RIGHT TO INFORMATION

February 26, 2007 K. Grile
Washington, D.C.

I. 5 U.S.C. 7114(b)(4)

A. The statutory language:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation-

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining

[NOTE: Enforced as an unfair labor practice in violation of 5 U.S.C. 7116(a)(1), (5) and (8). Charges filed with appropriate FLRA regional office. If grievance procedure allows grievances of ULPs, can alternatively pursue Section 7114(b)(4) violation as a grievance.]

B. The BIG problems with getting information under 5 U.S.C. 7114(b)(4)

1. The "which is … necessary for full and proper discussion, understanding and negotiation" per 5 U.S.C. 7114(b)(4)(B) issue—the "particularized need" /duty to be chatty problem

a. The background

i. Not a problem for many years

ii. National Labor Relations Board v. FLRA, 952 F.2d 523, 531-32 (D.C.Cir. 1992) (a union must be able to show "particularized need")

iii. FLRA gloss on NLRB—Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City, Mo., 50 FLRA (No. 86) 661, 669 (1995) ("*IRS, Kansas City*") (union must now articulate "particularized need")

b. What must be articulated, per *IRS, Kansas City*—

"… why [the Union] needs the requested information, including the uses to which the union will put the requested information, and the connection between those uses and the union's representational responsibilities under the Statute." [50 FLRA at 669]

c. Sample format— see Attachment A (why you want the information, what you're hoping the information will tell you, what the union may or may not do after receiving the information)

[cross-reference: "of subjects within the scope of collective bargaining"]

[NOTE: KG approach slightly different from JS/ex-FLRA GC approach]

d. Pitfalls/problems with the "particularized need" requirement

i. The "too glib"/conclusory/ lack of specificity/fear of divulging strategy problem

ii. The "clarification" problem

iii. The "need" for particularized need on Privacy Act issues (to be discussed, infra)

iv. The "not automatic entitlement"/ balancing issue (but see Scott AFB, infra; but see "security")

v. The multiple-item request (but see AFGE Local 2263 v. FLRA, 454 F.3d 1101 (10th Cir. 2006)

2. The "to the extent not prohibited by law" per 5 U.S.C. 7114(b)(4) issue-- the Privacy Act problem

a. The problem language [5 U.S.C. 552a(b)] —

"No agency shall disclose any record which is contained in a system of records … to any person, except pursuant to a written request by, or with the prior consent of, the individual to which the record pertains, unless disclosure of the record would be" [see exceptions to Privacy Act requirement prohibiting disclosure set forth in 5 U.S.C. 552a(b)(1)-(12), and, in particular, the "routine use" exception (5 U.S.C. 552a(b)(3))]

b. Background

i. Not a problem for many years

ii. Names and home addresses/Department of Defense v. FLRA, 510 U.S. 487 (1994), the "public interest" and " a clearly unwarranted invasion of personal privacy"

iii. FLRA gloss—U.S. Dep't of Transportation, FAA, New York TRACON, Westbury, N.Y., 50 FLRA (No. 55) 338 (1995)- the balancing test

c. Ways to avoid Privacy Act problems

i. If you don't need "personal identifiers"- agree to sanitization (and be chatty about it), and remember right to classify

ii. Consent (if info sought concerns grievant and/or ally)

iii. If you need "personal identifiers" and/or disclosure inevitably identifies individuals, a PARTIAL but useful exception, the "routine use exception," per 5 U.S.C. 552a(b)(3), for documents in an OPM "system of records"

(a) What is included in OPM's "system of records" (official personnel folders, any special performance or discipline files, "materials relied upon to support the reasons" for proposed

discipline) and medical files (relevant only insofar as exposure to hazards are an issue)

(b) FPM Letter 711-164 and Department of the Air Force, Scott AFB, Illinois v. FLRA, 104 F.3d 1396 (D.C.Cir. 1997)

[NOTE: cross-reference "particularized need" point illustrated by Scott AFB]

(c) Post-FPM "routine use" determinations—see 65 Fed. Reg. 24731-24753 (Apr. 27, 2000), available on www.opm.gov (click on subject index, then on Privacy Act information). Includes all OPM- controlled records outlined in (a)—see "OPM-Gov't-1," "OPM-Gov't-2" OPM-Gov't-3," and OPM-Gov't 10"

(d) General criteria for exclusive representative's invocation of OPM "routine use" exception to the Privacy Act—must be:

(i) "relevant" (interpreted to mean whether the matter at issue is grievable or, in a bargaining context, within the duty to bargain) AND

(ii) "necessary" (interpreted to mean whether the union has a "particularized need" for personally-identified information that cannot be satisfied by any other means)

d. Privacy Act and the duty to be chatty

i. if union can use information in sanitized form and/or has consent of person to whom the record pertains, say so in information request

ii. if union needs personally-identified information covered by the OPM "routine use" exception to the Privacy Act, say so in information request (citing to 65 Fed. Reg. 24731-24753 (Apr. 27, 2000)) and stating why the sought personally-identified information is "relevant" and "necessary" to the union's duties—see Attachment A

[NOTE: inability to defend disciplinary action because of redacted name in evidence file (a) shouldn't happen in light of OPM "routine use" exception, and (b) implicates due process issue that could defeat disciplinary action]

C. Madcap romp through other language in Section 7114(b)(4)

1. "in the case of an agency"- reciprocal duty?

2. "to furnish"- search and reproduction fees?

3. "to the exclusive representative"

4. "data … which is normally maintained by the agency in the regular course of business"

5. "which is reasonably available"- control and scope of request

6. "of subjects within the scope of collective bargaining"

7. The Section 7114(b)(4)(C) language

D. 5 U.S.C. 7114(b)(4) "loose ends"

1. When must a union request?/ Absent contract time limit, how long may the agency take in responding?

2. Is the time limit for a grievance's elevation to the next step automatically extended by a pending information request? Can a time limit for elevating a grievance be delayed? But see ALJ remedial order upheld by FLRA in Health Care Financing Administration, 56 FLRA (No. 79) 503, 507 (2000) (be careful in reading scope of HCFA)

3. Is there an agency duty to inform a union that sought information does not exist? U.S. Equal Employment Opportunity Commission, 51 FLRA 248, 251 n. 4 (1995)

4. Is there an agency duty to not destroy requested information (even if the union is ultimately not entitled to the requested information)? SSA, Dallas Region, Dallas, Tex., 51 FLRA 1219 (1996)

5. Issue of filing ULP versus going to the Arbitrator. Thoughts of KG and of teeming masses.

II. The Freedom of Information Act, 5 U.S.C. 552

A. The statutory language

1. The general authorizing language [5 U.S.C. 552(a)(3)(A)]:

"… each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person."

2. The exception language [5 U.S.C. 552(b)]:

"This section does not apply to matters that are—

[exemptions contained in 5 U.S.C. 552(b)(1)-(9); the more important exemptions for our purposes are:]

… "(2) related solely to the internal personnel rules and practices of an agency; …"

"… (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;" [the "deliberative process" and government attorney privileges]

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; …"

[following 5 U.S.C. 552(b)(9)] "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. …"

B. [KG view]- When is FOIA useful? When info held by another agency (e.g., GSA info needed by non-GSA local) or held by agency activity outside of the certified unit, or (in Title 38 world), where matters may be deemed non-grievable under collective bargaining agreement, or when information desired for a legislative purpose

C. Information from certified employing agency/activity for representational activity: Subject to grievability issues, anything a certified union can get from the agency under FOIA should be obtainable (and more) under 5 U.S.C. 7114(b)(4)

1. Why? 5 U.S.C. 552 (b)(6) and Department of Defense v. FLRA, 510 U.S. 487 (1994) or 5 U.S.C. 552(b)(5)/5 U.S.C. 7114(b)(4)(C)

2. Why may unions like/prefer FOIA to 5 U.S.C. 7114(b)(4)? KG view (grievability, greater righteousness of FOIA staff)

D. Process of request

1. Request of appropriate office under agency regulations [NOTE: Each agency issues its own FOIA regulations.]

   [NOTE: What format?]

2. Time limit for responding [Note are not always met and can be readily extended]

3. Response—can be requested material, denial of request, or partial disclosure and non-disclosure. Final response should include an intra-agency appeal right if there is a denial of any information.

4. (if necessary) Intra-agency appeal to office designated in agency's FOIA regulations challenging the grounds for partial or total denial of requested information as well as other issues such as the fees charged.

   [NOTE: What format?]

5. District Court if (a) appeal denied or (b) time limits in statute not met

   [NOTE: Suit following agency failure to meet time limits does not get records more quickly]

E. Search and reproduction fees- 5 U.S.C. 552(a)(4)(A)(i)

1. Fee schedules to be established by each agency

2. No fee for first two hours of search time or for first 100 pages of duplication- 5 U.S.C. 552 (a)(4)(A)(iv)

3. Waiver or reduction of fee "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester"- 5 U.S.C. 552(a)(4)(A)(iii)

[NOTE: Mere representative goals and/or desire to seek new legislation and/or building public support for its members NOT sufficient to establish "primary" benefit for public in order to qualify for fee waiver. NTEU v. Griffin, 811 F.2d 644, 648-49 (D.C.Cir. 1987)]