UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 24-13

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION CUMBERLAND, MARYLAND RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4010, AFL-CIO CHARGING PARTY	Case No. WA-CA-22-0409

Flor Burden
For the General Counsel

Katherine Siereveld
For the Respondent

Aaron Stump
For the Charging Party

Before: LEISHA A. SELF
Administrative Law Judge

DECISION

In May 2022, the Union made an information request under § 7114(b)(4) of the Statute for the Agency's current staffing guidelines and the effective date of them. While it already had the Agency's 2016 staffing guidelines, the Union wanted to ensure that it had the most current version for various reasons, including so that it could decide whether to bargain and engage in informed bargaining over staffing levels and staffing guidelines, consistent with Executive Order 14003, which requires agencies to elect to bargain over such matters.

The Agency denied the request, claiming that the document was not "readily available" and because it was exempt under § 7114(b)(4)(C), as it constituted management guidance "relating to collective bargaining." Now, approximately two years later, in the course of these unfair labor practice proceedings, the Agency concedes that the 2016 staffing guidelines (which the Union has) are the current guidelines and has provided the cover page and foreword of the document, proving that in fact the document was "readily available" to it. Moreover, even a shallow dive into an understanding of the exemption it invoked at the time of the request would have shown the Agency that its staffing guidelines (which are purely operational in nature) are not the type of strategic guidance related to the process of collective bargaining itself that § 7114(b)(4)(C) exempts. *See NLRB v. FLRA*, 952 F.2d 523, 529-31 (D.C. Cir. 1992). Given the strength of the Union's particularized need and the Agency's lack of a significant countervailing anti-disclosure interest, the Agency should therefore have provided the document (or told the Union it already had the document), and it violated the Statute by not doing so.

In these proceedings, as it is (now) clear that the Union already has the document it sought, the Agency chides the Union for "expending significant time, energy, and resources seeking a document that is clearly already in the Union's possession," and asks me to dismiss the case as moot as a result. However, it is the Agency, not the Union, that was in the position to know the current staffing guidelines and the effective date of them. It is the Agency therefore that caused the needless expenditure of time, energy, and resources and also caused a significant delay in possible bargaining. The chiding is therefore misplaced.

Moreover, in order for me to find the case moot, the Agency would need to establish that intervening events have completely or irrevocably eradicated the effects of the violation and that there is no reasonable expectation that the violation will recur. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (*Davis*). Certainly, the Agency's concession does not eradicate the two-year delay and the needless expenditure of time, energy and resources. Moreover, given the Agency's continued insistence that it had and has no obligation to provide the information, there is no reasonable expectation that the violation will not recur. Therefore, this matter is not moot.

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 May 16, 2022, the American Federation of Government Employees, Local 4010, AFL-CIO (the Union or Charging Party) filed a ULP charge against the Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland (the Agency, the Respondent, or FCI Cumberland). GC Ex. 3. After investigating the charge, the Regional Director of the Authority's Washington Region issued a Complaint and Notice of Hearing (Complaint) on July 18, 2023, on behalf of the Acting General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with certain information it had requested. GC Ex. 4, ¶¶ 13-16. On August 14, 2023, the Respondent filed its Answer to the Complaint (Answer), admitting that it denied the Union's request for information, but denying that its actions violated the Statute. GC Ex. 5 at 2, ¶ 12.

On April 17, 2024, the GC filed a Motion for Summary Judgment (Motion), arguing that there are no material facts in dispute and that it is entitled to summary judgment in its favor. Because the Motion came close in time to pre-hearing related matters and reasonably close in time to the hearing, in order to fully consider the matter, I issued an Order on April 17, 2024, postponing the hearing indefinitely. On April 22, 2024, the Respondent filed the Agency Response to Motion for Summary Judgment and Cross Motion for Summary Judgment (Cross Motion), arguing that the GC is not entitled to summary judgment, but the Respondent is. On April 29, 2024, the GC filed the General Counsel's Response to Respondent's Cross Motion for Summary Judgment (Response).

II. Motions for Summary Judgment

The Authority has long held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The GC and the Respondent have submitted exhibits in support of their pleadings, and, after reviewing these documents fully, I conclude that there are no genuine issues of material fact in this case. Neither the GC nor the Respondent argues otherwise. Therefore, as only questions of law are before me, it is appropriate to decide the case on the motions for summary judgment.

III. Findings of Fact

The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). GC Ex. 4, ¶ 2. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of a nationwide consolidated unit of Federal Bureau of Prison employees, which includes employees of the Respondent. GC Ex. 4, ¶ 3. The Union is an agent of AFGE for the purpose of representing the unit employees employed at the Respondent. GC Ex. 4, ¶ 4.[1]

On May 4, 2022, the Union requested that the Respondent furnish the "current correctional services staffing guidelines that the [A]gency uses to determine staffing levels at FCI Cumberland and the effective date of these guidelines." GC Ex. 1 at 1; GC Ex. 4, ¶ 6; GC Ex. 5, ¶ 6. The Union explained its particularized need as follows:

> The Union needs the documentation and information contained in the above request to represent its members. This information is fundamentally necessary for the Union to determine if the Agency has met its contractual obligation under the contract and law.

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[1] As to these factual findings, the Respondent did not specifically admit them in the Answer, but rather asserted that they are "argument, to which a response should not be necessary." GC Ex. 5, ¶¶ 2-4. The Respondent also made a general assertion in the Answer that it denied any allegation not specifically admitted. *Id.* at 2. However, the Respondent has not provided any basis for denying these allegations and does not so argue in its Cross Motion.

- Article 3 of the Master Agreement requires the parties to be governed by existing and/or future laws, rules and government-wide regulations. The Union intends to bargain Agency staffing guidelines in accordance with the Master Agreement and Executive Order 14003. The Union is hindered from accomplishing this if the Agency refuses to furnish the requested data.

- Article 27 of the Master Agreement requires that the Employer lower the inherent hazards in the correctional environment to the lowest possible level. The Union is obligated to bargain the staffing levels at the correctional facility as the staffing levels are directly tied to the level of violence and risk to staff well-being and safety at FCI Cumberland.

- Article 6 of the Master Agreement requires that employees are treated in a fair and equitable manner in all aspects of personnel management. The Union needs the requested data to ensure that this is taking place in respect to the numbers, types and grades of employees being assigned at FCI Cumberland. The Union needs to ensure that the staffing guidelines that are being followed by the [A]gency fosters consistent and fair distribution of workloads to all employees, and that employee safety is not being risked by understaffing at FCI Cumberland. The Union needs the requested data to engage in informed bargaining on these subjects where necessary. To date, the Union has no information on what guidelines the Agency is currently following or proposed guidelines that the Agency is implementing.

The data that the Union is requesting is within the scope of bargaining permitted by Executive Order 14003, 5 U.S.C. § 7106, and directives from the Office of Personnel Management and the Attorney General. Therefore, the Agency has an obligation to furnish the requested data to the Union in accordance with 5 U.S.C. § 7114, and to notify the Union prior to making any further changes related to items covered under 5 U.S.C. § 7106(b)(1). The Agency is required to give the Union the opportunity to bargain those changes prior to their implementation.

GC Ex. 1 at 1-2.

On May 11, 2022, the Respondent denied the Union's request for information. GC Ex. 2; GC Ex. 4, ¶ 12; GC Ex. 5, ¶ 12. In its response, the Respondent explained that it denied the request because the information "constitute[s] guidance, advice, counsel, or training provided by management officials or supervisors, related to collective bargaining," and was therefore exempt under § 7114(b)(4)(C), and because the "information is not readily available, as staffing levels are determined by the fluctuating budget provided by Congress." GC Ex. 2.

At some point prior to making the request in May 2022, the Union received the 2016 Agency staffing guidelines. Response at 3; GC Ex. 6, ¶¶ 11-12. The then-Union president believes that the Agency provided this document to the Union voluntarily. GC Ex. 6, ¶ 12. The Respondent now concedes in its Cross Motion that the 2016 guidelines are the current staffing guidelines. Cross Mot. at 3-4. However, the Union did not know that when requesting the information. Response at 3; GC Ex. 6, ¶¶ 11-12.

IV. Positions of the Parties

A. General Counsel

The GC submits that the Union satisfied the requirements of § 7114(b)(4) of the Statute, thus obligating the Agency to furnish the Union with the information it requested. Firstly, the GC asserts that the Union established a particularized need for the information, as defined by the Authority in *IRS, Wash., D.C. & IRS, Kan. City Service Center, Kan. City, Mo.*, 50 FLRA 661, 669-71 (1995) (*IRS, Kan. City*). The GC explains that the Union did so by stating in its request that it needed the information to represent its members and to determine if the Respondent met its obligations under the Master Agreement and Executive Order 14003. The Union also explained that it believed it was obligated to bargain staffing levels, as staffing guidelines are directly related to the level of violence and risk to staff well-being and safety. The GC further argues that the Union explained that it needed the requested data to determine what changes the Respondent had made to the numbers, types and grades of employees, in order to determine whether to invoke bargaining under § 7106(b)(1) of the Statute, and to be able to engage in informed bargaining on staffing levels, staffing guidelines, safety and fair workload distribution. Therefore, according to the GC, the Union sufficiently articulated with specificity why it needed the information (to represent its members in the oversight and administration of the collective bargaining agreement and to bargain), how it was going to use the information (to determine the Respondent's current staffing guidelines, changes to them, and changes in staffing levels), and the connection between the uses and the Union's representational responsibilities (to determine whether the Respondent has met its legal and contractual obligations and to determine whether to invoke bargaining). As such, according to the GC, the Union satisfied the requirement to establish a particularized need. Mot. at 4-5.

The GC then argues that the Agency did not adequately establish any countervailing anti-disclosure interest for the information at or near the time of the information request, as required. Instead, according to the GC, the Agency stated in a conclusory way that staffing guidelines were not reasonably available and that they constituted guidance, advice, counsel or training provided by management officials or supervisors, related to collective bargaining. *Id.*

Further, as to reasonable availability, the GC points out that the Agency claimed that the information is not reasonably available because staffing levels are based on fluctuating budgets. However, the Union requested current staffing guidance. Therefore, "[w]hile staffing levels may change *in the future* based on changes in the budget, the Charging Party requested the *current* staffing guidance used by Respondent to determine its staffing levels." *Id.* at 5 & n.20. The GC also points out that, in the past, the Respondent voluntarily provided the staffing guidelines from 2016.[2] For these reasons, the Respondent did not adequately explain why it did not have access to the current staffing guidelines. *Id.* at 5.

As to the Agency's claim that the information constitutes guidance, advice, counsel, or training provided by management officials or supervisors, related to collective bargaining, the GC argues that the staffing guidelines merely contain recommendations for staffing levels, not

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[2] It is noted that, when the GC submitted the instant Motion and made this point, the GC and the Union did not realize that the 2016 guidelines are the current guidelines. That became known only when the Respondent submitted its Cross Motion, conceding that information. Response at 3; Cross Mot. at 3-4.

information about the interpretation or application of negotiated collective bargaining agreements, positions to take during negotiations, how to respond to grievances or unfair labor practice complaints, or similar strategic information, which are the types of information that fall within this narrow exception the Agency invoked. *Id.* at 5-6. Therefore, the information requested is not exempt under § 7114(b)(4)(C), according to the GC. *Id.* at 6.

Because the Union established a particularized need and the Agency's asserted countervailing anti-disclosure interests do not outweigh that need, the Agency has a duty to provide the staffing guidelines, the GC argues. Its failure to do so violates § 7116(a)(1), (5), and (8) of the Statute. *Id.* To remedy this failure, the GC requests an order that the Agency provide the information, cease and desist from failing to provide information under § 7114(b)(4) of the Statute, and post a notice physically and by electronic mail to the bargaining unit employees. *Id.* at 6-7.

The GC also provides a response to the Respondent's claim in its Cross Motion that this case is moot because the Union has the document it sought in connection with the May 4, 2022 information request. The GC asserts that a party alleging a matter is moot must demonstrate: "(1) that there is no reasonable expectation that the alleged violation will recur; and (2) events have completely or irrevocably eradicated the effects of the alleged violation." Response at 2-3 (quoting *Dep't of Homeland Security, CBP, Laredo Station*, 70 FLRA 921, 922 (2018)). The GC argues that the Union was unaware at the time it made the request in 2022 that the 2016 staffing guidelines were the current staffing guidelines and, if the Agency had simply complied with its obligation under the Statute, the two-year delay and the waste of the parties' resources could have been avoided. Moreover, according to the GC, the Respondent continues to insist that it has no obligation to disclose staffing guidelines. Therefore, the GC asserts, the Respondent will continue to improperly deny future statutory information requests for staffing guidelines and events have not completely or irrevocably eradicated the effects of the alleged violation. As a result, the case is not moot, according to the GC. *Id.* at 2-3.

B. Respondent

In its Cross Motion, the Respondent asserts that the information is exempt from disclosure under § 7114(b)(4)(C), as it constitutes guidance for management officials relating to collective bargaining. According to the Respondent, it explained that when it denied the Union's request for information. Cross Mot. at 1-2 (citing 5 U.S.C. § 7114(b)(4)(B) and (C)).

The Respondent explains that the document requested contains a foreword which states the following:

> Staffing [c]onsiderations are recommended guidelines for use by [e]xecutive staff when determine the number of staff within each discipline in a federal correctional institution . . . These considerations are literally 'considerations' since local discipline staffing requirements vary, depending upon such factors as institution security level, mission, age, architecture, available technology, inmate population characteristics, etc. Application of these guidelines, in most cases, will ensure consistency among like institutions and proper fiscal management of resources.

Id. at 2.

The Respondent then asserts that, in determining whether a request for information "trigger[s] the [§ 7114(b)(4)(C)] exemption," the Authority "must examine each request on a 'case-by-case basis' and determine whether or not the union has met [its] burden of a particularized need." *Id.* at 2 (citing *NLRB v. FLRA*, 952 F.2d at 534). The Respondent asserts that, in *NLRB v. FLRA*, the Court explained, by way of example, that a union "may well meet the particularized need standard *where the union has a grievable complaint covering the information.*" *Id.* at 2-3 (citing 952 F.2d at 532). Again citing *NLRB v. FLRA*, the Respondent notes that "management often has a legitimate interest in preserving for itself, alone, information on guidance, advice, counsel or training provided for management officials. This interest is most weighty with respect to matters relating to the *process* of collective bargaining." *Id.* at 3 (quoting 952 F.2d at 532 (internal quotation marks omitted)). According to the Respondent, "the weight in this case is most certainly on the balance of management's interest in providing guidance to its executive staff on the internal distribution of resources throughout the Agency's approximately 120 facilities." *Id.* The Respondent also notes that, in its denial of the information request, the Agency explained to the Union that "the actual distribution of those resources depends on the needs of the different facilities at the time and funding levels from Congress and therefore the approved staffing levels are fluid." *Id.*

Finally, the Respondent argues that the case is moot because the issues presented are no longer "live" or "the parties lack a cognizable interest in the outcome." *Id.* (citing *Davis*, 440 U.S. at 631). According to the Respondent, this is so because the Union admits that it has possession of the document it sought in the information request. *Id.* Specifically, in the affidavit submitted with the GC's Motion, the then-Union president admitted that the Union had obtained the 2016 Agency staffing guidelines. Further, the GC attached the guidelines as an exhibit to the Motion. *Id.* (citing to GC Ex. 6, ¶ 12; GC Ex. 8). According to the Respondent, the Union is expending significant time, energy and resources seeking a document that it clearly already has, and therefore the matter should be dismissed as moot. *Id.* at 3-4. Based on these reasons, according to the Respondent, summary judgment against it should not be granted and summary judgment in favor of the Respondent should be, resulting in dismissal of the complaint. *Id.*

V. Analysis and Conclusions

A. The Agency violated § 7116(a)(1), (5) and (8) of the Statute when it failed and refused to provide the staffing guidelines the Union requested (or failed to inform the Union that it already had them).

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.

Under Authority precedent, § 7114(b)(4) requires that a union requesting information under it must first establish a "particularized need" for the information. *IRS, Kan. City*, 50 FLRA at 669.

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.* The requirement will not be satisfied merely by showing that the requested information is or would be relevant or useful. Instead, the union must demonstrate that the information is "required in order for the union adequately to represent its members." *Id.* at 669-70 (citation omitted). The union's responsibility for articulating and explaining its interests extends to more than a conclusory or bare assertion. Its explanation must be sufficient to permit an agency to make a reasoned judgment as to whether the information must be disclosed under the Statute. *Id.* at 670.

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.*; *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 330 (2016) (*PBGC*). Where the parties are unable to agree on whether, or to what extent, requested information must be provided, 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, Kan. City*, 50 FLRA at 671.

However, apart from the union's particularized need and weighing that need against the agency's (other) anti-disclosure interests, under § 7114(b)(4)(C), there is a categorical exemption from disclosure for information that constitutes "guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining." 5 U.S.C. § 7114(b)(4)(C). As explained by the Authority, this exemption applies only to information about the collective bargaining process itself. *NLRB*, 38 FLRA 506, 522-23 (1990), *aff'd in relevant part, NLRB v. FLRA*, 952 F.2d at 525. It includes information about: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or ULP charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive bargaining representative of the employees. *NLRB*, 38 FLRA at 522-523; *Dep't of HHS, Wash., D.C.*, 49 FLRA 61, 67-69 (1994) (*HHS*).

The Authority has explained that § 7114(b)(4)(C) "constitutes a narrow exception to an agency's duty to furnish data under [§] 7114(b) of the Statute." *NLRB*, 38 FLRA at 520. It does not exempt from disclosure "guidance, advice or counsel to management officials concerning the conditions of employment of a bargaining unit employee, for example: the personnel, policies and practices and other matters affecting the employee's working conditions that are not specifically related to the collective bargaining process." *Id.* at 523. The distinction is between "information about the subject of collective bargaining versus information about the bargaining itself," or "nonstrategic" versus "strategic information." *NLRB v. FLRA*, 952 F.2d at 530-31.

In its Cross Motion, the Respondent argues that, in assessing whether § 7114(b)(4)(C) exempts information, the Authority must balance an agency's interest against the union's particularized need, claiming that the union could prevail where it has a grievable complaint covering the information. Cross Mot. at 2-3. However, this description of the legal framework applicable to § 7114(b)(4)(C) is incorrect. If information falls within the parameters of § 7114(b)(4)(C), it is categorically exempt from disclosure. *NLRB v. FLRA*, 952 F.2d at 532. That

is, its exemption does not depend upon the strength of the union's particularized need, whether established by asserting that a grievable complaint covers the information or otherwise.

As § 7114(b)(4)(C) information is exempt from disclosure regardless of the strength of the Union's particularized need, I will address that issue first. I will then address whether the Union established a particularized need for the information, as required by § 7114(b)(4)(B) of the Statute, and whether the Agency's countervailing anti-disclosure interests outweigh that need.

1. The information requested is not exempt under § 7114(b)(4)(C) of the Statute.

At or near the time of the Union's request, the Agency asserted that the information was exempt under § 7114(b)(4)(C), but did not explain why it was that the information fell within that exemption. GC Ex. 2. In its Cross Motion, the Respondent explains that the information is exempt from disclosure under § 7114(b)(4)(C) because, as explained in the document's foreword, it contains staffing considerations, which are guidelines and considerations for executive staff for determining the number of staff, because the considerations vary depending on a number of factors, because application of them will ensure consistency among institutions, and because the document provides guidance to executive staff on the internal distribution of resources throughout the Agency. Cross Mot. at 2-3. The Respondent also mentions that "the actual distribution of those resources depends on the needs of the different facilities at the time and funding levels from Congress and therefore the approved staffing levels are fluid." *Id.* at 3. It is unclear whether this statement is intended as support for the Respondent's claim that the staffing guidelines are exempt from disclosure under § 7114(b)(4)(C), but it will be assumed to be for this analysis.

As noted, in order to establish that the information at issue is exempt from disclosure under § 7114(b)(4)(C), the Respondent must establish that it is strategic information about the collective bargaining process itself. *See NLRB v. FLRA*, 952 F.2d at 530-31. However, the explanations the Respondent provided do not so establish. That is, simply because the document provides guidelines and consideration about staffing to executive staff, as argued by the Respondent, does not make it strategic information about the collective bargaining process itself. Instead, for example, if the document gave recommendations to the Respondent's negotiating team for negotiating staffing with the Union, then it would be found that the document regards strategic information about the collective bargaining process itself. Similarly, simply because the document explains that staffing varies based on various factors, as explained by the Respondent, does not establish that the document includes strategic information about the collective bargaining process itself. Instead, for example, if the document described to management the way that those variations should be interpreted in the handling of a particular grievance, then it would be found that the document regards strategic information about the collective bargaining process itself. The same applies to the Respondent's other explanations. The Respondent's explanations simply support that the document contains management information and guidance about conditions of employment, namely staffing and post assignment, but there is nothing in the Respondent's explanations that supports that the document contains the type of strategic information about the collective bargaining process itself that is exempt from disclosure under § 7114(b)(4)(C).

In addition to assessing the Respondent's arguments about the document at issue, I have also independently reviewed the document[3] to determine whether it contains information that falls within the § 7114(b)(4)(C) exemption. In all, the document is focused on correctional services staffing based on the operational needs and considerations of the different facilities. GC Ex. 8. It provides information to management about mandatory and recommended staffing and some post assignment guidance. The document also includes a chart which provides the number of staff per post depending on the shift and the security level of the facility, among other factors. Some of these appear to be mandatory, *id.* at 7-9, and some appear to be recommendations or considerations, *id.* at 9-11.

My review also revealed that there is nothing in the document that regards strategic information about the collective bargaining process itself. In so finding, I have borne in mind the examples the Authority provided in *NLRB* of the type of strategic information at issue, that is: (1) courses of action Agency management should take in negotiations with the Union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or ULP charge should be handled; or (4) other labor-management interactions which have an impact on the Union's status as the exclusive bargaining representative of the employees. *See NLRB*, 38 FLRA at 522-523. There is nothing of the sort (or related thereto) in the Agency's 2016 staffing guidelines. As such, neither the Respondent's explanations in its Cross Motion nor my independent review establishes that the document at issue is exempt from disclosure under § 7114(b)(4)(C).

2. *The Union satisfied the particularized need requirement under § 7114(b)(4)(B) and the Agency's countervailing anti-disclosure interests do not outweigh that need.*

Given that the information requested is not exempt from disclosure under § 7114(b)(4)(C), the next consideration is whether the Union established a particularized need for the information, as required by § 7114(b)(4)(B). *See IRS, Kan. City*, 59 FLRA at 669. Consistent with *IRS, Kan. City,* in order to establish particularized need, the GC must establish that the Union explained at or near the time of its request, 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.*

In the Union's information request, the Union asserted that it needs the information for a number of reasons: "to represent its members"; "to determine if the Agency has met its contractual obligation under the contract and law"; "to bargain Agency staffing guidelines in accordance with the Master Agreement and Executive Order 14003"; to bargain staffing levels at the facility because "staffing levels are directly tied to the level of violence and risk to staff well-being and safety" at the facility and because Article 27 of the Master Agreement obligates the Agency to "lower the inherent hazards in the correctional environment to the lowest possible level"; "to ensure that the staffing guidelines that are being followed by the [A]gency foster consistent and fair distribution of workloads to all employees, and that employee safety is not being risked by understaffing," consistent with Article 6 (which the Union states "requires that employees are treated in a fair and

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[3] As noted, the Respondent concedes that the 2016 Agency staffing guidelines, which are an exhibit to the GC's Motion, are the current guidelines. Cross Mot. at 3-4; GC Ex. 8. Therefore, that is the document that I reviewed.

equitable manner in all aspects of personnel management"); and "to engage in informed bargaining on these subjects where necessary." GC Ex. 1 at 1-2.

With regard to information requests for contract negotiations, the Authority has held that an assertion that requested information is necessary to "assist in developing proposals for . . . negotiations" is a "conclusory or bare assertion that is insufficient to establish particularized need." *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 979 (2010) (*IRS*). Further, even if the union explains the particular subject of negotiation, it still needs to explain "why the union need[s] the particular information that it requested and the uses to which it would [put the] information with respect to preparing for negotiations." *Id.* Finally, "where a union asserts that it needs information to draft bargaining proposals concerning a certain matter, and that matter is outside the duty to bargain, the union does not demonstrate that the information is necessary within the meaning of § 7114(b)(4)(B) of the Statute." *Id.*

Here, the first two general reasons the Union provided, "to represent its members," and "to determine if the Agency has met its contractual obligation under the contract and law," are the type of conclusory or bare assertions that the Authority has found insufficient to establish particularized need. Other stated reasons the Union provided get closer, as they explain that the Union needs the information for bargaining and the particular subjects – staffing guidelines and staffing levels. Importantly, the Union then articulated why it needs the particular information for bargaining and the uses to which it will put the information: to assess staffing levels at the facility with a focus on employee safety and well-being, considering the Agency's contractual obligation under Article 27 to lower the inherent hazards in the correctional environment to the lowest possible level; to review the staffing guidelines to determine whether they "foster consistent and fair distribution of workloads to all employees, consistent with Article 6, which requires fair and equitable treatment of employees, and to ensure that employee safety is not being risked by understaffing; and, finally, to determine whether bargaining is "necessary" regarding these subjects. These last explanations provide the requisite specificity as they explain why the Union needs the information and the uses to which it will put the information in the bargaining context. *See, e.g., SSA*, 64 FLRA 293, 293 (2009) (the union established particularized need for employee lunch and break times because it explained it needed the information to determine whether the agency proposal on that subject was based on operational needs). That the Union tied its assertion of need to particular contract provisions further establishes the specificity required to establish particularized need. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015) (*FCI Ray Brook*).

As noted, though, even though a union adequately explains with specificity why it needs information and the uses to which it will put the information with regard to bargaining, if the "matter is outside the duty to bargain, the union does not demonstrate that the information is necessary within the meaning of § 7114(b)(4)(B) of the Statute." *IRS*, 64 FLRA at 979. That is so because a union must establish a connection between the uses to which it will put the information and its representational responsibilities under the Statute. *See IRS, Kan. City*, 59 FLRA at 669.

The Union here explained that it seeks to bargain staffing levels and staffing guidelines (or at least assess whether it should do so) pursuant to Executive Order 14003. GC Ex. 1 at 2. Under the Statute, the substance of staffing allocation and related matters are negotiable only at the election of the agency. 5 U.S.C.§ 7106(b)(1); *see AFGE, Local 1748, Nat'l Council of Field Labor*

Locals, 73 FLRA 233, 235 (2022) (Section 7106(b)(1) subjects include "the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency's organization and the accomplishment of its work"). However, Executive Order 14003, effective January 27, 2021, establishes that executive agencies are required to elect to bargain over § 7106(b)(1) subjects, which include staffing matters. GC Ex. 7 at 2 (86 Fed. Reg. 7231, 7232 (Jan. 27, 2021)). Therefore, given this obligation, there is a clear connection between the Union's stated use (to bargain over the substance of staffing guidelines and staffing levels) and its representational responsibilities.[4] *See IRS*, 64 FLRA at 979.

The Union also explained that it seeks to bargain staffing guidelines and staffing levels consistent with the Agency's obligation to bargain over changes to them prior to their implementation. GC Ex. 1 at 2. This explanation is understood to indicate that the Union intends to use the information it seeks to bargain over matters within the duty to bargain under § 7106(b)(2) and (3) of the Statute, that is, negotiable procedures and/or appropriate arrangements regarding changes the Agency makes to the staffing guidelines and staffing levels. *See* 5 U.S.C. § 7106(b)(2) and (3). As such, even apart from its invocation of Executive Order 14003 and bargaining over the substance of staffing, the Union has established a connection between the uses to which it will put the information it seeks and its representational responsibilities to bargain over § 7106(b)(2) and (3) matters. *See IRS*, 64 FLRA at 979.

It is notable that, when the Agency denied the information request, it did not assert that the Union had not established particularized need. GC Ex. 2. Nor does it do so in its Cross Motion. However, in the Cross Motion, in connection with its § 7114(b)(4)(C) argument, the Respondent mistakenly asserts that a union may overcome the § 7114(b)(4)(C) exemption when its particularized need consists of a "grievable complaint covering the information." Cross Mot. at 2-3 (italics omitted). The Respondent also asserts in the Cross Motion that "the actual distribution of . . . resources depends on the needs of the different facilities at the time and funding levels from Congress and therefore the approved staffing levels are fluid." Cross Mot. at 3. To the extent that either of these assertions could be construed to argue that the Union has not established particularized need, they are conclusory and unsupported. Moreover, a claim that the document the Union seeks does not provide it with all of the information it needs does not affect whether the document is considered necessary under the Statute. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808, 813 (2002) ("whether requested information would accomplish a union's purpose is not determinative of whether it is necessary within the meaning of the Statute").

As such, the Union has established its particularized need for the information by explaining why it needs the information, the uses to which it will put the information, and the connection between those uses and the Union's representational responsibilities. Therefore, an unfair labor practice will be found if 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. *See IRS, Kan. City*, 50 FLRA at 671. As explained above, the Agency had

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[4] It is noted that Executive Order 14003 by its terms does not create a right enforceable against executive agencies. 86 Fed. Reg. at 7233. However, in these proceedings, the GC is not seeking to require the Agency to elect to bargain over the substance of staffing matters. Nor is there an indication that the Agency will not elect to bargain over such matters. In the meantime, it is within the Union's representational responsibilities to prepare to bargain with the Agency over matters that Executive Order 14003 requires the Agency to elect to bargain.

an obligation to articulate its anti-disclosure interests at or near the time of the Union's information request and was required to do so in more than a conclusory way. *See PBGC*, 69 FLRA at 330.

Other than its assertion that the document was exempt under § 7114(b)(4)(C), as it was "guidance, advice, counsel, or training provided by management officials or supervisors, related to collective bargaining," GC Ex. 2, which has been rejected, the only other anti-disclosure interest the Agency raised at or near the time of the request was that the information "is not readily available as staffing levels are determined by the fluctuating budget provided by Congress." *Id.* This is assumed to be an assertion that the information is not "reasonably available" under § 7114(b)(4)(B). As noted, in its Cross Motion, the Respondent relatedly asserts that "the actual distribution of . . . resources depends on the needs of the different facilities at the time and funding levels from Congress and therefore the approved staffing levels are fluid." Cross Mot. at 3.

In *PBGC*, 69 FLRA at 330, the Authority explained that, when an agency asserts that information is not "reasonably available," it must substantiate that claim, such as by explaining how much time or resources would be required to retrieve the data. The Respondent did not do so, either when it denied the request or in its Cross Motion. Moreover, in its Cross Motion, the Respondent attached the cover page and the foreword of the document at issue. Resp. Att. 1 at 5-6. This obviously establishes that the Respondent currently has the document in its possession, and there is no reason to believe it did not also have it when the Union made the information request in May 2022. The Respondent has not so argued.

As to the Respondent's assertion that the information is not "readily available" because staffing levels are fluid and/or are determined by the fluctuating budget provided by Congress, the GC correctly points out that these reasons do not support that the document is not reasonably available. As the GC explained, the Union requested current staffing guidelines. Therefore, even though there may be changes based on future developments, the current staffing guidelines are reasonably available to the Agency. *See* Mot. at 5 n.20.

Given that the Union articulated its particularized need for the information it requested on May 4, 2022, and the Respondent has not established countervailing interests that outweigh the Union's articulation of particularized need, it is clear that the Agency was required to provide the information requested under § 7114(b)(4) of the Statute (or tell the Union that it already had it). Its failure to do so constitutes a failure to bargain in good faith with the Union, in violation of § 7116(a)(1), (5) and (8) of the Statute.

B. The case is not moot.

The Respondent argues however that the case is moot because the Union admits that it has the document that it sought in its May 4, 2022 information request. Cross Mot. at 3-4. The burden to establish mootness resides with the party asserting it, and it is a heavy one. A case is moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *Davis*, 440 U.S. at 631. In order to so establish, "interim relief or events [must] have completely and irrevocably eradicated the effects of the alleged violation" and there must be "'no reasonable expectation' that the alleged violation will recur." *Id.* (citations omitted).

In this case, while in possession of the 2016 Agency staffing guidelines, on May 4, 2022, the Union requested the current staffing guidelines and the effective date of those guidelines. GC Ex. 1 at 1. When it made the request in 2022, the Union was unaware that the 2016 Agency staffing guidelines are the current guidelines. Response at 3; GC Ex. 6, ¶¶ 11-12. Now, approximately two years later, in its Cross Motion submitted in April 2024, the Respondent acknowledges that the 2016 Agency staffing guidelines are the current staffing guidelines. It also chides the Union for wasting time, resources and money on a document that it already had. Cross Mot. at 3-4. However, it is the Agency that caused this waste of time, energy and resources and the resulting delay in possible bargaining, as it was in the position to know that the 2016 Agency staffing guidelines were (and are) the current guidelines and in the position to provide that document to the Union. The Union was not in the position to know that it had the current document. Given the waste and delay the Respondent caused, it cannot be said that its concession completely and irrevocably eradicates the effects of the violation. *See, e.g., SSA,* 64 FLRA at 297 ("the fact that the [r]espondent later provided the requested information does not alter the fact that it violated the Statute when it denied the request").

Moreover, the Respondent continues to assert that it had and has no obligation to provide staffing guidelines under the Statute. Cross Mot. at 1-3. Therefore, it also cannot be said that there is no reasonable expectation that the alleged violation will recur. *See Davis*, 440 U.S. at 631. For these reasons, the Respondent has not met its burden to establish that this matter is moot.

C. The Agency is ordered to remedy its actions.

When an agency unlawfully refuses to furnish necessary information, the Authority normally orders the agency to provide that information and to post a notice, physically and electronically. *See FCI Ray Brook*, 68 FLRA at 494, 498-99. That is the remedy the GC seeks in this case. Mot. at 6-7. However, the Respondent has admitted that the 2016 staffing guidelines are the current guidelines. Cross Mot. at 3-4. As the Union has those staffing guidelines, it has the information that it sought in its information request. GC Ex. 6, ¶¶ 11-12; Response at 3. Therefore, it is not necessary to order the Respondent to provide the guidelines to the Union. As such, the appropriate remedy in this case is to order the Agency to post a notice, physically and electronically. *See SSA*, 64 FLRA at 297-98 (cease-and-desist order accompanied by a notice posting is appropriate when the union has already received the information requested).

I therefore recommend that the Authority grant the General Counsel's Motion for Summary Judgment, deny the Respondent's Cross Motion, and issue the following Order:

ORDER

Pursuant to § 2423.41 of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute, the Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland shall:

1. Cease and desist from:

   (a) Failing and refusing to provide information properly requested under Section 7114(b)(4) of the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Post copies of the attached Notice at the Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland. The Notices shall be on forms to be furnished by the Federal Labor Relations Authority. They shall be signed by Christopher Wade, Chief of Labor Relations, and then posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and all other places where notices are customarily posted in the facilities where the Charging Party's bargaining unit employees work. Reasonable steps shall be taken to ensure that the Notices are not altered, defaced, or covered by any other material.

(b) On the same day as the physical postings, send a copy of the Notice by email to the bargaining unit employees of the Charging Party. The message of the email transmitted with the Notice shall state in its entirety: "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number WA-CA-22-0409."

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office in writing, within thirty (30) days from the date this Order becomes final, as to what steps have been taken to comply.

Issued, May 23, 2024, Washington, D.C.

LEISHA SELF

Digitally signed by LEISHA SELF
Date: 2024.05.23 11:32:30 -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 Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice:

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the American Federation of Government Employees, Local 4010 with information properly requested under Section 7114(b)(4) of the Federal Service Labor-Management Relations Statute.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(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, Washington Regional Office, whose address is 1400 K Street, NW, Third Floor, Washington, D.C. 20424, and whose telephone number is: (771) 444-5780.