68 FLRA No. 83

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
RAY BROOK
RAY BROOK, NEW YORK
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3882
(Charging Party/Union)

BN-CA-10-0552

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DECISION AND ORDER

April 22, 2015

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

I. Statement of the Case

In the attached decision, the Federal Labor Relations Authority's (FLRA's) Chief Administrative Law Judge (the Judge) found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to provide certain information requested by the Union under § 7114(b)(4) of the Statute.[2]

This case presents three issues: (1) whether the Union articulated a particularized need for the information; (2) whether the Agency adequately raised a countervailing anti-disclosure interest; and (3) whether disclosure of the information is prohibited by law. We find that the Judge correctly applied Authority precedent to determine that the Union established its need for the information, and that the Agency failed to articulate an anti-disclosure interest at the time it denied the Union's request. Moreover, with one exception, we find that there is no merit to the Agency's contention that disclosure of the information is prohibited by law. Finally, we conclude that the disclosure of the Agency's contingency plans is contrary to law, based on the parties' stipulation to that effect.

II. Background and Judge's Decision

A. Background

Following a series of violent confrontations between rival gangs of inmates housed by the Agency, the Agency repeatedly placed the institution on lockdown, whereby prisoners were confined to their individual cells. The Agency initiated the first lockdown on August 1, 2010,[3] following two incidents, which occurred on July 31 and August 1. Violence broke out again on August 3, shortly after the Agency lifted the lockdown, causing it to return to lockdown status that same day. Another incident occurred on August 6, soon after the Agency's second attempt to lift the lockdown, and in connection with that incident, an inmate was apprehended with a weapon. Rather than returning to full lockdown, the Agency placed the institution on a modified lockdown, confining inmates to their housing units, but not to individual cells.

Following these incidents, on August 9, the Union requested copies of security footage of the incidents, as well as information related to the Agency's decision to institute a modified, rather than full, lockdown. Specifically, the Union requested:

> Item 1: All government-wide rules, regulations, orders, policies, or procedures that were used in making this decision. . . .
>
> Item 2: All documents used in substantiating the decision to return the institution to normal operations even though there was a lack of intelligence information. . . .
>
> Item 3: Copies of any emails or correspondence by any management official that was used regarding the above matters. . . .
>
> Item 4: The procedures used to obtain the evidence.[4]

The Agency responded to the Union's request one month later, on September 9, indicating that the

[1] 5 U.S.C. § 7116(a)(1), (5), (8).
[2] *Id.* § 7114(b)(4).
[3] All dates are in 2010 unless otherwise noted.
[4] Joint Mot. for Decision on Stipulated R. (Joint Mot.) ¶ 46 (emphasis omitted) (citing *id.*, Ex. B); *accord* Judge's Decision at 2-3.

Union's need for the information was "unclear."[5] It also told the Union that, with respect to Items 2 and 3, "[w]hile certain investigative information might be disclosed after an administrative investigation is completed, particular care must be exercised regarding disclosure during the course of the investigation to ensure personal safety and prison security."[6] Finally, the Agency stated that while it would not release the security footage, the Union could view it.

The Union sent a second, more detailed request on September 14 that requested much of the same information, but with several distinct differences. The second request did not ask for security footage, and the numbered items were modified. For example, Item 1 added a specific reference to contingency plans, program statements, and past incidents; and Items 2 and 3 included a request that the Agency provide the applicable law, policy, or regulations that justified its refusal to provide the information that the Union requested on August 9. Item 4 was essentially new, requesting "[c]opies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by [m]anagement to obtain evidence that was used to support [its] decisions regarding the incidents."[7]

The Union explained that it needed the first two items to "[d]etermine if [m]anagement's actions were appropriate within the context of [its] requirement to lower the inherent risks of the correctional environment in accordance with the [governing master labor agreement (master agreement)] . . . [and] if [m]anagement followed its own policies and guidelines."[8] The Union also stated that it needed the information sought by the third item to "[d]etermine if [m]anagement, during the course of the electronic/written discussions regarding the incidents in question, ever factored in [its] responsibility to lower the inherent risk of the correctional environment in accordance with the [m]aster [a]greement."[9] And, with respect to the fourth item, the Union stated that it needed the information to "[d]etermine if [m]anagement followed its own policies and guidelines during the initial investigation(s) that were/was then used to justify [its] actions regarding the incidents."[10] The Union stated that it would use the information to "[d]etermine if a representational course of action on behalf of all bargaining[-]unit employees [wa]s justified in this matter . . . [and f]ulfill the Union's representational responsibilities."[11]

On September 21, while reviewing the security footage that the Agency made available in response to the Union's first request, a Union representative discovered that some of the footage from the August 6 incident was missing. After contacting an assistant warden about the missing footage, the representative asked to see the inmate investigative report (SIS report) for the inmate who was apprehended with a weapon. However, the assistant warden stated that he would not release the report because the Agency was planning to prosecute the inmate for that incident.

On October 6, the assistant warden advised the Union representative that the Agency would not provide the information requested on September 14 because the Agency could not release any information that it would need to prosecute the inmate. But the assistant warden did not explain how releasing the information would compromise the prosecution of the inmate.

On October 12, the assistant warden sent the Union representative an email that summarized their October 6 conversation. The email stated that the Agency had made the security footage available to the Union to view, but repeated that it could not release the footage because of the pending prosecution of the inmate. The email also asserted that the Union had "not identified [a] particularized need . . . [that] relate[d] to the [U]nion's representational duties."[12]

The Union then filed a ULP charge with the FLRA's Boston Regional Office. The FLRA's General Counsel (GC) issued a complaint alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by not providing the information requested by the Union on September 14. Because the parties agreed that there were no material facts in dispute, they filed a joint motion requesting that the Judge decide the case on a stipulated record.

B. Judge's Decision

As relevant here, the Agency argued that it did not violate the Statute by withholding the information requested by the Union because the Union did not establish a particularized need for the information. In this regard, the Agency compared the Union's request to a request that the Authority found did not establish a particularized need in *U.S. DOJ, Federal BOP*,

[5] Joint Mot., Ex. C at 1.
[6] Judge's Decision at 3 (quoting Joint Mot., Ex. C at 1) (internal quotation marks omitted).
[7] *Id.* at 5 (quoting Joint Mot., Ex. D at 3).
[8] *Id.* at 4 (quoting Joint Mot., Ex. D at 2).
[9] *Id.* at 5 (quoting Joint Mot., Ex. D at 2-3).
[10] *Id.* (quoting Joint Mot., Ex. D at 3).
[11] *Id.* at 4-5 (quoting Joint Mot., Ex. D at 2-3).
[12] *Id.* at 6 (quoting Joint Mot., Ex. E) (internal quotation marks omitted).

U.S. Penitentiary, Marion, Illinois (*Marion*).[13] The Agency also argued that it articulated a non-disclosure interest when it informed the Union that it could not release the information because of the ongoing investigation and its intent to prosecute the inmate. Finally, the Agency argued that Exemption 7(e) of the Freedom of Information Act (FOIA)[14] permits the Agency to withhold "records or information compiled for law enforcement purposes . . . to the extent that the production. . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[15]

Conversely, the GC argued that the Union explained its need for the information in sufficient detail and that the anti-disclosure interests that the Agency articulated were vague and conclusory.

The Judge first addressed whether the Union adequately explained its need for the information. The Judge observed that, under Article 27 of the master agreement, the Agency was obligated "to lower the inherent hazards of a correctional environment to the lowest possible level . . . without relinquishing its rights" under § 7106 of the Statute.[16] The Judge further found that the Union adequately explained why it needed the information and how it would use the information to fulfill its representational duties.[17] Specifically, he found that:

> common sense would lead any sensible person to conclude that what the Union wanted to understand was how and why the [w]arden thought transitioning away from full lockdown status, or not returning to that status after a fourth incident of inmate violence lowered the inherent risk of the correctional environment faced by bargaining[-]unit employees.[18]

The Judge next addressed whether the Agency articulated a countervailing anti-disclosure interest to the Union at or near the time of the request. The Judge did not consider the Agency's anti-disclosure interests because the Agency did not raise this issue until it filed its brief, rather than "at or near the time" of denial of the information request.[19] The Judge also found that the only reason that the Agency gave for not disclosing the information when it denied the request was that the Union failed to establish a particularized need for the information. But the Judge observed that the assistant warden failed to explain why the fact that "the inmate . . . was being prosecuted . . . justif[ied]" not providing the Union a copy of the requested security footage.[20] Moreover, because the Union did not request the security footage in the September 14 information request, the Judge concluded that "any countervailing anti-disclosure interest that such a conclusory claim did represent was not applicable to the second request."[21]

Finally, the Judge rejected the Agency's comparison of the request here to the request in *Marion*. In this regard, he observed that:

> In *Marion*, the only reason provided for the information requested was a conclusory assertion that the union needed the information to prepare for arbitration of a previous grievance. In this case, the Union made it very clear that it wanted to assess the decisions made regarding the level of security implemented in response to the gang violence occurring at [the Agency], using the same guidance, policy requirements, and information as that used by the [w]arden. The Union also explained that [it] wanted to conduct this assessment to determine if the contractual obligation to lower the inherent hazards of a correctional environment to the lowest possible level was followed, and to seek recourse on behalf of bargaining[-]unit employees if that contractual requirement was not properly honored.[22]

Accordingly, the Judge found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it refused to provide the information sought by the Union's September 14 request. As a remedy, the Judge ordered the Agency to provide the information and to post, and electronically distribute, a notice.

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[13] 52 FLRA 1195 (1997) (Member Wasserman dissenting), *petition for review denied sub nom. AFGE, Local 2343 v. FLRA*, 144 F.3d 85 (D.C. Cir. 1998).
[14] 5 U.S.C. § 552(b)(7)(E).
[15] *Id.*
[16] Judge's Decision at 9.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 10 (citing *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91 (2004) (*Houston*); *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472-73 (1996)).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 11.

The Agency filed exceptions to the Judge's decision, and the GC filed an opposition to the exceptions.

III. Preliminary Matters

A. Section 2429.5 of the Authority's Regulations bars one of the Agency's exceptions, in part.

The Agency argues that the Judge's remedy requiring it to provide the Union with the information requested by Items 1 through 4 "is contrary to law because this information is prohibited from disclosure under FOIA Exemption 7(e) and the Privacy Act."[23] However, in the joint motion, the Agency conceded that, with the exception of the Agency's contingency plans, the information covered by Item 1 was not prohibited from disclosure by law.[24] Additionally, the Agency never argued before the Judge that the Privacy Act prohibited the disclosure of any information.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence, arguments, or issues "that could have been, but were not, presented in the proceedings before the . . . Administrative Law Judge."[25] Further, the Authority applies § 2429.5 to bar a party from advancing a position before the Authority that is inconsistent with a position it took below.[26] Accordingly, we decline to consider the Agency's Privacy-Act claims and its argument that the disclosure of the information – other than its contingency plans – covered by Item 1 is contrary to law.

B. The Agency's failure to inform the Union that the security footage no longer existed and its failure to provide the Union with a copy of the inmate's presentencing report are not at issue here.

The Agency argues that it informed the Union that security footage of the inmate wielding the weapon was not archived, and that it therefore did not violate the Statute when it failed to notify the Union that some of the information did not exist.[27] It also argues that it did not violate the Statute when it failed to provide the inmate's presentence investigative report (PSI report) [28] because it does not maintain the PSI report, which is under seal by the U.S. District Court for the Northern District of New York.[29] It is unclear why the Agency raises these issues in its exceptions, because the Judge expressly noted that issues concerning the security footage were beyond the scope of the complaint,[30] and the GC conceded that it was "not seek[ing] a finding of a violation as to [the PSI report]."[31]

Accordingly, because the Judge did not find a violation based on the security footage or the PSI report, we find it unnecessary to address these arguments further.

IV. Analysis and Conclusions

A. The Union established a particularized need for the information.

The Agency argues that the Judge erred when he found that the Union established a particularized need for the information, and claims that, for each item that it requested, the Union's explanation of its need for the information "[wa]s merely a boilerplate[,] conclusory assertion."[32]

Under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if, as relevant here, the requested information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[33] To demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4), a union must establish a "particularized need" by articulating, with specificity, why it needs the requested information, including how the union will use the information, and how the union's use of the information relates to its representational responsibilities under the Statute.[34] The

[23] Exceptions at 22.
[24] Joint Mot. at ¶ 84.
[25] 5 C.F.R. § 2429.5.
[26] *E.g., U.S. Dep't of the Army, Army Corps of Eng'rs, Directorate of Contracting Sw. Div., Fort Worth Dist., Fort Worth, Tex.*, 67 FLRA 211, 215 (2014) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command*, 67 FLRA 117, 119 (2013)); *Broad. Bd. of Governors*, 65 FLRA 830, 831 (2011) (citing *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009); *U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001)).
[27] Exceptions at 17-18 (citing *SSA, Dall. Region, Dall., Tex.*, 51 FLRA 1219, 1226 (1996); *Veterans Admin., Long Beach, Cal.*, 48 FLRA 970, 975-78 (1993)).
[28] *See generally* Fed. R. Crim. P. 32(d) (discussing contents of presentence report).
[29] Exceptions 21-22.
[30] Judge's Decision at 10 & n.3.
[31] Joint Mot. ¶ 82.
[32] Exceptions at 9 (citing *U.S. Dep't of the Air Force, Materiel Command, Kirtland Air Force Base, Albuquerque, N.M.*, 60 FLRA 791, 795 (2005); *Marion*, 52 FLRA at 1206); *see also id.* at 11-12, 13, 14-15.
[33] 5 U.S.C. § 7114(b)(4).
[34] *IRS, Wash., D.C., & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS*).

union's explanation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information.[35]

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;[36] (2) in connection with a pending grievance;[37] (3) to determine how to support and pursue a grievance;[38] or (4) to assess whether to arbitrate or settle a pending grievance.[39] The Authority has emphasized that such information is necessary because arbitration can function properly only when the grievance procedures leading to it are able to sift out unmeritorious grievances.[40]

However, "a union's request for information 'need not be so specific' as 'to reveal its strategies.'"[41] Thus, the Authority has rejected claims that a union failed to "articulate[] its need with requisite specificity" where the union's information request referenced a specific agency action and specified that the union needed the information to assess: (1) whether the agency violated established policies and (2) whether to file a grievance; even though the union did not explain exactly how the information would enable it to determine whether to file a grievance.[42] In addition, the Authority has held that a union's citation to specific collective-bargaining-agreement provisions served to notify the agency that the requested information was necessary for the union to administer and enforce the agreement.[43]

Here, the Union referenced the Agency's decision to place the facility on a modified, rather than full, lockdown; explained that it would use the information to evaluate the appropriateness of that decision; and referred to the Agency's responsibility under the master agreement to lower the inherent risks of the correctional environment. Thus, the precedent set forth above supports the Judge's conclusion that the Union established a particularized need for the information.

Further, contrary to the Agency's arguments, we find that the facts of this case are distinguishable from those in *Marion*. In *Marion*, the only explanation that the union gave for a request was that it needed the information to prepare for arbitration of its previously filed grievance.[44] The Authority found that that explanation did not establish a particularized need because the information related only tangentially to the issue raised in the grievance, as understood by the agency when it denied the request.[45] Conversely, in this case, the Union explained the relationship between the information and its representational concerns.

Accordingly, the Judge correctly concluded that the Union established a particularized need for the information. We therefore deny the Agency's exception.

B. The Agency did not adequately establish a countervailing anti-disclosure interest.

The Agency also argues that the Judge erred in concluding that it had not established a countervailing anti-disclosure interest. Specifically, the Agency claims that it informed the Union on September 9, in response to the first information request, that it could not disclose the information until it completed an administrative investigation,[46] and that it referenced that response on October 6 and again on October 12.[47] The Agency notes that it denied the Union's request to review the SIS report because the Agency was planning to prosecute the inmate,[48] and then repeated that same explanation for its refusal to provide the security footage in its October 6 and October 12 denials.[49]

An agency denying a request for information under § 7114(b)(4) must assert and establish any countervailing anti-disclosure interests.[50] "Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying 'no.'"[51] An agency must raise its

[35] *Id.* at 670.
[36] *U.S. Dep't of Transp., FAA, New Eng. Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1068 (1996).
[37] *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004).
[38] *IRS*, 50 FLRA at 672.
[39] *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 682-83 (1995), *enforced* 104 F.3d 1396 (D.C. Cir. 1997).
[40] *Id.* at 683 n.5 (citing *NLRB v. Acme Indus.*, 385 U.S. 432, 438 (1967)).
[41] *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000) (quoting *IRS*, 50 FLRA at 670 n.13).
[42] *Id.* at 506-07.
[43] *Library of Cong.*, 63 FLRA 515, 519 (2009).
[44] *Marion*, 52 FLRA at 1202.
[45] *Id.* at 1202-03.
[46] Exceptions at 16 (citing Joint Mot., Ex. C).
[47] *Id.* at 16-17 (quoting Joint Mot., Ex. E).
[48] *Id.* at 16 (citing Joint Mot. ¶ 77).
[49] *Id.* (citing Joint Mot., Ex. E).
[50] *IRS*, 50 FLRA at 670.
[51] *Id.*

anti-disclosure interests "at or near the time it denies the union's request."[52]

Here, the Judge determined that the Agency's purported anti-disclosure interest – its plan to prosecute the inmate – was "conclusory" and applied only to the Union's requests for the security footage.[53] Even assuming that the Agency's explanation – that it was planning to prosecute the inmate – extends to all of the information covered by the Union's request, we find that this explanation is insufficient to establish a countervailing anti-disclosure interest.

The Agency did not explain how releasing the information would interfere with its plans to prosecute the inmate or identify what information would jeopardize those plans; nor did the Agency suggest when, if ever, it would be able to provide the requested information. Thus, the Agency's explanation did not aid the Union in identifying "alternative forms or means of disclosure that may satisfy both [the U]nion's information needs and [the A]gency's interests."[54] Even assuming that the claimed countervailing interest was raised in response to the Union's request, it is not sufficient to outweigh the Union's demonstration of a particularized need for the information.[55]

Finally, the Agency argues that FOIA Exemption 7(e) permitted it to withhold the information.[56] However, the Authority has consistently held that an agency must raise *any* anti-disclosure interests "at or near the time it denies the union's request."[57] The mere fact that an anti-disclosure interest is also reflected as an exemption from mandatory disclosure under FOIA does not relieve an agency of this burden. Here, the Judge found,[58] and the record reflects,[59] that the Agency did not raise the security interests protected by Exemption 7(e) when it denied the Union's information request.

Accordingly, we find that the Judge did not err when he concluded that the Agency failed to adequately raise a countervailing anti-disclosure interest. We therefore deny the Agency's exception.

C. Disclosure of most of the requested information is not prohibited by law.

The Agency argues that FOIA Exemption 7(e) prohibits the disclosure of the requested information[60] and that the Judge's order to provide the information is contrary to law.[61] This argument reflects a misunderstanding of FOIA and its exemptions. FOIA is "solely a disclosure statute"[62] and "does not prohibit release of data within the meaning of [§] 7114(b)(4) of the Statute."[63] The same reasons that led Congress to exempt certain categories of records from mandatory disclosure may give rise to anti-disclosure interests under § 7114(b)(4), but as discussed above, an agency must articulate its anti-disclosure interests "at or near the time" that it denies a union's request for information.[64] Here, the Agency failed to raise the anti-disclosure interests addressed by Exemption 7(e) "at or near the time"[65] that it denied the Union's request.

Accordingly, except as discussed below, the Agency has not established that the release of the requested information is prohibited by law. We therefore deny the Agency's exception, except as discussed below.

D. Disclosure of the Agency's contingency plans is prohibited by law.

Finally, the Agency argues that the Judge erred insofar as he found a violation based on the Agency's failure to provide its contingency plans.[66] Specifically, the Agency argues that the parties stipulated that the contingency plans "are prohibited from disclosure by law."[67] Conversely, the GC argues that the parties also stipulated that the Union has access to the contingency plans,[68] and argues that "compliance with the [Judge]'s order can be achieved by continuing to allow the Union

[52] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fort Dix, N.J.*, 64 FLRA 106, 109 (2009) (*Ft. Dix*) (citing *Houston*, 60 FLRA at 93).
[53] Judge's Decision at 10.
[54] *IRS*, 50 FLRA at 671.
[55] *See Houston*, 60 FLRA at 94.
[56] Exceptions at 18-21.
[57] *Ft. Dix*, 64 FLRA at 109 (citing *Houston*, 60 FLRA at 93).
[58] Judge's Decision at 10.
[59] Joint Mot. ¶ 78; *id.*, Exs. C, E.
[60] Exceptions at 19-23.
[61] *Id.* at 22-23.
[62] *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1184 (8th Cir. 2000) (*Glickman*).
[63] *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 44 FLRA 452, 456 (1992) (*F.E. Warren*) (quoting *U.S. DOL, Office of the Assistant Sec'y for Admin. & Mgmt.*, 26 FLRA 943, 952 (1987) (internal quotation marks omitted)); *accord NFFE, Local 951, IAMAW*, 59 FLRA 951, 954 (2004) (Dissenting Opinion of then-Member Pope) (citing *Glickman*, 200 F.3d 1180; *F.E. Warren*, 44 FLRA at 456).
[64] *Ft. Dix*, 64 FLRA at 109 (citing *Houston*, 60 FLRA at 93).
[65] *Id.* (citing *Houston*, 60 FLRA at 93).
[66] Exceptions at 22.
[67] *Id.* (citing Joint Mot. ¶ 85).
[68] Opp'n at 22 (quoting Joint Mot. ¶ 85).

. . . to review these [c]ontingecy [p]lans in accordance with the stipulation."[69]

As noted above, the statutory obligation to provide data applies only "to the extent [the data's release is] not prohibited by law."[70] Because the parties stipulated that disclosure of the contingency plans is prohibited by law, the Agency did not violate the Statute by withholding the plans.[71] Accordingly, we find that the Agency did not violate the Statute by withholding its contingency plans.

We therefore grant the Agency's exception, as it relates to the contingency plans, and we modify the Judge's order accordingly.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[72] and § 7118 of the Statute,[73] we order the Agency to:

1. Cease and desist from:

   (a) Failing and refusing to furnish the Union with:

   (1) All governmental rules, regulations, orders, policies, and written procedures that were considered by the Agency when making the decision to refrain from initiating a full lockdown following repeated inmate violence, in addition to the program statements and descriptions of the past incidents that the Agency referred to and evaluated during the decision-making process.

   (2) All documents used to substantiate the decisions to return the institution to normal operations following repeated gang-related violence in addition to any laws, policies, regulations, or cases relied upon by the Agency to support its position that this information could not be disclosed until after the administrative investigation was completed.

   (3) Copies of all e-mails or correspondence by any member of Agency management pertaining to the incidents, lockdowns, etc., in addition to any laws, policies, or regulations relied on by the Agency to support its position that this information could not be disclosed until after the administrative investigation was completed.

   (4) Copies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by the Agency to obtain evidence that was used to support their decisions regarding the incidents.

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

   (a) Furnish the Union with:

   (1) All governmental rules, regulations, orders, policies, and written procedures that were considered by the Agency when making the decision to refrain from initiating a full lockdown following repeated inmate violence, in addition to the program statements and descriptions of the past incidents that the Agency

[69] *Id.*
[70] 5 U.S.C. § 7114(b)(4).
[71] *See e.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 673-74 (2012).
[72] 5 C.F.R. § 2423.41(c).
[73] 5 U.S.C. § 7118.

referred to and evaluated during the decision-making process.

(2) All documents used to substantiate the decision to return the institution to normal operations following repeated gang-related violence in addition to any laws, policies, regulations, or cases relied upon by the Agency to support its position that this information could not be disclosed until after the administrative investigation was completed.

(3) Copies of all e-mails or correspondence by any member of Agency management pertaining to the incidents, lockdowns, etc., in addition to any laws, policies, or regulations relied on by the Agency to support its position that this information could not be disclosed until after the administrative investigation was completed.

(4) Copies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by the Agency to obtain evidence that was used to support their decisions regarding the incidents.

(b) Post at the Agency, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Director of Field Operations, and they shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Agency customarily communicates with employees by such means.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Boston Regional Office, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

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

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, New York, 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 or refuse to furnish the American Federation of Government Employees, Local 3882 (the Union) with information requested on September 14, 2010, relating to the decision not to order a full lockdown following the gang-related violence on August 6, 2010.

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

WE WILL furnish the Union with the information requested on September 14, 2010, relating to the decision to not order a full lockdown following the gang-related violence on August 6, 2010.

_____
Agency/Activity

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

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

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, FLRA, whose address is: 10 Causeway Street, Suite 472, Boston, MA, 02222, and whose telephone number is: (617) 565-5100.

Office of Administrative Law Judges

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
RAY BROOK
RAY BROOK, NEW YORK
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3882
Charging Party

Case No. BN-CA-10-0552

David J. Mithen
For the General Counsel

Meryl A. White
For the Respondent

Mark Allen
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

Based upon unfair labor practice (ULP) charges filed by the American Federation of Government Employees, Local 3882 (Union), a complaint was issued by the Regional Director of the Boston Region of the FLRA. The complaint alleges that the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Ray Brook, Ray Brook, New York (Respondent) violated § 7116(a)(1), (5) and (8) of the Statute when it failed to furnish information requested pursuant to § 7114(b)(4) of the Statute. The Respondent filed a timely Answer denying the allegations of the complaint.

On January 12, 2012, the parties filed a joint motion for a decision based upon a stipulated record, attaching to the motion a joint stipulated record (JSR) with joint exhibits A through F. (Jt. Exs. A, B, C, D, E &F). In response to the joint motion, the scheduled hearing was indefinitely postponed. On February 24, 2012, the parties filed timely briefs that were fully considered and pursuant to 5 C.F.R. § 2423.26, this decision is issued without a hearing.[1] Based upon the stipulated record and attached exhibits, I find that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute when it failed to furnish information requested pursuant to § 7114(b)(4) of the Statute, and make the following findings of fact, conclusions and recommendations in support of that determination.

FINDINGS OF FACT

The United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, New York, is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (JSR).

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Bureau of Prisons. (JSR).

The American Federation of Government Employees, Local 3882 (Union), is the agent of AFGE for the purpose of representing bargaining unit employees at the Respondent. (JSR).

On August 9, 2010, Union president Steven Bartlemus submitted to Warden Deborah Schult a letter seeking four items of information regarding a series of gang-related incidents that took place on August 1, August 3, and August 6, 2010. (Jt. Ex. B).

The letter stated that it was a "formal request for all information to include CCTV footage of the aforementioned incidents pertaining to the aforementioned situation under the provisions of 5 USC 7114(b)(4) of the Federal Service Labor Management Relations Statute." (Jt. Ex. B).

In addition to the general request for "all information to include CCTV footage", the letter requested the production of items identified as follows:

1. All government-wide rules, regulations, orders, policies, or procedures that were used in making this decision.

[1] Prior to filing the joint motion for decision on a stipulated record, the Respondent filed a motion for summary judgment and a motion to quash a subpoena that were rendered moot by the subsequent joint motion. Thus, the prior motions are not addressed in this decision.

2. All documents used in substantiating the decisions to return the institution to normal operations even though there was a lack of intelligence information.

3. Copies of any emails or correspondence by any management official that was used regarding the above matters.

4. The procedures used to obtain the evidence. (Jt. Ex. B).

The letter also indicated that "Documents or information that contained Privacy Act date (sic) should be sanitized." (Jt. Ex. B).

The August 9 letter from Bartlemus indicated that the Union needed the information to allow it "to provide adequate, effective representation for all staff at risk at F.C.I. Ray Brook. The information will be used as part of our investigation that may result in a grievance, congressional inquiry, or to prepare a case for arbitration. It is required to determine if the agency acted in accordance with all applicable laws and regulations, conducted a proper investigation, and made sound correctional decisions in returning the institution to normal operations." (Jt. Ex. B).

Approximately one month later, on September 9, 2010, Associate Warden (AW) David Porter responded to the August 9 letter from Bartlemus. In his reply, Porter asserted that while the request was broad and the particularized need unclear, he would attempt to respond. Porter responded to the four listed items in the following manner. (Jt. Ex. C).

With respect to the Union's first item, he indicated that: "Specific guidance utilized to make decisions include, but are not limited to, Contingency Plans, Program Statements, verbal discussions, assessment of the incidents, past experience, etc." However, none of those documents were actually provided. (Jt. Ex. C).

As to the Union's second item, he stated: "While certain investigative information might be disclosed after an administrative investigation is completed, particular care must be exercised regarding disclosure during the course of the investigation to ensure personal safety and prison security. You have requested copies of the CCTV video footage. Although this video cannot be released, you are permitted to view the video footage in the SIS office. Please contact me to schedule a time." (Jt. Ex. C).

In response to the Union's third item, Porter advised: "Again, until the completion of the administrative investigation, I am unable to determine what information exists for appropriate release." (Jt. Ex. C).

Finally, in reply to the Union's fourth item, Porter indicated: "I am unable to determine what information you are requesting and your particularized need. Your request will be re-considered if you can articulate with specificity your request." (Jt. Ex. C).

On September 14, 2010, Mark Allen, the Union's vice-president, submitted a second letter asking for information in an "attempt to more adequately satisfy Management's insistence that the Union particularize its need for the requested information." (Jt. Ex. D).

In this second letter, Allen, clarified and modified the descriptions of the four items of information being sought and provided a more detailed explanation of the Union's particularized need. (Jt. Ex. D). The first item requested:

> All governmental rules, regulations, orders, policies, and written procedures that were considered by Management when making the decision to refrain from initiating a full lock-down following repeated inmate violence. The response to the Union's first Request for Information stated that certain Contingency Plans, Program Statements, and past incidents were used, but failed to provide any of them or even state exactly which ones were used. The Union requests, at a bare minimum, that Management specify which Contingency Plans and Program Statements they referred to during the decision-making process, and that Management articulate precisely which past incidents they evaluated and provide any documentation that exists pertaining to these past incidents.

With respect to the Union's particularized need, Allen indicated the need was to:

> a. Determine if Management's actions were appropriate within the context of their requirement to lower the inherent risks of the correctional environment in accordance with the Master Agreement;
>
> b. Determine if Management followed its own policies and guidelines and determine if a representational course of action on behalf of all bargaining unit employees is justified in this matter; [and]

> c. Fulfill the Union's representational responsibilities.

(Jt. Ex. D at 2).

This explanation of particularized need was also set forth as part of the second item listed in Allen's request, which sought:

> All documents used to substantiate the decisions to return the institution to normal operations following repeated gang-related violence. In Management's response to the Union's first Request for Information, they cite that this information cannot be disclosed until after the administrative investigation is complete, but cite no law, policy, regulation, case, etc. that supports such a refusal; if this continues to be Management's stated reason for refusing to supply the requested information, the Union requests that Management provide documentation that supports such a position.
>
> The third item requested:
>
> Copies of all emails or correspondence by any member of Management pertaining to the incidents, lock-downs, etc. Again, in Management's response to the Union's first Request for Information, they stated these documents cannot be disclosed until after the administrative investigation is completed; again, the Union requests that if Management continues to cite this as their reason for not providing the requested information, they then provide the applicable law, policy, regulation, etc. that justifies their refusal.

(Jt. Ex. D at 2).

In describing the Union's particularized need for this information, Allen stated it was to:

> a. Determine if Management, during the course of the electronic/written discussions regarding the incidents in question, ever factored in their responsibility to lower the inherent risk of the correctional environment in accordance with the Master Agreement;
>
> b. Determine if a representational course of action on behalf of all bargaining unit employees is justified in this matter; [and]
>
> c. Fulfill the Union's representational responsibilities.

(Jt. Ex. D at 2-3).

Allen's fourth item asked for:

> Copies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by Management to obtain evidence that was used to support their decisions regarding the incidents.

Allen indicated that the Union's particularized need for this information was to:

> a. Determine if Management followed its own policies and guidelines during the initial investigation(s) that were/was then used to justify their actions regarding the incidents;
>
> b. Determine if a representational course of action on behalf of all bargaining unit employees is justified in this matter; [and]
>
> c. Fulfill the Union's representational responsibilities.

(Jt. Ex. D at 3).

Allen further indicated that documents or information containing Privacy Act material should be sanitized and he requested a response within five calendar days. (Jt. Ex. D).

On October 12, 2010, AW Porter sent a message to Bartlemus and Allen via electronic mail to "re-cap our conversation on October 6, 2010 regarding the union's 2nd request for information surrounding the incident on August 6, 2010." The message indicated that the Union was afforded the opportunity to view video tapes of the Use of Force move on the recreational yard on August 6, 2010, as well as video footage from the incidents on August 1 and August 3. The message also indicated that video footage of the inmate in possession of a weapon in the gymnasium on August 6, 2010, was not archived and no longer existed, and that none of the video that did exist would be released to the Union due to an ongoing attempt to prosecute the inmate for the possession of the weapon. Finally, the message indicated that "as you have not identified your particularized need as it relates to the union's representational duties, our initial response remains the same." (Jt. Ex. E).

The charge in this case was filed by the Union with the Boston Acting Regional Director on September 30, 2010, and a copy was served on the Respondent. (JSR).

A first amended charge was filed by the Union with the Boston Acting Regional Director on March 30, 2011, and a copy was served on the Respondent. (JSR).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the information requested by the Union on September 14, 2010, met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to furnish this information violated § 7116(a)(1), (5) and (8) of the Statute.

The GC contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The GC asserts that the Union stated a particularized need for the four items of information it requested by indicating that it needed the information to assess the actions of management to determine if claims against management for failure to comply with the Master Agreement (MA) should be filed on behalf of bargaining unit employees as part of its representational responsibilities.

The GC asserts that the laws, policies, regulations or cases requested in second and third items set forth in the Union's September 14, 2010, request were releasable and submits that the Respondent failed to adequately convey a countervailing anti-disclosure interest that was more than conclusory at or near the time of the request. Further, the General Counsel argues that countervailing anti-disclosure interests raised after the denial should not be considered, but contends that they would not outweigh the particularized need stated by the Union if they were considered.

The GC requests that an order be issued requiring the Respondent to provide the requested information and to post a notice to all employees informing them that it violated § 7116(a)(1), (5) and (8) of the Statute.

Respondent

The Respondent contends that the Union failed to establish a particularized need for each of the four items set forth in the request, arguing that the Union only provided conclusory assertions and failed to draw a connection between them and how they would shed light upon determining if management acted appropriately to fulfill the obligation to lower the inherent risks of the correctional environment as required by the MA.

The Respondent submits that it informed the Union of its countervailing anti-disclosure interests on multiple occasions at or near the time of the request, by telling the Union that investigative information might be disclosed after an administrative investigation was completed but not during the course of the investigation and informing the Union that it planned to prosecute an inmate who was involved in the incident that prompted the Union's request. The Respondent also contends that it properly informed the Union that certain video footage of the incident was not archived and therefore no longer existed.

The Respondent contends that certain documents compiled in the course of investigating and criminally prosecuting an inmate involved in the incident, to include the Form 583, Report of the Incident; Chain of Custody log to include photographs and description of the evidence; the Inmate Investigative Report (SIS Report), were prohibited from disclosure by law pursuant to the Freedom of Information Act (FOIA) Exemption 7(e).

Finally, the Respondent claims that certain documents to include the presentence investigative report, grand jury report, and tally sheet were sealed by the U.S. District Court with further dissemination prohibited. Thus, it argues that such documents are not within its possession and not normally maintained and reasonably available.

ANALYSIS AND CONCLUSIONS

While demonstrating some of the communication and dialog envisioned by the Authority in *IRS, Wash., D.C.*, 50 FLRA 661 (1995) (*IRS*), this case also demonstrates the imprecise application and ubiquitous quibbling, parsing, and contentiousness frequently present in cases involving § 7114(b)(4) of the Statute. Here, most of the fault lays with the Respondent, who was deliberately obtuse and feigned ignorance in a misguided attempt to avoid the legal obligation to provide information to an exclusive representative.

The circumstances surrounding the request provide: the revealing context by which the parties' behavior must be assessed. Among the inmates housed at FCI Ray Brook are inmates from two Security Threat Groups, one known as the "Bloods" and the other known as the "D.C." group. (JSR at 5). On July 31, 2010, several "D.C." inmates assaulted a "Blood" inmate on the recreation yard. (JSR at5). On August 1, 2010, three "Blood" inmates assaulted a "D.C." inmate in a housing unit and in response the institution was placed on lockdown status. (JSR at 5). A lockdown is a procedure whereby the inmates are restricted to their individual cells until it is determined that conditions are again safe. (JSR at 5). The procedure is not implemented as

punishment; rather, it is a safety measure to ensure that the institution is under control. (JSR at 5). When a decision to institute lockdown status is made, it is rapidly implemented. (JSR at 5).

On August 3, 2010, when attempting to migrate out of lockdown status and integrate inmates back into a regular schedule, a "Blood" inmate fought a "D.C." inmate in a housing unit and the institution was again placed on lockdown status. (JSR at 5).

From July 31, 2010 to August 8, 2010, inmate interviews were conducted and several "Blood" and "D.C." inmates were placed in the Special Housing Unit (SHU) based upon information obtained via interviews indicating they were involved in the assaults. (JSR at 5).

On August 5, 2010, a "Blood" inmate requested protective custody status, as a result of a purported threat issued by one of his "Blood" associates in response to his failure to assist them during an assault. (JSR at 5).

The lockdown implemented in response to the incident on August 3, 2010, was lifted on August 6, 2010, whereupon, a metal detector alerted while scanning a "Blood" inmate, and when staff responded, they found him with a shank/knife in his possession and he was in pursuit of a second "Blood" inmate. (JSR at 5). The staff also found a pair of bloody pants in a trashcan that belonged to a third "Blood" inmate, and a fourth "Blood" inmate was found with fractured ribs and contusions to his face, scalp and chest. (JSR at 5). All four "Blood" inmates involved in this incident were placed in the SHU and the incident was referred to the U.S. Attorney for prosecution. (JSR at 5).

In response to the August 6, 2010 incident, which was the fourth incident of inmate violence within seven days, the Warden ordered implementation of a modified lockdown that was less stringent than the earlier full lockdown. Under this modified status, visiting hours for the weekend were cancelled and the recreation area was closed. While the inmates were confined to their housing units, they were allowed to use the common areas therein rather than being restricted to their individual cells. (JSR at 5).

In short, the Warden placed the institution on full lockdown status on August 1 in response to a second incident of inmate violence and placed it on full lockdown again two days later when a third incident of inmate violence erupted soon after the first full lockdown was lifted. Then, after leaving the institution in full lockdown status for an additional three days, a fourth incident of inmate violence resulted when the institution again attempted to transition out of full lockdown status. In response to this fourth incident, and after having the institution in full lockdown for most of the prior five days and experiencing inmate violence each time the full lockdown was lifted, the Warden imposed a lesser level of prisoner restriction by implementing a modified lockdown.

While there may have been legitimate reasons for the Warden's decisions to lift the lockdowns during this course of events, as well as altering the response to the inmate violence after the fourth incident, given that violence had erupted each time something less than full lockdown status was implemented, such decisions had an impact upon the inherent hazards of the correctional environment faced by bargaining unit employees.

Pursuant to Article 27 of the MA, the Union had legitimate reason and right to explore such decisions on behalf of the bargaining unit employees it represents, especially when the Warden's response to the fourth incident reduced the restrictive nature of the full lockdown response previously deemed necessary to restored order. In Article 27, the health and safety article, the Respondent agreed to lower the inherent hazards of a correctional environment to the lowest possible level for bargaining unit employees without relinquishing its rights under 5 U.S.C. § 7106. In so agreeing, the Respondent made compliance with that obligation the subject of a potential grievance that the Union could pursue on behalf of bargaining unit employees. Thus, conducting an independent investigation to determine if filing a grievance over non-compliance with that provision was appropriate, and that entitled the Union to request the information it needed to conduct such an investigation. *Dep't of HHS, SSA, Balt., Md*., 39 FLRA 298, 309 (1990). Further, a union is not required to describe the exact nature of a respondent's alleged misapplication or violation of policy/procedure, law, or regulation when making an information request. *Health Care Fin. Admin*., 56 FLRA 156, 162 (2000). In fact, the Union may not be aware of the contents of a requested document and what it might reveal until it is provided. *IRS*, 50 FLRA at 670, n.13.

To demonstrate that requested information is "necessary," a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." *id. at* 669. The union's responsibility for articulating its interests in the request requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute. *id.* at 670. I find that the Union established that it needed the information sought in items 1 through 4 of the September 14, 2010, request to

determine if management followed its own policies and guidelines when establishing the operational status of the institution during this period of inmate unrest. The Union properly explained that it needed that information to determine if a representational course of action on behalf of all bargaining unit employees was justified and necessary to fulfill its representational responsibilities, and that explanation was sufficient to permit the Respondent to make a reasoned judgment about the information requested. The fact that the Respondent elected to play dumb when presented with a clear explanation was a feeble attempt at avoiding its statutory obligation and not an indication of the Union's failure to establish a particularized need.

The exercise of even a bare minimum of common sense would lead any sensible person to conclude that what the Union wanted to understand was how and why the Warden thought transitioning away from full lockdown status, or not returning to that status after a fourth incident of inmate violence lowered the inherent risk of the correctional environment faced by bargaining unit employees. Either common sense is not that common within the Bureau of Prisons or the organization doesn't appreciate anyone questioning a Warden's decision, let alone having such judgment be the subject of a legitimate grievance. Given the authoritarian nature of the correctional environment it is entirely possible that the latter is the more logical conclusion, but that does not make playing dumb any more attractive or the behavior any more legal.

More importantly, feigning ignorance on the issue of particularized need ultimately resulted in the Respondent proffering only simplistic justifications for the refusal to provide the information requested near in time to the request. *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472-73 (1996) (*DOJ-INS*) (Agency must timely disclose its anti-disclosure interests). In the email sent to Union officers Bartlemus and Allen on October 12, 2010, AW Porter recapped the fact that some of the videotape requested in the August 9, 2010, letter was shown to the Union, that some of it was not available as a result of the Respondent's failure to archive it[2], and that copies would not be provided to the Union because the inmate involved in the incident of August 6 was being prosecuted.[3]

AW Porter then explained that the Respondent's response to the second request remained the same as its first response because the Union had not identified its particularized need as it related to the Union's representational duties. (Jt. Ex. E). Thus, the only justification the Respondent provided at or near the time it decided to provide none of the information listed in the four items set forth in the second request was the Union's failure to state a particularized need. (Jt. Ex. E). As discussed above, that reason has no merit. Because the Respondent justified its refusal to provide the information sought in the second request only upon the Union's failure to state a particularize need, I find that the Respondent raised no countervailing anti-disclosure interest at or near the time of the Union's request. *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91 (2004).

Although AW Porter's response of October 12, indicated that a copy of the videotape that was available would not be provided because the inmate involved was being prosecuted, he offered no explanation for why that gave rise to an interest sufficient to justify not disclosing any information. Given that such evidence would be subject to discovery by a criminal defendant in any subsequent criminal prosecution, the Respondent's interest in not providing it to the Union makes little sense. But more importantly, that cursory justification was only linked to the videotape, which was not requested in the second information request, thus, any countervailing anti-disclosure interest that such a conclusory claim did represent was not applicable to the second request. Therefore, the only justification given for not providing the information sought by the second request was a failure to state a sufficient particularized need, and that justification is woefully erroneous. As for the countervailing anti-disclosure interests set forth in the Respondent's brief, interests not raised at or near the time of denial cannot rise like Phoenix after the fact for consideration just because they may have more merit than the inadequate basis proffered at the time of denial. *id.*; *DOJ-INS*, 51 FLRA at 1472-73.

With respect to the Respondent's argument that the particularized need stated in this case is similar to that found insufficient by the Authority in *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195 (1997) (*Marion*), the argument is patently ridiculous. In *Marion*, the only reason provided for the information requested was a conclusory assertion that the union needed the information to prepare for arbitration of a previous grievance. In this case, the Union made it very clear that it wanted to assess the decisions made

[2] That videotape of the shank wielding inmate's apprehension was the only video related to these incidents not archived provides additional reason to question the intent and good faith of the Bureau of Prisons, and further demonstrates the circumspect behavior exhibited towards any attempt by the Union to question or challenge the decisions made by the Warden.

[3] The information requested in the August 9, 2010, letter from Allen was not part of the complaint and the videotape was not part of the Union's second request, thus, the question of whether being allowed to watch a video replay without being given a copy of the tape is sufficient to satisfy the requirement to furnish information is not at issue in this case.

regarding the level of security implemented in response to the gang violence occurring at FCI Ray Brook, using the same guidance, policy requirements, and information as that used by the Warden. The Union also explained that they wanted to conduct this assessment to determine if the contractual obligation to lower the inherent hazards of a correctional environment to the lowest possible level was followed, and to seek recourse on behalf of bargaining unit employees if that contractual requirement was not properly honored. This is not the kind of conclusory assertion present in *Marion*. In fact, it is the antithesis of a conclusory assertion and apparently being obtuse is a trait not limited to the fictional Warden Norton. Anyone who applied a modicum of reasoning would have understood what information the Union wanted, why it wanted it, how it would be used, and how that related to their representational responsibilities. Once met, the burden imposed by *IRS* cannot be undone by feigning ignorance to avoid one's legal obligation and doing so is even more unbecoming of an agency responsible for enforcing the law of this nation.

CONCLUSION

I find that the Union provided a particularized need for each of the four items sought by the information request dated September 14, 2010, and the Respondent did not adequately raise a countervailing anti-disclosure interest at or near the time of the request that justified its refusal to provide any of the information requested. Thus, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by not providing the information requested in Items 1, 2, 3, and 4 of the request made on September 14, 2010.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, New York, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 3882 (AFGE Local 3882/Union) with:

(1) All governmental rules, regulations, orders, policies, and written procedures that were considered by Management when making the decision to refrain from initiating a full lockdown following repeated inmate violence, in addition to the contingency plans, program statements, and descriptions of the past incidents which management referred to and evaluated during the decision-making process.

(2) All documents used to substantiate the decisions to return the institution to normal operations following repeated gang-related violence in addition to any laws, policies, regulations, or cases relied upon by management to support its position that this information could not be disclosed until after the administrative investigation was completed.

(3) Copies of all e-mails or correspondence by any member of Management pertaining to the incidents, lockdowns, etc., in additions to any laws, policies, or regulations relied on by management to support its position that this information could not be disclosed until after the administrative investigation was completed.

(4) Copies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by Management to obtain evidence that was used to support their decisions regarding the incidents.

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

(a) Furnish the AFGE Local 3882 with:

(1) All governmental rules, regulations, orders, policies, and written procedures that were considered by Management when

making the decision to refrain from initiating a full lockdown following repeated inmate violence, in addition to the contingency plans, program statements, and descriptions of the past incidents which management referred to and evaluated during the decision-making process.

(2) All documents used to substantiate the decisions to return the institution to normal operations following repeated gang-related violence in addition to any laws, policies, regulations, or cases relied upon by management to support its position that this information could not be disclosed until after the administrative investigation was completed.

(3) Copies of all e-mails or correspondence by any member of Management pertaining to the incidents, lockdowns, etc., in additions to any laws, policies, or regulations relied on by management to support its position that this information could not be disclosed until after the administrative investigation was completed.

(4) Copies of any investigative reports relating to the incidents in question as well as a complete accounting of any and all methods used and/or employed by Management to obtain evidence that was used to support their decisions regarding the incidents.

(b) Post at the Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, New York, copies of the attached Notice on forms to be furnished by the Federal labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of Field Operations, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Boston Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 19, 2014

CHARLES R. CENTER
Chief Administrative Law Judge

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

The Federal Labor Relations Authority has found that United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, New York, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish as requested, the American Federation of Government Employees, Local 3882 (Union), with information requested on September 14, 2010, relating to the decision to not order a full lockdown following the gang-related violence on August 6, 2010.

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

WE WILL, furnish the Union with the information requested on September 14, 2010, relating to the decision to not order a full lockdown following the gang related violence on August 6, 2010.

_____
(Agency/Activity)

Dated: _____ 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 any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA, 02222, and whose telephone number is: 617-565-5100.