, it had filed a grievance that was proceeding to arbitration. The Union believed it needed the forms to present its case at arbitration.

The Union's information request provided a detailed account of the information it needed, why it needed the information and how it would specifically use the information at the arbitration. Recognizing that the forms would include privacy-protected information, as noted, the Union specified that the forms should be sanitized. Moreover, in its request the Union invited the Agency

to further redact the forms as it believed necessary to address its privacy-related concerns and offered to discuss clarification of the request or the format or means of furnishing the information.

Instead of meeting this effort toward compromise with a similar mindset, the Agency responded with delay, which was subsequently followed by a cryptic explanation that did not truly explain the Agency's reasons for not providing the information the Union sought. While it gave the Union some basic information (that was not useful for the Union's purpose), it did not provide the forms. It also did not work with the Union to try to obtain accommodation of its concerns, provide the forms sanitized as per the Union's request, or provide further redacted forms. As a result, the Union filed the instant unfair labor practice charge, and the entire grievance arbitration had to be postponed pending its resolution.

Regarding information requests under the Statute, the Authority will find an unfair labor practice if a union has established a particularized need for the information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest, but it does not outweigh the union's demonstration of particularized need. *IRS, Wash., D.C. and IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 671 (1995) (*IRS, Kan. City*).

In this case, I am called upon to answer two questions associated with this framework. The first is whether the Union established a particularized need for the referral forms it requested. Because the Union articulated with specificity why it needs the information, including the uses to which the information will be put, and the connection between those uses and the union's representational responsibilities under the Statute, consistent with the requirement established in *IRS, Kan. City*, the answer is yes.

The second is whether the Privacy Act's prohibition on disclosing information that would be a "clearly unwarranted invasion of privacy" prohibits the disclosure of the sanitized referral forms. Because disclosure of sanitized documents does not implicate privacy interests and because the Union in any event gave the Agency the option of redacting the forms even further to address its concerns, the answer is no.

As the Union established its particularized need and the Agency did not establish a countervailing interest that outweighed that need, the Agency's failure to provide the requested information violates the Statute. There is one more consideration here that deserves highlighting however. That is that, for information requests, the Authority envisioned an interactive process for the parties to "consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information must be disclosed." *IRS, Kan. City*, 50 FLRA at 670-71. That is what the Union did here, by offering to discuss the request and/or format or means of furnishing the information, and by allowing the Agency to redact the already sanitized forms even further. That is also what the Agency did not do – by delaying, by responding cryptically as to its concerns, and by declining the Union's efforts at compromise. Unfortunately, it takes two to accomplish the Authority's vision for the interactive process required pursuant to § 7114(b)(4) information requests under the Statute and one party was missing here.

I. Statement of the Case

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

On April 27, 2022, the American Federation of Government Employees, Local 3584 (Union or Charging Party) filed ULP charge SF-CA-22-0323 against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California (Agency or Respondent). GC Ex. 1(a). After investigating the charges, the Regional Director of the San Francisco Region issued a Complaint and Notice of Hearing (Complaint) on June 22, 2023, on behalf of the Acting General Counsel (GC). GC Ex. 1(b). The Complaint alleged that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with sanitized copies of employee misconduct referral forms, called BP-A0715 Referral of Incident forms (BP-A0715 forms), for a particular, ten-month period. GC Ex. 1(b), ¶¶ 15-16. On July 18, 2023, the Respondent filed the Respondent's Answer to Complaint and Notice of Hearing (Answer). GC Ex. 1(d). In the Answer, the Respondent alleged that it was without enough information to admit or deny that it had denied the Union's request for information. *Id.*, ¶ 12. Also, it denied that the information requested is normally maintained in the regular course of business, that it is reasonably available, that it is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of bargaining, that it does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, related to collective bargaining, and that it is not prohibited from disclosure by law. *Id.*, ¶¶ 7-11. Finally, the Respondent denied that its conduct violated the Statute. *Id.*, ¶¶ 14-16.

A hearing was held on this matter on July 16, 2024, via the Microsoft Teams video platform. 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 the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

II. Findings of Fact

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) 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 Federal Bureau of Prisons, which includes employees of the Respondent. AFGE, Local 3584 is an agent of AFGE for the purpose of representing the unit of employees employed at the Respondent. GC Ex. 1(b), ¶¶ 2-4; GC Ex. 1(d), ¶¶ 2-4. AFGE and the Respondent are parties to a collective bargaining agreement, titled Master Agreement, with a term from July 21, 2014 – July 20, 2017, which has been extended by amendment to May 2026. Jt. Ex. 1.

Susan Canales is the secretary-treasurer for the Union, having held positions with the Union for many years. She is also a retired Agency employee, having worked there for twenty-five years, including approximately twelve years as a special investigative services technician. Tr. 15. Based

on her work both for the Union and the Agency, she is familiar with the process by which staff misconduct is supposed to be handled at the Agency. Tr. 15. Specifically, employees are obligated to report staff misconduct and may do so to the CEO or warden (noting that the two names are synonyms for the same position at the Agency). Tr. 15-16; Jt. Ex. 2, p. 112. Under Bureau of Prisons Program Statement 1210.24 (Program Statement 1210.24), upon learning of staff misconduct, the warden is then obligated to report it to the Office of Internal Affairs (OIA) and within certain timeframes. Jt. Ex. 2, p. 112-13; Tr. 16.[1] The OIA is the investigating arm of the Federal Bureau of Prisons for allegations of staff misconduct. Tr. 55.

To refer staff misconduct to the OIA, the warden or the warden's delegate, often the special investigative agent (SIA), typically fills out a BP-A0715 form. Tr. 16-17, 58-60. Then, the warden signs it and provides the completed form to the OIA. Tr. 16-17. The form includes information that should be submitted in connection with a misconduct allegation, Tr. 67, for example, the date, time and place of the incident, the allegation and source of the allegation, the name, title and grade of the subject of the allegation, a summary of the incident, signature of the person preparing the referral, and signature of the warden and date. Jt. Ex. 4, p. 137. Both the warden and OIA keep copies of the completed and referred forms. Tr. 17. The SIA also retains a copy of the forms. Tr. 18. Once OIA receives the referral, they make a determination about whether the referral should be returned to the institution, whether OIA should investigate or whether the matter should be offered to the Office of the Inspector General for the Department of Justice (OIG), because that office has jurisdiction over and a right of first refusal as to certain matters. Tr. 16, 55-57.

The chief of OIA, Beth Reese, explained that the BP-A0715 form is not the only means for referring staff misconduct to the OIA, Tr. 58, and that referrals do not need to come from the warden, but may come from others, including staff. Tr. 55. However, most commonly referrals come from the leadership of the institution, Tr. 55, and in most cases the warden uses the BP-A0715 form. Tr. 55, 58, 66-67.

On December 7, 2021, the Union filed a grievance against the Agency because it believed that the warden was only referring bargaining-unit staff misconduct reported to the warden and not timely referring or referring at all non-bargaining-unit staff misconduct reported to the warden, in violation of Program Statement 1210.24. Tr. 19; *see also* Jt. Ex. 4, p. 139. The grievance alleged that these actions also violate the standards of employee conduct policy and lead to safety concerns at the institution, thereby violating the Master Agreement's requirement that the Agency lower safety hazards to the lowest possible level. Jt. Ex. 4, p. 141; *see also* Tr. 19.

There were two different situations involving five different managers that initially led the Union to become concerned about referrals and to file the grievance. Tr. 19-20. As to the first situation, the Union explained in the grievance that, between June 29, 2021 and October 22, 2021, the Union reported six times to two acting wardens, among others, that a Merit Systems Protection Board judge had found that two Agency officials had cherry-picked evidence against a bargaining-unit staff member and denied the employee due process rights. Jt. Ex. 4, p. 140;

[1] Program Statement 1210.25, also addressed to procedures for reporting allegations of staff misconduct to the OIA, replaced and rescinded Program Statement 1210.24 on August 1, 2023. Jt. Ex. 3. Because that is after the dates involved in the incidents in this case, Program Statement 1210.24 applies, rather than Program Statement 1210.25. Jt. Ex. 2; *see also* GC Br. at 2 n.3.

see also Tr. 20. As to the second situation, the Union explained in the grievance that, on October 19, 2021, staff reported to management allegations that three managers had engaged in misconduct by soliciting funds on government property during government time, and, on November 12, 2021, the Union reported the alleged misconduct to two acting wardens, among others. Jt. Ex. 4, p. 140; *see also* Tr. 20. However, according to the grievance, the list of misconduct referrals to OIA that the Agency provided to the Union on November 12, 2021 did not include referrals of these misconduct allegations. Jt. Ex. 4, pp. 139-40; *see also* Tr. 20.

This grievance was invoked to arbitration, with an arbitrator selected and an arbitration scheduled for June 7, 2022. Tr. 20; Jt. Ex. 4, p. 135. In preparation for the arbitration, the Union submitted an information request pursuant to § 7114(b)(4) of the Statute to the Agency dated March 27, 2022.[2] Jt. Ex. 4. The information request was two-part, but only the first bullet-pointed request is the subject of this proceeding. Tr. 31-32; Jt. Ex. 4, p. 133; GC Exs. 1(a), 1(b), ¶ 6. In that bullet-point, the Union requested:

> A copy of all BP-A0715 referral of incident forms for incidents that occurred at FCI Dublin during the period of 05-25-2021 to 03-27-2022 (a blank copy of form BP-A0715 is attached for reference). Some personal identifiers can be redacted. The form should provide the date of the incident, place of the incident, allegation, title and grade of subject, name and signature of person referring the incident, CEO's name and signature, location, and date. The form areas that can be redacted to satisfy the Agency's [P]rivacy [A]ct concerns are the source of the allegation, subject's name, victim's name, victim's title, summary of incident and action taken locally. (A blank copy of form BP-A0715 with areas that should be redacted is attached for reference.)

Jt. Ex. 4, p. 133.

In the information request, the Union provided a long and detailed statement of particularized need. It first indicated that it needed the information "to evaluate the actions and/or inactions of the Agency in complying with law, rule, regulation and contractual requirement." It then gave specifics, including that it needed to compare the number of bargaining-unit versus non-bargaining-unit employee referrals to OIA to ensure that management is complying with Program Statement 1210.24 in reporting cases, and that referrals are being made fairly regardless of bargaining-unit status. It also explained that it needed the information because it was aware of several staff infractions that it believed the Agency had failed to refer and/or had failed to timely refer, and it needed to determine whether the Agency was complying with Program Statement 1210.24 as to these. For these problems, it needed the information to protect the rights of bargaining-unit employees and/or the Union. *Id.* at 134.

The Union also explained in its particularized need statement that it had filed the grievance described above on December 7, 2021, and that it needed the information for the arbitration of that grievance alleging management disparity in reporting staff misconduct to OIA based on bargaining-unit status. Specifically, the Union stated that it needed to cross-reference staff reports

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[2] While the information request is dated March 27, 2022, it was transmitted by email to the Agency on March 28, 2022. Jt. Ex. 5, pp. 133, 144.

to the warden of staff misconduct (as explained in the grievance) against the BP-A0715 forms to determine whether the warden reported the alleged staff misconduct (by non-bargaining-unit employees) to the OIA and in a timely way. *Id.* at 135. The Union explained that, without the BP-A0715 forms, it would be unable to prove its case regarding disparate treatment regarding referrals. This is because the Union intended to have witnesses testify that they reported non-bargaining-unit staff misconduct and the Union needed the forms to establish that the warden had not referred or had not timely referred the incidents using BP-A0715 forms. *Id.*

The Union included attachments to the information request as well. One was the December 7, 2021 grievance for reference. Jt. Ex. 4, pp. 139-143. The other two were a blank, unredacted BP-A0715 form, *id.* at 137, and the same form, but this version had blacked-out sections that were consistent with the Union's written explanation of information that the Agency could redact. *Id.* at 133, 138. The Union provided these documents to make it clearer to the Agency what the Union sought, rather than having the Agency simply rely on the written explanation. Tr. 23. Canales explained that the Union allowed for these redactions in order to "not have [the information request] be challenged," so that they could get the forms in a timely way. Tr. 22. She also explained that, even with the redactions, the forms would provide the information the Union needed. This was because the forms would establish whether a referral (using the form) was made, provide authenticity, have the signature of the warden making the referrals, include dates of referrals to determine timeliness of the referrals, and provide bargaining unit status, titles and grades of employees. All of that would go toward showing "whether bargaining and non-bargaining managers were being treated differently," as alleged in the grievance. Tr. 23.

The information request concluded with additional, important information. Specifically, it requested that the Agency communicate with the Union for any needed clarifications. The Union also offered to meet to discuss the request and/or format or means of furnishing the information. The Union further requested that, if the Agency believed any data on the forms still needed to be withheld under the Privacy Act (even though the Union had already agreed to significant redactions), it should redact that data and provide the forms and, if the Agency had any objections, it should still deliver the portion of the forms to which it did not object. Finally, the Union requested that the forms be provided within ten working days of receipt of the information request, noting that the grievance arbitration was scheduled for June 7, 2022, and it needed the forms in order to prepare. Jt. Ex. 4, pp. 135-36.

The Agency did not respond within ten working days as requested. On April 14, 2022, after expiration of the ten-working-days deadline, the Union emailed a reminder about the request and noted that there were thirty-seven working days left until the arbitration for which it needed the information. Jt. Ex. 5, p. 144. Only then did the Agency even acknowledge that it had received the request and was reviewing it. *Id.* On that same day, the Union asked the Agency to confirm that it would provide the forms, in which case it would extend the deadline rather than filing an unfair labor practice charge, and reminded the Agency again of the imminent arbitration. *Id.*

After that, it took the Agency another eleven days to respond, which it did on April 26, 2022.[3] Jt. Ex. 6, p. 145. In the response letter, Sherry Franco, the then-human resource manager

[3] While the response letter is dated April 25, 2022, Jt. Ex. 6, p. 146, it was transmitted by email on April 26, 2022. *Id.* at 145.

for the Agency, first explained that the Union had requested a detailed list of all BP-A0715 forms for May 25, 2021 through March 27, 2022, with redactions (and also the second bullet-pointed request that is not the subject of this proceeding). *Id.* at 146; Tr. 38. It is noted, however, that the Union did not request a list, but rather requested copies of actual, completed BP-A0715 forms. Jt. Ex. 4, p. 133. Franco then stated the following:

> Based on the Administrative decision dated, August 8, 2016, only required the Agency to provide information for the period of January 1, 2014, through April 28, 2015. However, based on your request and the previous Administrative Law Judge, Susan E. Jelen decision, below is the requested information.
>
> Total number of referrals from May 25, 2021, through March 27, 2022 – (20 bargaining, 4 non-bargaining, 1 unknown).

Jt. Ex. 6, p. 146.

While Franco's statements about the August 2016 decision and its relationship to the Union's current information request are not completely clear, it can be surmised that she was indicating that that decision meant that the Agency, in response to the current request, did not need to provide the actual referral forms, but rather only the total number of referrals, broken down by bargaining-unit status. This interpretation is consistent with Franco's testimony at the hearing, in which she explained that "the judge [in the August 8, 2016 decision] had made a ruling that there was no reason to give the actual referrals. However, they did recommend giving the number of referrals." Tr. 40. To be clear, in that decision, the administrative law judge (ALJ) considered whether the union's information request for a list of referrals to OIA, broken down by bargaining-unit status but sanitized of personal identifiers, violated the Privacy Act. Based on the union's request for a sanitized list and that the union had made an "open-ended offer to accept anything the [r]espondent was willing to give" in order "to avoid any violation of the Privacy Act," the ALJ found that disclosure did not violate the Privacy Act. *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Inst. Dublin, Cal.*, 2016 WL 4413795 (OALJ Case No. SF-CA-15-0693) (*FCI Dublin*) at *7-8. Based apparently on her (mis)understanding of that decision, Franco provided the total number of referrals during the indicated time frame, along with the number for bargaining-unit employees, non-bargaining-unit employees, and unknown bargaining-unit status. Jt. Ex. 6, p. 146.

Franco did not provide copies of the actual, completed BP-A0715 forms. Instead, she wrote that the requested information for BP-A0715 referral forms "fails to identify how this information . . . would be used as it relates to the Union's representational responsibilities." *Id.* In the Agency's response, Franco did not request clarification of the Union's particularized need or otherwise offer or agree to discuss matters further. This was consistent with Franco's limited role as she apparently understood it with regard to information requests, specifically that she should review requests, determine whether they satisfied statutory requirements, provide the information if so, and if not state why not. Tr. 38.

Franco testified that, separate from the Agency's response to the information request, she raised the Agency's privacy concerns with the Union about its request. Tr. 50. However, her testimony on this point was unconvincing. She claimed she did so "verbally," but then that she

needed to "pull up old emails," that she was "not sure," but to her "best recollection" she did notify the Union then of the Agency's privacy concerns, but did "not recall" how she did that, that she didn't "know exactly," and that "[m]aybe it was in" the labor-management relations (LMR) meeting notes. Tr. 51-52.

Canales testified credibly that, during the period prior to the ULP charge being filed, all communications between the Union and the Agency about the information request occurred via email. Tr. 24. No emails for this period were provided in which the Agency directly raised Privacy Act concerns with the Union. Canales also testified credibly that, other than the Agency's response on April 26, 2022, the Agency did not raise any other concerns about the information request. Tr. 27.

The Union responded to the Agency's information request response (which only included the number of referrals by bargaining-unit versus non-bargaining-unit, and one unknown) the very next day. Jt. Ex. 7, p. 147. In the email, the Union explained that the Agency's response did not fulfill the information request as it did not include the forms. It also sought to address the Agency's indicated concern that the Union had not identified how it would use the information as it related to the union's representational responsibilities. The Union explained that,

> [w]ithout having the actual BP-A0715 forms, the Union cannot determine if the act of the referral has or has not occurred . . . The Union needs the BP-A0715 forms to ensure each report of a violation, bargaining vs. non-bargaining, has a BP-A0715 form and we cannot do that without the BP-A0715 forms. We clearly need the BP-A0715 forms to ensure that the Agency is not discriminating against bargaining unit employees in how the Agency refers matters to OIA [by comparing BP-A0715 bargaining-unit forms to BP-A0715 non-bargaining-unit forms]. We also clearly stated this would be used at arbitration scheduled in June 2022 and that entire grievance and arbitration data is included as part of the particularized need.

Id.

The Union's email response also sought to address the Agency's claim that *FCI Dublin*, 2016 WL 4413795, authorized the Agency to refrain from providing the actual forms, and to simply provide the number of referrals by bargaining-unit status instead. It explained firstly that the decision was not applicable because in that case there was no request for the BP-A0715 forms (and therefore the ALJ did not rule on that matter). Secondly, the Union pointed out that, at least in that case, the Agency had provided case numbers and the Agency had not even done that regarding the instant information request. The Union indicated that it would be filing a ULP charge based on the Agency's failure to provide the forms as requested. *Id.* The Union did so shortly thereafter, GC Ex. 1(a), providing copies of the charge to both Franco and the warden. Jt. Ex. 8, p. 149.

Within minutes of receiving the ULP charge, Franco emailed a spreadsheet to the Union, which she described in her cover email as a "list of [c]ase numbers as requested." Jt. Ex. 8, pp. 149-51. Franco testified that she provided the spreadsheet instead of the forms because she, the warden and counsel had determined that there was no way to redact the forms and have the Union still "figure out whatever it is that they were figuring out" from the forms. Tr. 41.

The spreadsheet the Agency provided after the Union filed the charge consists of twenty-five lines, presumably correlating with the twenty-five referrals to OIA. On each of the lines there is additional information, but there is nothing on the spreadsheet that explains what that additional information regards. Jt. Ex. 8, pp. 150-51. Canales testified that she could only guess at the possibilities. Tr. 28. While some of the information seems self-evident, such as case numbers, other data is less so. For example, a date is provided on each line. However, it is unknown if that is the date of the incident being described, the date of the referral to OIA, or something else. Tr. 28. A bargaining-unit status is also provided. While that is likely a reference to the bargaining-unit status of the individual who is being referred for investigation, it could be the victim. The spreadsheet also included acronyms, such as "UCSN." Jt. Ex. 8, pp. 150-51. Canales testified that she did not know what that meant, as well as other information on the spreadsheet. Tr. 28-29. Franco testified that she would have explained the categories of information if the Union had asked, but no one asked. Tr. 42.

For her part, Canales explained that, in any event, the spreadsheet that Franco provided does not satisfy the Union's need. Tr. 29. This is so for a number of reasons, including that it is a created spreadsheet (which could be inaccurate) and not an official form, as opposed to the actual forms, which provide the best evidence of what was on the forms. The forms also would include the name and signature of the warden and the spreadsheet did not. Further, the spreadsheet did not include titles and grades of the individual and the forms would have. Finally, the spreadsheet gave a date, but it was not clear what the date meant. By comparison, the form had a box for the "Date of Incident," and the date of the referral by the warden. Canales explained that the Union intended to use all of this information from the forms (that were not also on the spreadsheet) to prepare for arbitration, to identify witnesses, to prove the Union's case, and as exhibits in the arbitration. The spreadsheet did not accomplish these purposes. Tr. 28-32. Canales explained that the arbitration is on hold until the Union gets the information it seeks. Tr. 31-32.

After the Union filed the ULP charge, at monthly LMR meetings, the Union regularly raises the issue of the outstanding forms to determine whether the Agency has changed its position and is willing to provide the redacted forms. Each time, the Agency responds that the matter is in the "ULP forum and it will be dealt with at a hearing." Tr. 24-26. Each time, the Union requests that the Agency maintain the forms until then. This information was confirmed by Canales' review of the meeting minutes. Tr. 25.

Even though Franco did not explain directly to the Union at the time of the request the Agency's privacy concerns (but did make reference to the *FCI Dublin* decision), she testified about that matter. She explained that, even with the redactions the Union had offered, some of the information on the forms could still reveal the subject of the referral. That is so because the Agency is a very small institution and with information including the title and grade of the individual referred, as well as the "place of the incident," it would be easy to narrow down who was involved. Tr. 42-44; *see also* Tr. 62-63.

In addition to the testimony about being able to identify the subject of the referral with information the Union had not specifically requested to be redacted, the Respondent also provided testimony about the Agency's other concerns about identification. Reese testified that whether

there is a concern or not depends on the timeline. She explained that, once an investigation is completed and disciplinary or other action is underway, OIA routinely releases these forms to the Union and does not have a concern about doing so. However, that is not so when an investigation is open and pending. When that is the case, there would be sensitive information on the form that is "not in the Agency's or frankly in the Union's best interest in [her] view to release." Tr. 60-61. She explained that is because, if individuals learn too early that they are the subject of an investigation, they may damage the investigation and their own case. For example, they may reach out to potential witnesses to try to convince them of a version of facts that is inconsistent with other facts. Tr. 61-62.

III. Positions of the Parties

A. General Counsel

The GC submits that the Union satisfied the requirements of § 7114(b)(4) of the Statute regarding its information request for the sanitized BP-A0715 forms, thus obligating the Agency to furnish the Union with the information it requested. By failing and refusing to provide the forms as requested under § 7114(b)(4), the Respondent therefore violated § 7116(a)(1), (5) and (8) of the Statute. GC Br. at 1.

Citing § 7114(b)(4), the GC points out that an agency must furnish information to a union upon request, and to the extent not prohibited by law, if the requested information is normally maintained by the agency in the regular course of business, is reasonably available, is necessary and does not constitute guidance, advice, counsel or training for managers and supervisors relating to collective bargaining. *Id.* at 7. Starting with whether the information is normally maintained by the Agency in the regular course of business and reasonably available, the GC explains that it provided unrebutted testimony that the Agency maintains copies of the BP-A0715 forms after they are sent to OIA and that certain Agency officials, such as the associate warden and the SIA, have access to them. *Id.* at 9-10. Moreover, citing *U.S. DOJ, Wash., D.C.*, 56 FLRA 556, 560 (2000), the GC argues that OIA and OIG are agents of the Agency, and are thus obligated to comply with the Statute. Therefore, the Agency should not be absolved from providing the forms to the Union solely because some of the forms may be in the custody of OIG. GC Br. at 10. Finally, the GC argues that, even if the forms were not kept at the Agency and were completely under the control of OIA and OIG, the Agency would still be required to make a reasonable effort to obtain them, citing *U.S. Dep't of Transp., FAA, Nat'l Aviation Support Facility, Atl. City Airport, N.J.*, 43 FLRA 191, 197 (1991). Therefore, according to the GC, the BP-A0715 forms are both normally maintained by the Agency in the regular course of business and reasonably available. GC Br. at 11.

The GC next argues that the information is necessary. Specifically, the GC argues that the Union established a particularized need for the information at or near the time of the request because it explained with specificity why it needs the requested information, including how it will use it and how the use relates to the Union's representational responsibilities. *Id.* The GC explains that the Union identified Program Statement 1210.24 and explained its concerns that the Agency was failing to comply with that policy's requirements about referring reports of staff misconduct. It explained its basis for its concerns as well, specifically that the Union had information that the warden and management were not referring or timely referring reports of non-bargaining-unit staff

misconduct. Therefore, the Union wanted to review the sanitized forms and wanted "'to compare the number of referrals to OIA given to non-bargaining compared to bargaining employees.'" *Id.* at 12. The Union further explained that it had filed a grievance about this matter, attached the grievance to the request, and explained that it would use the information for the arbitration hearing over the grievance. *Id.* Citing *FAA*, 55 FLRA 254, 259-60 (1999), the GC points out that the Authority has long held that the filing and processing of grievances are within the range of a union's representational responsibilities under the Statute, thus making the forms "necessary" within the meaning of § 7114(b)(4) of the Statute. GC Br. at 12.

Citing *IRS, Kan. City*, 50 FLRA at 669-71, the GC explains that the Authority envisioned the particularized need requirement as a dialog that allows parties to consider and accommodate their respective interests to attempt to reach agreement. However, in this case, the Agency simply identified twenty-five referrals, broken down by bargaining-unit status, which did not satisfy the request, and refused to provide other information. GC Br. at 13. While the Agency subsequently provided a spreadsheet, the GC argues that that document did not satisfy the request either and it, and the Union's lack of engagement with the Agency about the spreadsheet, was post-charge conduct that is not relevant in the determination of whether the Agency violated the Statute, citing *U.S. DOJ, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 467 (2006) (*DOJ, Exec. Office*). GC Br. at 13.

The GC also addresses the Agency's Privacy Act anti-disclosure interests, which were due to the possibility, according to Agency, that the subjects of misconduct referrals could be identified even with the redactions and because it is not in either the Union's or the Agency's interest to release the forms during open investigations. The GC argues that, because the Union requested the forms in a sanitized format, the burden was on the Agency to raise any privacy-based anti-disclosure interest at the time the Union made its request, citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 496 (2015) (*Ray Brook*) and *FAA*, 55 FLRA 254. GC Br. at 13-14. According to the GC, the Agency failed to do so, as the Agency's response to the request did not mention privacy concerns (or other anti-disclosure concerns, other than the Union's alleged failure to establish a particularized need) and the parties never discussed the Agency's privacy concerns otherwise. *Id.* at 14. Citing *FAA*, 55 FLRA at 260, the GC also argues that an agency may not raise an anti-disclosure interest for the first time at an unfair labor practice hearing, which the GC alleges the Agency did here. GC Br. at 14-15. The GC also points out that the public interest is "substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information," citing *U.S. Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base, Mo.*, 50 FLRA 455, 460-461 (1995). GC Br. at 14.

Finally, the GC addresses the Agency's assertion that the information request would not accomplish the purposes for which it is sought. Citing *IRS, Kan. City*, 50 FLRA at 673, the GC argues that whether information would accomplish the Union's stated purpose does not determine whether the Union is entitled to information under § 7114(b)(4) of the Statute. GC Br. at 15.

As a remedy, the GC requests that the Agency be ordered to cease and desist from its unlawful conduct. Further, the GC requests that the Agency be ordered to furnish the Union with the requested information. GC Br. at 16.

B. Respondent

The Respondent argues that it did not violate § 7116(a)(1), (5), or (8) of the Statute when it did not furnish the BP-A0715 forms. This is so, according to the Respondent, because the Union did not establish a particularized need for the information and the Respondent has established that the information is protected against disclosure. Resp. Br. at 1-2.

The Respondent argues that the Union did not establish particularized need because the information being requested can be obtained without providing the forms the Union requested. Further, the Union did not establish a connection between its need related to timeliness of referrals and the forms because the forms do not include the date the CEO or warden became aware of the alleged misconduct, which would be needed to address timeliness of the referral, according to the Respondent. Finally, the Agency explained in its response that the Union failed to identify how the information would be useful to the Union's representational needs. *Id.* at 3-4.

The Respondent also argues that it articulated and established its privacy concerns at or near the time of the request. According to the Respondent, the Agency did so when it referenced *FCI Dublin*, 2016 WL 4413795, in its response. The Respondent argues that, because that decision involved the same information as that requested in the instant case and referenced privacy concerns, the Agency explained and established its privacy concerns at or near the time of the request. Resp. Br. at 4.

For these reasons, according to the Respondent, the Agency did not violate the Statute. Therefore, it requests dismissal of the Complaint. *Id.* at 5.

IV. Analysis and Conclusions

Under § 7114(b)(4) of the Statute, an agency must furnish a union, upon request, and to the extent not prohibited by law, data which: (1) is normally maintained by the agency in the regular course of business; (2) is reasonably available and necessary for full and proper discussion, understanding, and negotiations of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. 5 U.S.C. § 7114(b)(4). An agency's failure to provide information requested consistent with § 7114(b)(4) is a violation of § 7116(a)(1), (5) and (8) of the Statute. *IRS, Kan. City*, 50 FLRA at 673.

Under Authority precedent, § 7114(b)(4) requires that a union requesting information under it must first establish a "particularized need" for the information. This means that, at or near the time of the request, the union must articulate with specificity why it needs the information, including the uses to which the information will be put, and the connection between those uses and the union's representational responsibilities under the Statute. *Id.* at 669. As for the agency's responsibilities, the agency must assert and establish any countervailing anti-disclosure interests at or near the time of the union's request, and, like the union, it must do so in more than a conclusory way. *Id.* at 670; *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 330 (2016) (*PBGC*).

The Authority in *IRS, Kan. City*, envisioned that this process of articulating and exchanging respective interests would allow the parties to "consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information must be disclosed." 50 FLRA at 670-71. Where parties are unable to agree, the Authority will find an unfair labor practice if a union has established a particularized need for the information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest, but it does not outweigh the union's demonstration of particularized need. *Id.* at 671. Therefore, the analysis begins with the Union's articulation and establishment of particularized need.

The Union's Articulation and Establishment of Particularized Need

As noted, in order to establish a particularized need for information it seeks under § 7114(b)(4), the union is required, at or near the time it makes the request, to articulate with specificity why it needs the information, including the uses to which the information will be put, and the connection between those uses and the union's representational responsibilities under the Statute. *Id.* at 669; *Ray Brook,* 68 FLRA at 495. The requirement will not be satisfied "merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is 'required in order for the union adequately to represent its members.'" *IRS, Kan. City*, 50 FLRA at 669-70 (internal citation omitted). The union's responsibility for articulating and explaining its interests extends to more than a conclusory or bare assertion. Although the union does not need to reveal its strategies or explain precisely how the information will enable it to accomplish its stated purpose, the explanation must enable the agency to make a reasoned judgment as to whether the Statute requires disclosure. *Ray Brook*, 68 FLRA at 495-96.

The Authority has found that a union establishes a particularized need where the union states that it needs information: "(1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance." *Id.* at 496. The Authority also rejects claims that particularized need is not established when "the 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." *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 430 (2019) (*VAMC Decatur*).

As to why the Union needed the BP-A0715 forms, the Union explained in its request that the Union and others had made multiple reports to Agency management about non-bargaining-unit staff misconduct during a particular period (and provided a detailed description in the request of some of the reports); yet, a list of BP-A0715 referrals the Union had received from that period did not include referrals related to those reports. As a result, the Union explained that it had reason to believe that Agency management was not complying with the Program Statement 1210.24 requirements that management refer and timely refer all reports of staff misconduct to OIA. The Union further explained that it believed these failures violated Program Statement 1210.24, Master Agreement Article 27, Section A's requirement that the Agency lower safety hazards to the lowest possible level, and other law and policy. The Union also explained that it believed that the absence of BP-A0715 forms for the reported non-bargaining-unit staff misconduct established unfair

discrimination against bargaining-unit staff in terms of management reporting, which the Union believed was an unfair labor practice and a violation of Master Agreement Article 6's requirement that all employees be treated fairly and equitably in all aspects of personnel management. Jt. Ex. 4.

The Union also articulated in its request how it would use the forms. Although the Agency claimed that the request did not identify how the information would be used for the Union's representational responsibilities, Jt. Ex. 6, the Union could not have been more specific on this point. That is so even though a union is not required to go so far as to reveal its strategies or explain precisely how the information will enable it to accomplish its stated purpose. *Ray Brook*, 68 FLRA at 495-96. It explained that it had filed a grievance about this (which it attached to the information request), that the grievance was proceeding to arbitration, and that it would use the forms to present its case at arbitration. It explained that, at the arbitration, it would have witnesses testify about when they reported to management certain misconduct allegations. Then, the Union would use the information on the forms to cross-reference whether and when the warden referred those matters to OIA. Jt. Ex. 4. These explanations clearly articulate that the Union needs the information for the pending grievance, consistent with *Ray Brook*, 68 FLRA at 496, and referenced a specific agency action and specified that the union needed the information to assess whether that action violated established policies, as alleged in the grievance, consistent with *VAMC Decatur*, 71 FLRA at 430.

Finally, the Union established the connection between how it would use the forms and its representational responsibilities under the Statute, that is, that it would use the forms to prove its grievance case at arbitration. The Authority has long recognized that the processing of a grievance is within the range of a union's representational responsibilities under the Statute. *FAA*, 55 FLRA at 259-60.

It is also important to note that the Union only requested forms for a short period of time, from May 25, 2021 to March 27, 2022. The Union explained in its request that that time period matched the date of the violations in the grievance it had filed, establishing the connection between the time period and the Union's need. As well, the Union connected its need for all of the forms to the Union's reason for the information and how it would use the information. Specifically, the Union explained that it needed to make comparisons between the BP-A0715 forms for bargaining-unit staff and those for non-bargaining-unit staff to establish unfair and inequitable treatment, as well as failure to refer or timely refer.

Thus, the Union articulated with specificity why it needs the information, including the uses to which the information will be put, and the connection between those uses and the Union's representational responsibilities under the Statute. It therefore established the requisite particularized need.

The Respondent argues however that the Union did not establish particularized need because the information being requested can be obtained without providing the forms the Union requested. Resp. Br. at 3. The Respondent did not explain this concern at or near the time of the request. Nor does it explain that point in these proceedings, except to state that it was "shown during the hearing." *Id.* What was shown during the hearing however was that, prior to the charge being filed, the Respondent only gave the Union the total number of referrals, with an additional

breakdown by the number of referrals regarding bargaining-unit employees, non-bargaining-unit employees, and one unknown. Jt. Ex. 6, p. 146. This information does not accomplish the Union's clearly stated need, which is to compare actual referrals against the reports of misconduct allegations, to determine whether the referral was made, to determine whether it was timely made, and to compare the referrals of bargaining-unit staff versus non-bargaining-unit staff. The Agency did not provide any other alternative form of satisfying the Union's request before the Union filed the ULP charge.

Shortly after the Union filed the ULP charge, however, the Agency provided some additional information. Jt. Ex. 8. While the Authority has held that "post-charge conduct is irrelevant in determining whether or not the Statute has been violated," *DOJ, Exec. Office*, 61 FLRA at 467, in the context of an information request, it is also important to analyze the surrounding circumstances. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 & n.12 (1997). This is particularly so because of the requirement that the parties engage in a dialog to "consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information must be disclosed." *IRS, Kan. City*, 50 FLRA at 670-71.

Therefore, even though the Agency's additional information came (shortly) after the Union filed the ULP charge, it is worth considering this information and whether the Union improperly cut the dialog short by filing the charge so quickly on the heels of the Agency's denial of its request. *See* Jt. Ex. 5; GC Ex. 1(a). On balance, however, I find that the Union appropriately engaged in the interactive process the Authority envisioned, and did not cut the dialog short when it filed the ULP charge. This is so for several reasons. Firstly, there was a fast-approaching arbitration date for which the Union needed the information. The Union had so advised the Agency, but the Agency nevertheless seemingly ignored this concern with its slow response times to the Union. Jt. Exs. 4-6. Secondly, when the Agency did respond, its response did not invite dialog or other interaction at all. Jt. Ex. 6, p. 146. This is in stark contrast to the Union's information request, which invited dialog and compromise, including a request that the Agency reach out for further clarification or to meet to discuss the matter, the format or the means of providing the information, and that the Agency redact information as it considered necessary. Jt. Ex. 4, pp. 135-36. Thirdly and well-worth noting, Franco, the warden and counsel met to consider what they could redact from the forms while still giving the Union sufficient information "to figure out whatever it is that they were figuring out," Tr. 41, but did not see fit to meet with the Union to accomplish that, despite the Union's offer.

In any event, the additional information the Agency provided after the Union filed the ULP charge – the spreadsheet with additional data, some of which was self-explanatory (e.g., case number) and some of which was not (e.g., date), Jt. Ex. 8, pp. 150-51 – does not satisfy the Union's need. Canales explained the reasons why. For one, she testified that the spreadsheet is not an official document, Tr. 29, and therefore would presumably not be satisfactory for arbitration purposes. There is merit to that point. As opposed to the actual referral forms, which speak for themselves, the spreadsheet is a document apparently created by Franco regarding the forms, Tr. 42, and she would therefore be needed to explain the content of the spreadsheet and the basis for that content at arbitration. It seems improbable that she would willingly testify for the Union to prove that content, and that is especially so since she has worked at a different facility (as the

human resource manager) since shortly after the events in this case occurred. Tr. 37-38. It is also noted that Franco was not a particularly clear and well-informed witness at the instant hearing. This would present yet another hurdle were she called by the Union to explain the spreadsheet the Union would have to use to try to prove its case. Finally, on this point, Franco testified that she had never seen the BP-A0715 forms themselves, Tr. 41, making the source of the information in the spreadsheet even further removed.

Canales also explained the second reason the spreadsheet did not satisfy its need: the spreadsheet did not include the name of the warden making each referral or the warden's signature. Canales testified that the warden's name and signature were important for the arbitration in order to prove the "time the referral was made, who made the referral, was the referral made, was it made on the actual referral form." Tr. 30-31. Franco confirmed that the spreadsheet did not indicate which warden had made which referral and she was dubious that that information could be learned from the spreadsheet. Tr. 44-45. As the Union needed that information for arbitration, the alternative format the Agency provided after the Union filed its ULP charge, namely, the spreadsheet, did not satisfy the Union's need.

The Respondent also argues that the sanitized forms would not accomplish the Union's objective of establishing the timeliness of the referral. This is so, according to the Respondent, because the date of the report of the allegation is not part of the information included on the form. Resp. Br. at 3-4. But, the Respondent did not raise this point at or near the time of the request. Moreover, the question of whether information would accomplish a union's stated purpose is not determinative of whether a union is entitled to the information under § 7114(b)(4). *IRS, Kan. City*, 50 FLRA at 673; *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009). In any event, the Respondent is incorrect, as the information on the forms in fact would establish timeliness or lack thereof. This is so because the Union had independent knowledge of the date the allegations were reported to management and intended to use the forms to cross-reference the date of referral (which is included in the form) against that independent knowledge. Jt. Ex. 4, p. 135. As such, the sanitized forms would accomplish the Union's timeliness objective, as well as the objective to establish that a referral was made (or not).

Related to the Respondent's argument that the sanitized forms would not prove the Union's grievance about the warden's lack of referral and lack of timely referral of non-bargaining-unit misconduct allegations, at the hearing, the Respondent's witness, Reese, testified that the BP-A0715 form is not the only means by which a warden may refer a matter to OIA. Tr. 55-58. Presumably, this point was made to establish that the warden could have referred the non-bargaining-unit staff misconduct which the Union and others had reported by some other means, such that the lack of a form does not establish the absence of referral. However, even Reese testified that the warden typically uses the BP-A0715 form to make referrals. Tr. 55, 58, 66-67. Canales testified that the form is the means by which the warden collects the data and makes the referral. Tr. 16. Therefore, the lack of a form is, at a minimum, the starting point to establish the Union's allegation of lack of referral.

Reese also testified that referrals are not limited to the warden. Rather, referrals may come from many different sources. Tr. 55-58. This testimony, however, misses the point of the Union's grievance and related information request. The Union's grievance seeks to establish that the

warden and Agency management were not making referrals or timely referrals of non-bargaining-unit staff misconduct reported to them. Jt. Ex. 4, p. 140. Therefore, whether others made referrals is not relevant.

For all of these reasons, the GC has established that the Union demonstrated its particularized need for the BP-A0715 forms. The Respondent has failed to establish otherwise.

The Agency's Assertion and Establishment of Countervailing Anti-Disclosure Interests

The next consideration in the information request framework is whether the Agency established a countervailing interest at or near the time of the request and whether that interest outweighs the Union's demonstration of particularized need. *See IRS, Kan. City*, 50 FLRA at 670; *PBGC*, 69 FLRA at 330. In its response at or near the time of the request, the Agency gave only two cryptic reasons for denying the request. First, it claimed that the Union failed "to identify how [the] information would be used as it relates to the [U]nion's representational responsibilities." Second, it claimed that *FCI Dublin*, 2016 WL 4413795, establishes that the Agency only needed to provide the number of referrals broken down by bargaining unit status. Jt. Ex. 6, p. 146.

In its Answer, the Respondent identified other anti-disclosure interests when it denied that the information is normally maintained by the Respondent in the regular course of business, that the information is reasonably available, and that it does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, related to collective bargaining. GC Ex. 1(d), ¶¶ 7-8, 10. As these anti-disclosure interests were not asserted and established at or near the time of the Union's request, *see PBGC*, 69 FLRA at 330, I will not consider them in these ULP proceedings. Moreover, other than in the Answer, the Respondent has not asserted these arguments, either at the hearing or in its post-hearing brief. It is also noted, as to reasonable availability of the information and that it is normally maintained, the GC provided unrebutted testimony that, in the regular course, the warden and the SIA retain copies of the forms after the referral to OIA and that the SIA continues to retain them. Tr. 17-18.

As to the first anti-disclosure interest the Agency raised at or near the time of the information request, that the Union did not identify how the information would be used as it relates to the Union's representational responsibilities, that point has been addressed above. The second anti-disclosure interest raised at or near the time of the request – that *FCI Dublin*, 2016 WL 4413795, establishes that the Agency needed to provide only the number of referrals broken down by bargaining-unit status – requires more parsing out.

The first thing that is clear about this asserted anti-disclosure interest is that it neither mentions the Privacy Act by name nor does it directly assert privacy-based concerns. Franco herself acknowledged that in her testimony. Tr. 51. While she also claimed that she raised that matter separately, her testimony on that topic was unconvincing and Canales' testimony to the contrary was. Tr. 25-26, 50-52, 73-74. The Respondent argues however that the statement about *FCI Dublin*, 2016 WL 4413795, articulated and established the Agency's anti-disclosure interest related to the Privacy Act. Resp. Br. at 4.

As noted, *FCI Dublin* addresses a list of referrals to OIA by bargaining-unit status, but sanitized of personal identifiers, and finds that the disclosure of such a list does not violate the Privacy Act. It does not address sanitized BP-A0715 forms at all. 2016 WL 4413795 at *7-8. As such, it cannot be said that the Agency's reference to *FCI Dublin* in its response establishes the Respondent's Privacy Act anti-disclosure interest. On the other hand, a review of that decision (which the Union did, *see* Jt. Ex. 7, p. 147), would undoubtedly give the Union notice that the Agency was focused on privacy-based concerns.

Whether providing this type of (undeveloped) notice is sufficient and consistent with the requirement that the Agency assert and establish its anti-disclosure interests at or near the time of the information request – so as to enable the parties to try to accommodate each others' interests – is unclear. However, specifically with regard to Privacy Act defenses to ULP claims involving information requests, the Authority has considered and addressed vague and/or belated Privacy Act assertions, even though not properly raised at or near the time of the request. *See, e.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary Marion, Ill.*, 66 FLRA 669, 673-74 (2012). Therefore, in the interests of the fullest possible record, I will consider that defense here, as the Respondent denied in its Answer that providing the information is not prohibited by law, GC Ex. 1(d), ¶ 11, presented testimony about privacy-related concerns, and raised a Privacy Act defense in its post-hearing brief. Resp. Br. at 4.[4]

Pursuant to the Privacy Act, an agency is not required to disclose information if the disclosure would be a "clearly unwarranted invasion of personal privacy." *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 345 (1995) (*TRACON*); *see* 5 U.S.C. § 552(b)(6). Under the Authority's framework for analyzing such a claim in the context of a § 7114(b)(4) information request, the agency bears the burden of demonstrating: (1) that the information requested is contained in a "system of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency makes the requisite showings, the burden shifts to the General Counsel to: (1) identify a public interest that is cognizable under the Freedom of Information Act; and (2) demonstrate how disclosure of the requested information will serve that public interest. Although the parties bear the burdens set forth above, the Authority has, where appropriate, considered matters that are otherwise apparent. Once the respective interests have been articulated, the Authority balances the privacy interests against the public interest. *TRACON*, 50 FLRA at 345.

Addressing the first element of the Respondent's burden under *TRACON*, although the Respondent did not, it is apparent that the forms the Union requested are records contained within a system of records. Certainly, the forms are records. Moreover, there was testimony that the Agency, via the warden and the SIA, maintains copies of the forms after referral. Presumably the Agency would maintain those records in a particular system of records. As such, the first element of the framework is satisfied.

However, what is not apparent, and the Respondent did not make apparent, is the second element of the Respondent's burden, that is, that disclosure of the forms would implicate employee

[4] I note however that neither party's post-hearing brief develops the substance of the privacy-based matters at issue, but rather the briefs confine their arguments to whether the Agency timely raised its Privacy Act anti-disclosure interests.

privacy interests. This is so because the Union requested the forms sanitized of personal identifiers, including the subject's name, the victim's name, the victim's title, the summary of the incident, the action taken locally, and the source of the allegation. Jt. Ex. 4, p. 135. Therefore, presumably the privacy interests of the subject and the victim would not be implicated. *See Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000) (disclosure of records sanitized of identifying information does not implicate privacy interests); *U.S. DOJ, INS, Border Patrol, El Paso, Tex.*, 37 FLRA 1310, 1324 (1990) (same).

The Respondent presented testimony at the hearing however (but did not raise the issue at or near the time of the request, at which point it could have been addressed) that, because of the small size of the institution, the Union could still identify those involved based on information the Union had not already offered to redact, such as the title and grade of the individuals referred, as well as the place of the incident. That would be so, according to the Respondent, because there are some titles and grades at the institution which are encumbered by only one or a few individuals. Tr. 42-44, 62-63. The Respondent did not explain the reason that the place of the incident would make the subject or victim identifiable. However, that would presumably be so because only one or a few individuals would have access to certain places. The Respondent also presented testimony that it is better for all involved, including the subject of the allegation, not to be aware that he or she has been referred for investigation until the subject is notified of the investigative interview.[5] Tr. 61-62.

One of the obvious problems with this analysis about identifying someone by title, grade and/or place of incident is that it is hypothetical. Notably, Franco testified that she had not even seen the forms. Therefore, she could not know that any of the forms actually did involve individuals in positions that could be identified by title, grade, and/or place of incident. To determine whether someone's privacy interest is implicated or not, at a minimum, it would be necessary to review each form to determine whether or not identification could be made. Regardless, even when the size of the institution would make identification easier, the Authority has held that release of sanitized data would not constitute a clearly unwarranted invasion of privacy. *Rolla Research Ctr., U.S. Bureau of Mines, Rolla, Mo.*, 29 FLRA 107, 110, 113 (1987).

Moreover, even assuming that privacy interests were implicated based upon the remaining information in the sanitized forms, the Union had explicitly notified the Agency when it made the information request that it could redact whatever it needed to in order to address its privacy concerns. Jt. Ex. 4, p. 136. In other words, the Union gave the Agency *carte blanche* to redact as necessary any information in the forms to address the concerns it now raises about identification by title, grade and/or place of incident. Given this discretion, as well as the fact that the Union had already requested only sanitized forms, it cannot be said that employee privacy interests would be implicated by disclosure of the forms. Therefore, the Respondent has not satisfied its burden under *TRACON,* 50 FLRA at 345.

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[5] To the extent that the Respondent's interest in ensuring that the investigative subject or others not learn of a referral until the appropriate time is considered separately from the Respondent's Privacy Act defense, it was not raised at or near the time of the information request and is therefore not appropriate for separate consideration as an anti-disclosure interest. Moreover, the Respondent has not asserted any alleged, anti-disclosure legal bar associated with this interest (other than the Privacy Act) to providing the sanitized forms. As such, it is not the type of anti-disclosure interest that the Authority might consider belatedly.

For these reasons, I find that disclosing the sanitized BP-A0715 forms would not constitute a clearly unwarranted invasion of privacy. Therefore, the Privacy Act does not bar disclosure of the sanitized forms.

The ULP and Its Remedy

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

In order to remedy the Agency's unfair labor practice, the Agency will be ordered to furnish the requested information to the Union. In doing so, the Agency may redact titles and grades from particular forms when the title and grade would specifically identify the subject of the referral because the title and grade is held by only one individual. Similarly, the Agency may redact the place of incident on particular forms when that place would specifically identify the subject of the referral or the victim involved.

In further remedy, the Agency will be ordered to post a notice to employees to the effect above, signed by the warden. In accordance with the Authority's decision that ULP notices should, as a matter of course, be posted on bulletin boards and distributed to employees electronically, I will order both methods of dissemination. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City., Okla.*, 67 FLRA 221 (2014).

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 Justice, Federal Bureau of Prisons, FCI Dublin (the Agency), shall:

1. Cease and desist from:

    (a) Failing and refusing to furnish the American Federation of Government Employees, Local 3584, AFL-CIO (the Union), with the information it sought in its March 27, 2022, information request.

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

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

   (a) Furnish the Union with copies of all BP-A0715 Referral of Incident forms for incidents that occurred at FCI Dublin during the period of May 25, 2021 to March 27, 2022, sanitized by redacting the source of the allegation, the subject's name, the victim's name, the victim's title, the summary of incident, and action taken locally. As necessary, the Agency may redact titles and grades from particular forms when the title and grade would specifically identify the subject of the referral because the title and grade is held by only one individual. Similarly, the Agency may redact the place of incident on particular forms because that place would specifically identify the subject of the referral.

   (b) Post at the FCI Dublin facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden of FCI Dublin, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

   (c) Email copies of the attached Notice to all bargaining unit employees represented by the Union. The message of the email transmitted with the Notice will state in its entirety: "The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, FCI Dublin violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by the attached Notice."

   (d) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director of the San Francisco Regional Office of the Federal Labor Relations Authority in writing, within 30 days from the date this Order becomes final if no exceptions are filed, as to what steps have been taken to comply.

Issued, October 1, 2024, Washington, D.C.

LEISHA SELF — Digitally signed by LEISHA SELF Date: 2024.10.01 10:14:30 -04'00'

LEISHA A. SELF
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, FCI Dublin (the Agency) violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice:

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 3584, AFL-CIO with sanitized copies of all BP-A0715 Referral of Incident forms for incidents that occurred at FCI Dublin during the period of May 25, 2021 to March 27, 2022.

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

WE WILL furnish the American Federation of Government Employees, Local 3584, AFL-CIO with sanitized copies of all BP-A0715 Referral of Incident forms for incidents that occurred at FCI Dublin during the period of May 25, 2021 to March 27, 2022.

____

(Agency)

Date:_______________ By: ____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, San Francisco Regional Office, whose address is: 1301 Clay Street, Suite 1180N, Oakland, California 95412, and whose telephone number is: 510-982-5440.