Information Requests

Introduction

The law recognizes that constructive labor-management relations are in the public interest and that the process of labor-management relations is facilitated when the agency provides unions with information needed for effective negotiations and representation.

Objectives

At the conclusion of this module, you will be able to accomplish the following:

• Review information disputes.
• Write an information request.
Outline

• The FAA on: Information Requests
• Sample Information Requests/ Privacy Release Form
• FLRA Guidance on Investigating, Deciding and Resolving Information Disputes
• FLRA Pending Information Cases
• Executive Summary
THE FAA ON:
INFORMATION REQUESTS

Disclosure of Information To The Union

Section 7114(b)(4) of the Federal Service Labor Relations Statute provides for agencies to furnish labor organizations with data/information related to collective bargaining. This aspect of labor law continues to evolve, causing a certain amount of confusion to all parties. We would like to provide the current position regarding this ever-changing requirement. Since the case law in this area continues to evolve, the positions taken in the guide should be used only as a beginning point in researching questions involving the release of data/information to labor organizations. Information based on significant new decisions in the area will be communicated in the Emery Topics newsletter or other forms of communication to the field.

The law recognizes that constructive labor-management relations are in the public interest and that the process of labor management relations is facilitated when the agency provides unions with information needed for effective negotiations and representation. Accordingly, the FAA recognizes an affirmative obligation to provide such information and has adopted a policy of cooperation with our recognized unions in meeting their bona fide information needs. At the same time, the FAA recognizes that there are a number of legitimate reasons for denying information which may be requested by unions, including protecting the privacy interests of individuals; preventing undue cost to the FAA, disruption of its operations, and preventing prejudice to the agency’s position through disclosure of privileged management information on labor relations.

The Statute sets forth three Criteria which must be met before the duty to furnish data arises. The data sought must:

1. be normally maintained in the regular course of business;

2. be reasonably available and necessary;

3. not be guidance, advice, counsel or training for management relative to collective bargaining.

A union has a right to the information that is necessary and relevant to its representational responsibilities. The right extends not only to information necessary to process a pending grievance, but also to information necessary to determine whether or not to file a grievance at all. The union’s right to information extends to documentation that is to be used to determine whether to file an unfair labor practice (ULP) charge. Information may be requested as the union prepares for arbitration of a grievance. The
Authority has interpreted the word “furnished” in the Statute to require agencies to provide the union, “free of charge”, requested data to which it is entitled. The union can also request information through the Freedom of Information Act like any other member of the public seeking information. If the union does seek information through FOIA, it can be charged for the cost of providing the information. The FAA cannot require unions to seek material that is pertinent to representational duty under 7114 through a FOIA request. The union occupies a unique position under 7114(b)(4) in requesting information to fulfill its representational duties and cannot be forced to use the FOIA for material necessary to these responsibilities.

“Normally Maintained by the Agency”

An agency’s obligation to furnish information to the exclusive representative is limited to information which is normally maintained by the agency in the regular course of business. Information may be sought through requests for documents or requests for answers to specific questions.

The scope of “normally maintained by the agency” was reviewed by the Authority in a case on the release of “memory joggers”. These “memory joggers” are personal notes kept by supervisors. In this case, the agency argued that these “memory joggers” should not be released because they were the supervisor’s personal and private notes, which were not within the control of an agency’s record keeping system. However, the Authority concluded that these “memory joggers” were contemporaneous records regarding an employee’s conduct during an official awards ceremony. The Authority ruled that the “memory joggers” were normally maintained by the agency in the regular course of business and ordered these supervisory notes to be released to the union. Remember there is a potential that your personal notes may be released to the union. Therefore, they should be written with an “eye” on potential future release.

An agency is obligated to furnish information to the union in a timely manner. However, in order for there to be a duty to disclose information, the information must exist. An unfair labor practice may not be based upon a denial of access to nonexistent data. However, just because the data/information is not maintained in the form requested by the union, does not release the agency from providing the data. In a recent case, an agency argued that to provide the information the union requested would require it to “create” documents that do not presently exist. The Authority rejected this argument. They ruled that compiling information/data from existing documents instead of merely copying them is no more than furnishing data that is normally maintained. The “creation” of new documents is within the statutory duty to furnish data as long as the information is maintained in some form and need not be sought from outside sources.

Your response to an information request from a union must not be unduly delayed. Failure to exercise timeliness in providing information is an unfair labor practice. However, there is no obligation to meet a specific arbitrary deadline established in the union request. Additionally, there is no requirement to extend the time deadlines in
the grievance procedures based upon a union’s request for information. It is important to communicate to the union, the status of their information request. You have an obligation to reply to a request for information even if you respond by telling them that the information they requested does not exist.

“Reasonably Available”

The focus of the requirement that information to be released must be “reasonably available” centers on whether information requests are unduly burdensome. Remember the standard is unduly burdensome, not inconvenient. What is unduly burdensome to management is almost never burdensome in the eyes of the union and probably not burdensome in the eyes of the FLRA.

The importance of communication between management and the union must be emphasized. If management believes that the request for information is unduly burdensome, management should advise the union of such objections at the time the information is requested. It is proper for management to ask the union for clarification and specify under such circumstances so that only relevant information might be provided with less burden. It is not an unfair labor practice to ask the union to make its request for information reasonable and specific.

If you believe that a request is “unduly burdensome”, you are encouraged to meet with your union representative so you may discuss alternative arrangements in order to meet the union’s request. The agency failure to discuss alternative arrangements with the union could be the basis for determining an unfair labor practice has occurred. Keep a record of all discussions and meetings with the union. Why is it so important to communicate with the union and attempt to resolve any “unduly burdensome” concerns simply because the Authority’s standard on what constitutes unduly burdensome is much different than that of most FAA managers and supervisors. Two decisions are helpful in examining the Authority’s standard for unduly burdensome. In one case, it was estimated by an agency that it would take approximately three weeks of work to accumulate the information. The Authority determined that reasonable was defined as not extreme or excessive. The Authority ruled that complying with a request that would take three (3) weeks to accumulate the information might be “somewhat onerous” but was not extreme or excessive. The Authority determined that the information was reasonably available. In another case, the evidence presented stated it would take 150 employee hours to complete and copy the data requested. The estimated cost of $1,500.00 or somewhat higher, if a significant amount of overtime pay were to be involved, was not an excessive burden according to the Authority and it determined the data was “reasonably available”.

These two examples should show you why it is important to meet with your union representative to attempt to reach an accommodation on what information is actually needed.
“Necessary and Relevant”

Section 7114(b)(4)(B) requires agencies to furnish the exclusive representative with data necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. For information to be necessary it must at least be relevant to negotiations or to a union representational activity such as a grievance. A base assertion by the union that requested information is needed, in some cases, may be insufficient. The union can be required to sufficiently justify the relevance of the information.

It is clear that a union’s assertion that information is necessary and relevant does not automatically obligate an agency to supply it.

Privacy Act Considerations

Some of the information requested by unions is covered by the Privacy Act. Agencies are prohibited from furnishing a record that is covered by the Privacy Act without the prior written consent of the subject of the record, unless the disclosure is permitted by an exception to the Privacy Act’s disclosure prohibitions. There is an exception under the Privacy Act “for a routine use”. The Office of Personnel Management, in their regulations, has included routine uses that permit disclosure of a system of records to officials of labor organizations, recognized under the Statute when relevant and necessary to their duties of exclusive representation.

Under OPM’s routine use, the union’s access to information from Privacy Act systems of records is not unconditional. The union must demonstrate that the information requested is both “relevant” to the express purpose for which it is sought, and “necessary” for that purpose. Relevant means that the nature of the information bears a traceable, logical, and significant connection to the purpose to be served. Necessary means that there are no adequate alternative means or sources for satisfying the union’s information needs.

Unions will often cite a generalized need for information about agency actions with respect to individual employees. For example, the union may ask for copies of disciplinary records on employees who have been disciplined, within a specific time frame for a specific reason, in order to determine if a grievance should be filed. If this occurs, you must apply a two-step analysis to determine whether the requested information is releasable. First, the union must show that the information is relevant to carrying out its representational obligations. Second, if the agency determines that the information is “relevant”, it must also determine that the information is in fact “necessary.” The union must show that it has a particular need for the information and that the information needs cannot be satisfied through less intrusive means, such as by releasing records with personally identifying information deleted. *(It is critical that you coordinate any request for information received from your union with your operating division in order to determine what information can be released.)*
**Steps to Follow**

First, make sure you communicate the union’s request to your Program Division and LMR. There are some steps which should be utilized by management in dealing with requests by unions for information which might be questionable to release.

A. **Analyze the Request** – You need to analyze each union request to determine whether or not the data should be released. You need to attempt to obtain as much information as possible on exactly what the union wants and how it relates to specific negotiations or representation functions. Communicate with the union so it is clear what information is requested.

B. **Attempt Compromise** – As you can see by some of these above cited FLRA decisions, the Authority has consistently placed a heavy burden on agencies who have attempted to defend a finding of “reasonably available” by showing undue burden. This is because of the Labor Relations Statute’s bias toward the process of collective bargaining. Therefore, the importance of compromise is a key in dealing with potential burdensome requests. When the request for data may be burdensome or pertains to information which may not properly be furnished, attempts should be made to reach a compromise with the union. In this way, it may be possible to satisfy the union’s legitimate needs for information in a form which is less burdensome.

C. **Maintain Dialogue** – Even when there is a sound basis for denying a union’s request for data, information requests should never be preemptively refused. After attempts to compromise have been made, the union should be furnished a clear statement of the agency’s response for withholding. While a written record of this is desirable, the explanation should preferably be given face-to-face to allow for discussion. This approach demonstrates good faith and provides the maximum opportunity for accommodation. Pains should be taken to prevent this process from degenerating into an adversarial exchange of papers.

Always remember to keep a copy of any data/information that you disclose to the union, along with a copy of the transmittal document for record keeping.
Sample letters

- Information Request (Pre-Grievance)
- Information Request (Post-Grievance)
- Information Request (Second Request)

** Pre-Grievance Information Request **

(Date)

CERTIFIED MAIL #

(Name)
(Title)
Federal Aviation Administration
Address1
Address2
City, State, ZIP

Re: Information Request

Dear:

In accordance with 5 USC 7114 (b)(4) and Article 9 Section 19, the following information is requested and required for NATCA ____ Local to properly represent the bargaining unit employees.

This information is necessary to evaluate the actions and/or inaction’s of the Agency in complying with law, rule, regulation, and contractual requirement. The information will be used to determine if a grievance and/or other legal remedy is required to protect the rights of bargaining unit employees and/or the union. Lastly, the information shall be utilized in such a fashion that the union will be able to make correct assertions concerning litigation in the matter. NATCA has an obligation under the law to perform representational duties to its bargaining unit employees. NATCA also has an obligation and a right to ensure compliance with the collective bargaining agreement by the Agency. As such, the information is necessary and needed for the union to have full and proper discussion, understanding, and negotiation of the subject within the scope of bargaining so defined herein.
Definitions

1. “Document” means the original (or an identical copy when the original is not in the possession, custody, or control of the Agency, its agents, or representatives) and each non identical (whether different from originals because of notes made on such copies or otherwise), of writings or other graphic material of every kind and description in your possession, custody, or control whether inscribed by had or by mechanical, electronic, microfilm photographic or other means, as well as phonic (such as tape recordings) or visual reproductions or oral statements, conversations, records of conversations or events, and including, but not limited to, correspondence, messages, memoranda, notes, reports, summaries, tabulations, records, computer printouts, telex, fax, Teletype, returns, and receipts, and any other written, printed or reproduced material including all drafts, alterations, modifications, changes and amendments or corrections of any of the foregoing.

2. “Documents pertaining to” a given subject matter, as used herein, means a document that constitutes, embodies, comprises, reflects, identifies, states, refers to, deals with, comments on, responds to, describes, analyzes, contains information concerning, or is in any way pertinent to that subject matter, including, without limitation, documents concerning the preparation of other documents, in whole or in part.

3. “Agency” refers to the FAA local facility, regional headquarters and national headquarters and any FAA body attached or separated thereof.

4. “Agent” refers to any authorized or unauthorized person, employed or not employed, by the Federal Aviation Administration who rendered any input of any kind, direct or indirect, into any topic relative to the matter contained within this request.

Instructions

1. This request for production is to be read, interpreted and answered in accordance with these instructions and the definitions that are previously set forth and applicable law. If any document request cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why compliance is not possible. Additionally, the Agency shall inform the union if there is not information to release or if the information can’t be released; see VA Long Beach and AFGE Local 3943, 48 FLRA 970, 975-78 (1993). In the latter case where the Agency refuses to disclose the information, it shall: a) assert a countervailing anti-disclosure interest; and b) establish its anti-disclosure interest as required by the FLRA’s General Counsel’s guidance. Similarly, if the agency refuses to disclose information asserting that some other requirement of section 7114(b)(4) has
not been met, the Agency shall establish that reason. Finally, the Agency’s failure to communicate and articulate to the union and countervailing anti-disclosure interests or other reasons for not disclosing the requested information shall constitute a failure to bargaining in good faith and an independent unfair labor practice per the guidance of the General Counsel.

2. Each request for documents seeks production of all documents described, including all drafts and non-identical copies.

3. Each request for documents seeks production of all documents described herein and any attachments thereto, in the Agency’s possession, custody, or control or in the possession, custody or control of any of the Agency’s attorneys employees, which the agency employees, agents, or representatives have the legal right to obtain or have the ability to obtain from sources under their control.

4. Each request for a document contemplates production of the document in its entirety, without abbreviation or expurgation including any amendments thereto whether referred to in the document or otherwise.

5. The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The word “including” shall be construed to mean without limitation.

6. The use of the past tense shall include the present tense and the use of the present tense shall include the past tense so as to make the document request inclusive rather than exclusive.

7. The singular includes the plural, and vice versa.

8. If it is claimed that the attorney client privilege or any other privilege, including privacy, is applicable to any document sought by this request, the document is to be identified as follows:

   a) State the date, nature, and subject matter of the document;
   b) Identify each and every author of the document;
   c) Identify each and every preparer of the document;
   d) Identify each and every person who received the document;
   e) Identify each and every person form whom the document was received;
   f) State the present location of the document and all copies thereof;
   g) Identify each and every person who has ever had possession, custody, or control of the document or any copy thereof;
   h) State the number of pages, attachments, appendices and exhibits; and
   i) Provide all further information concerning the document and the circumstances upon which the claim or privileges is asserted.
9. In the event that any document called for by this request has been destroyed or discarded or otherwise disposed of, that document is to be identified as completely as possible, including without limitation, the following information:

   a) Identify each and every author of the document;
   b) Identify each and every preparer of the document;
   c) Identify each and every addressee of the document;
   d) Identify each and every person who received the document;
   e) State the date of the document;
   f) State the subject matter of the document;
   g) State the reason(s) for disposal of the document;
   h) Identify each and every person who authorized disposal of the document;
   i) Identify each and every person who disposed of the document.

10. Unless otherwise stated, this production for request of documents covers the time period in which these events arose through the date of the response to this request. Please be advised, however, that this request should be considered as a continuing request, and any new information that is generated that falls into one of the above categories should be delivered to us as soon as possible after it is created. And old information that is found after your original reply which falls within one of the above categories should be delivered to us as soon as possible after it is found. Furthermore, the time limits covered by the Parties’ collective bargaining agreement shall not be instituted until such time as I am in receipt of the information requested and had time to review it in its entirety. Unless I hear from you by the close of business today, I will consider this request uncontested.

11. In producing the documents requested herein, indicate the specific request (paragraph and subparagraph) in response to which each document or group of documents is being produced.

Privacy Concerns

The following information is request in unsanitized form. This request is consistent with the guidance established by the FLRA General Counsel in his memorandum to Regional Directors. The Union has shown in accordance with Internal Revenue Service, Washington DC and Internal Revenue Service, Kansas City Service Center, Kansas City Missouri, 50 FLRA 661 (1995) the necessity for the information. Additionally, the Union contends the unsanitized information is to be correctly provided since such disclosure is clearly defined as serving the public interest. Indeed, the public has a great interest in assuring the actions and inactions of this federal agency are done in accordance with law, rule, and regulation. For this purpose, and that of the General Counsel’s guidance, the public interest is considered under the extent this information will shed light on the “Agency’s performance of its statutory
duties” or to otherwise “inform citizens concerning the activities of the Government.” Since the union maintains that the actions and/or inactions of the FAA have possibly been made illegally and in violations of federal law, as well as rule, regulation, and contractual obligation, and whereas said violations would erode public confidence in the Agency’s obligations under law, and whereas unsanitized information is necessary to properly evaluate said actions and inactions of the Agency, and whereas sanitized information will not serve the same purpose, the union contends disclosure serves the public interest.

Should the Agency differ in its interpretation, and as indicated elsewhere in this document, the union hereby requests the Agency provide sanitized copies of the following items. The union shall at all times follow legal remedy to obtain the material originally requested in said specified form while temporarily accepting the given format. Additionally, it is requested, and is required by law, that the following information also be provided in accordance with the General counsel guidance: 1) a statement that the information is maintained with an Agency “system of records” within the meaning of the privacy act; 2) a statement that disclosure of the information would implicate employee privacy interests; and 3) a statement of the nature and significance of those privacy interests. These statements are required by law (see U.S. Department of Transportation, Federal Aviation Administration, New York TRACON, Westbury New York, 50 FLRA 338 (1995).

Documents Requested

1.
2.
3.
4.

In accordance with the principles established in U.S. Immigration and naturalization Service, Border Patrol, Tucson Arizona and National Border Patrol Council, Local 2544 FLRA July 16, 1997, we need and expect to receive this information no later than __________(Date)______.

If you believe that you cannot provide me with some of the information because of legal impediments, or if there are questions concerning the contents of this request, please contact me by close of business the day of receipt. In the manner, we may discuss the problem and I may be able to revise my request so as to remove the impediment(s) and you will be able to provide the information.

Sincerely,

____________________
(Name)
President, NATCA ______
**Post-Grievance Information Request**

(Date)

CERTIFIED MAIL #____________

(Name)
(Title)
Federal Aviation Administration
Address1
Address2
City, State, ZIP

RE: Grievance Number (NC)XXX-9X-XXX-FAC-02, Name

Dear:

Pursuant to Article 9, Section 19 of the NATCA/FAA collective bargaining agreement dated August 1993, and the provisions of 5 U.S.C. 7114(b)(4), the Union, by its undersigned representative, requests the Agency to provide the data requested herein to (your name), representative of the National Air Traffic Controllers Association, (address).

The documentation requested herein is necessary to properly investigate charges (and allegations of discrimination, disparate treatment, and harassment of bargaining unit employees)¹, and to determine whether the FAA has violated the rights of the union (and/or employees)² guaranteed by the United States Constitution, United States Code, other federal laws, rules, regulation, or policies, memoranda of understanding, and the negotiated agreement between NATCA and the FAA. The data herein requested is also necessary so that the Union, by its undersigned representative, can fulfill its statutory obligation toward the bargaining unit employees by ensuring that management’s actions are consistent with all governing laws, rules, regulation, and policies of the United States and the FAA, and that the conditions of employment of bargaining unit employees are not subverted nor undermined by discriminatory and illegal administration and interpretation of existing laws, rules, regulations, policies, memoranda of understanding, and the contract between NATCA and the FAA. Additionally, the data herein requested is relevant and necessary so that the Union and the signatory of this instrument can assess the relevancy and necessity of the demand of data herein to insure a fair and impartial hearing on behalf of the aggrieved and so that the Union and the signatory of this instrument can properly perform its representational duties.

Info. • 1.13
DATA REQUESTED

1. Copies of any documents contained in any files or system of records maintained by the FAA or any of its employees relating to (NAME).

2. Copies of any laws, rules, regulations, orders, memoranda, directives, guidelines, or other documents which the FAA used in the determination to __________.

3. Copies of any communications, oral or otherwise, relating to (NAME).

4. Copies of any (proposal(s) of discipline), occurring within the immediately preceding five year period, for any FAA employee(s) charged with the same or similar offenses, either individually or compounded, as those for which (NAME) was removed.

5. Copies of the final disposition of the proposals listed in item 4, above.

6. Copies of the report of investigation (ROI) for any investigation conducted by any DOT or FAA entity, relating to (NAME).

Please produce the requested data in catalogued format indicating that data which you are producing in response to each enumerated request. If any of the requested data is not produced, please identify that data in accordance with the instructions listed above.

Please provide the requested data not later than the close of business on (Date). If you have any questions concerning this request, or if you do not understand any part of this request, notify the signatory of this document not later than the close of business on (Date). You can contact me at (Phone Number) or via pager at 1-800-759-8255, PIN #_______. If you have not contacted the signatory by the close of business on (Date), the Union will assume that this request is granted, in its entirety, as written.

Thank you for your prompt attention to this matter.

Sincerely,

(Name)
(Title)

cc: (Grievant)

1 Relevant in a discipline case.
2 Relevant in a discipline case.
Second Information Request

(Date)

CERTIFIED MAIL #____________

(Name)
(Title)
Federal Aviation Administration
Address 1
Address 2
City, State, ZIP

Re: Information Request

Dear:

In accordance with 5 USC 7114 (b)(4) and Article 9 Section 19, the following information is requested and required for NATCA _____Local to properly represent the bargaining unit employees.

On (Date), I notified you of a request for documents. As of (Date), you have not responded to the information request. In order to give you an opportunity to fulfill your obligation for properly requested documentation, I am asking that you provide the requested information to me no later than 5 business days upon receipt of this letter. Failure to respond will leave me no choice but to seek relief in the proper forum.

Sincerely,

________________
(Name)
President, NATCA ________
Authorization for Release of Information

I, ____________________, hereby authorize the Federal Aviation Administration to release any and all information contained in my Official Personnel File, (facility file), (and medical file) to __________________, of the National Air Traffic Controllers Association, that might otherwise be prohibited under the Privacy Act. Therefore, any request for this information should be fulfilled.

___________________________  __________________
(Name)                      Date
MEMORANDUM

TO: Regional Directors

FROM: Joe Swerdzewski
General Counsel

SUBJECT: Guidance on Investigating, Deciding and Resolving Information Disputes

The Authority has issued two precedent setting decisions interpreting the duty to furnish information under section 7114(b)(4) of the Statute.1 These decisions significantly impact the manner in which unfair labor practice charges alleging a refusal to furnish information should be investigated and decided. The purpose of this memorandum is to provide guidance to the Regional Directors when investigating and deciding these charges, and when assisting the parties in resolving disputes over the disclosure of information.

One Authority decision involves what exclusive representatives must show as to their need for information to trigger an agency’s statutory duty to furnish that information, what agencies must

1 Section 7114(b)(4) of the Statute provides that the obligation to bargain in good faith includes 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.
show to establish any anti-disclosure interests and both parties’ obligation to communicate and articulate their respective interests. Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA No. 86, 50 FLRA 661 (1995) [IRS, KC]. These matters are discussed in Part 1 of this memorandum.

The other Authority decision concerns the relationship between section 7114(b)(4) of the Statute, the Privacy Act and the Freedom of Information Act. U.S. Department of Transportation, Federal Aviation Administration, New York Tacon, Westbury, New York, 50 FLRA No. 55, 50 FLRA 338 (1995) [FAA, Westbury]. This relationship is discussed in Part 2 of this memorandum.

Part 3 of this memorandum describes the assistance the Regional Directors can afford the parties, in narrowing and resolving their disputes, over information requests arising under section 7114(b)(4)(B) of the Statute, without time consuming and costly litigation. Sample forms also are provided for unions when submitting information requests and for agencies when responding, as well as a sample form to assist the parties in using an interest based approach to resolve information disputes prior to filing an unfair labor practice charge.

**PART 1 - "NECESSARY" INFORMATION**

**SECTION 1 - THE RULE ESTABLISHED IN IRS, KC**

In IRS, KC, the Authority set forth its new analytical approach to determine whether information is “necessary” under section 7114(b)(4) of the Statute. The Authority adopted the “particularized need” standard for determining the necessity of all requested information, concluding that it will apply the same approach in deciding whether information is necessary, regardless of the type of documents requested.

In defining the term “particularized need”, however, the Authority did not require the “heightened level of ‘need’ for disclosure of intramanagement guidance that a union must establish to outweigh the countervailing agency interests” identified by the D.C. Circuit in National Labor Relations Board v. FLRA, 952 F. 2d 523 (D.C. Cir. 1992) (NLRB v. FLRA). Rather, the Authority noted that the D.C. Circuit had used the phrase “particularized need” in varying contexts, causing “confusion.” The term “particularized need” was originally introduced by the D.C. Circuit when analyzing requests for intra-management guidance in NLRB v. FLRA, but later was applied by the court regardless of the type of documents or countervailing interests at issue. When the Authority adopted the NLRB v. FLRA approach in National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 127, 48 FLRA 1151 (1993), “the Authority did not address this apparent distinction.” IRS, KC, at p. 667. The Authority has now clarified the matter by deciding to use the term “particularized need” consistent with its use by the D.C. Circuit in later decisions, such as United States Department of Veterans Affairs, Washington, D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993) and United States Department of Justice, Bureau of Prisons, Allenwood Prison Camp, Montgomery, Pennsylvania v. FLRA, 988 F. 2d 1267 (D.C. Cir. 1993).
Under this interpretation, a union requesting information under section 7114(b)(4) of the Statute must establish a particularized need for requested 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.” IRS KC, at p. 669. The Authority noted that this requirement “will not be satisfied merely by showing that requested information is or would be relevant or useful to a union.” “Instead, a union must establish that requested information is ‘required in order for the union adequately to represent its members.’” IRS KC, at p. 669-670.

In addition to satisfying the particularized need standard in order to trigger the statutory duty to furnish the requested information, the union request must contain sufficient particularity to allow an agency to make a decision upon the request. The Authority now requires that “[t]he union is responsible for articulating and explaining its interests in disclosure of the information. Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether the information must be disclosed under the Statute.” IRS KC, at p. 669-670. As to specificity, the Authority will not require the request to “be so specific as, for example, to require a union to reveal its strategies or compromise the identity of potential grievants who wish anonymity.” “Moreover, the degree of specificity required of a union must take into account the fact that, in many cases, a union may not be aware of the contents of a requested document.” IRS KC, at p. 669-670.

With respect to an agency’s defense to furnishing information, the Authority found that there is no presumptive anti-disclosure interests in non-intramanagement guidance information. Rather, “[a]n agency denying a request for information under section 7114(b)(4) must assert and establish any countervailing anti-disclosure interests.” “Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying ‘no’.” IRS KC, at p. 669-670.

Where parties are unable to agree on whether or to what extent requested information must be provided, the Authority stated that an unfair labor practice will be found if a union has established a particularized need for the requested information as discussed above and either: (1) the agency has not established a countervailing interest; or (2) the agency’s established countervailing interest does not outweigh the union’s demonstration of particularized need. Of course, the requesting union must also establish that the other elements in section 7114(b)(4) have been met.
SECTION 2 - INVESTIGATING WHETHER THERE IS A PARTICULARIZED NEED FOR THE REQUESTED INFORMATION

The requesting labor organization must establish a particularized need for the information and that its request to the agency for the information was sufficient.

Particularized Need Standard

To establish a particularized need for requested information, the union must establish that the requested information is actually required for the union to fulfill its representational responsibilities as the exclusive representative. The assertions of need advanced by the union must demonstrate that the information requested is required for the union to adequately represent unit employees. Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 51 FLRA No. 49 (1995). This requires the Regions when investigating a refusal to furnish requested information to discover with specificity:

1. Exactly why did the union need the requested information;

2. What would the union have used the requested information for if it had been furnished; and

3. How would that use of the information relate to the union's role as the exclusive representative.

Absent discovery of evidence that establishes that the requested information was required in order for the union to adequately represent its members; i.e., absent the establishment of a particularized need, the unfair labor practice charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

Sufficiency of Union Request for Information

Even if a charging party labor organization presents evidence of a particularized need for information not furnished, the Region must still ascertain whether the union's request for that information was sufficient so as to trigger an agency's statutory duty to furnish data.

A valid request requires that the union must articulate and explain to the agency its interests in the disclosure of the information. This requires the Regions when investigating a refusal to furnish requested information to discover with specificity:

1. Was the request specific enough to permit the agency to make a reasoned judgment as to whether the information must be disclosed under the Statute;
2. Did the Union articulate and explain its interests in disclosure of the information; and

3. Did the union respond properly to any agency requests for further clarification as to why the union needed the information; the purpose for which the union would use the information; and how that use relates to the union's representation of the unit employees, without revealing the union's strategies or compromising the identity of a potential grievant who wishes anonymity.

The Regions should investigate whether requests for information meet this test, just as the Regions in unilateral change cases investigate requests to bargain and in investigatory examination cases investigate requests for representation. A request may be oral, as well as written, or a combination of oral and written communications. The Authority will not consider reasons supporting a request which are advanced for the first time by the General Counsel after issuance of a complaint rather than by the union in its request to the agency. U.S. Department of Veterans Affairs, Regional Office, St. Petersburg, Florida, 51 FLRA 47 (1995). Thus, a valid request is an essential element of any violation of section 7114(b)(4) of the Statute. Absent a finding by the Region that the request was sufficient so as to permit the agency to make such a reasoned judgment, the unfair labor practice charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

Agency Anti-Disclosure Interests

If a requesting union has established a particularized need based on a sufficient request for information under section 7114(b)(4), an agency may establish a countervailing interest in the disclosure of that information. When investigating a refusal to furnish information based on an agency's assertion of a countervailing anti-disclosure interest, the Region must ascertain:

1. Whether the agency informed the union in response to the request that it was asserting a countervailing anti-disclosure interest; and

2. Whether the agency has established such an anti-disclosure interest.

Personal Identifiers

Part 2 of this memorandum discusses, among other things, whether the release of personal identifiers (such as names, social security numbers or other information identifying a particular employee) renders the disclosure of that information contrary to the Privacy Act. However, in addition to Privacy Act restrictions on releasing personal identifiers, the Authority rarely finds any particularized need for the release of personal identifiers under section 7114(b)(4)(B) of the Statute.
In U.S. Department of Labor, Washington, D.C., 51 FLRA No. 41 (1995) (DOL), the Authority found that the union did not satisfy its burden of demonstrating that the requested information was required to adequately represent its members. The Authority held that the union had not established with the requisite specificity a need for the requested records. In addition, the Authority specifically stated that the union did not identify why it needed the name-identified documents.

It appears that the Authority will require the same degree of specificity when personal identifiers are requested; i.e., why the union needs the names or personal identifiers, the specific uses to which the union will put the personal identifiers and the connection between those uses and the union's representational responsibilities - as it requires when substantive information in documents is requested. Thus, when investigating unfair labor practice charges which concern a request for personal identifiers in documents, the Regions should apply the same particularized need analysis independently to the personal identifiers as it applies to the substance in the requested documents. For example, it is possible that the Authority could find a particularized need for the contents of documents but could find no particularized need for the same documents with personal identifiers. Similarly, the Authority requires that a particularized need be established for the time period covered by the requested documents. For example, there may be a particularized need for certain documents for a certain time period (such as one year) but no particularized need for those same types of documents for a greater time period (such as five years, as in DOL).

Also in DOL, the Authority held that an Administrative Law Judge cannot order the release of sanitized documents if the union requested only unsanitized documents and the complaint only alleged the refusal to provide unsanitized documents. An agency must have the opportunity to fully and fairly litigate the issue whether sanitized information should have been furnished.

Thus, when drafting information complaints, the Regions should ensure that all information complaints specifically plead whether the alleged violation is the failure to furnish sanitized or unsanitized documents. If the complaint alleges only unsanitized, consistent with DOL, the Region should not argue in the alternative the failure to furnish sanitized documents. If the union requested either sanitized or unsanitized and the agency refused both requests, the complaint should separately allege both refusals. Note, however, that a prerequisite to pleading a failure to furnish both unsanitized and sanitized documents is a sufficient union request for both types of documents.

Regional Office Decision Making Process

When an unfair labor practice charge is filed alleging a violation of section 7114(b)(4), the necessity of the requested information is in dispute and the parties are unable with the Region's assistance to agree on whether or to what extent requested information must be provided, the Region should follow the following decisional process:
Insufficient request or particularized need not established - If the investigation does not establish both a sufficient union request and a particularized need for the information, in addition to the other elements of section 7114(b)(4), the Region should dismiss the unfair labor practice charge, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

No countervailing anti-disclosure interest - If a union has made a sufficient request and has established a particularized need, and the other elements in section 7114(b)(4) have been met, and if there is no assertion and establishment of countervailing anti-disclosure interests, absent settlement, complaint should issue consistent with the Office of the General Counsel Settlement Policy.

Particularized need and countervailing anti-disclosure interests both established - If a sufficient request, a particularized need, and the other elements in section 7114(b)(4) are established, as well as countervailing interests, the Region should balance the needs and interests of the parties and determine whether the union's needs for the information outweigh the agency's interests against disclosure. In IRS KC, the Authority also stated that it "expects the parties to consider, as we will in determining whether and/or how disclosure is required, alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information." IRS KC, at p. 671.

Thus, in my view, a union's good faith and reasonable attempt to accommodate an agency's anti-disclosure interest and an agency's good faith and reasonable attempt to accommodate a union's need for information are factors which must be considered in determining whether a complaint, absent settlement, will issue alleging a violation of section 7114(b)(4) of the Statute. For example, an agency's reasonable offer of accommodation, rejected by a union, may constitute a valid response to an information request, resulting in dismissal of a charge, if the Region is unable to assist the parties in resolving their information dispute as discussed in Part 3 of this memorandum. Similarly, a union's reasonable offer to accept sanitized information, rejected by an agency, may result in issuance of an unfair labor practice complaint if the Region is unable to assist the parties in resolving their information dispute.

Agency failure to articulate its reasons for nondisclosure to the union - In situations where the Region finds a sufficient request and a particularized need for requested information, as well as satisfaction of the other elements in section 7114(b)(4), and the agency has refused to articulate to the union its reasons for nondisclosure or has refused to discuss with the union alternative methods to meet both its own and the union's interests, any complaint which issues alleging the failure to provide the information should also allege an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute.

Similarly, even if the Region determines that there is no statutory requirement to
furnish requested information, an agency refusal to articulate to the union its reasons for nondisclosure or a refusal to discuss with the union alternative methods to meet both its own and the union’s interests should be alleged to be an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. As a remedy the Region should seek an order requiring the agency to engage in such communication for future requests, but should not require disclosure of the information.

PART 2 - THE PRIVACY ACT

SECTION 1 - THE RULE ESTABLISHED IN FAA, Western.

FOIA Exemption 6

In FAA, the Authority set forth the analytical approach to assess an agency’s claims that disclosure of information requested under section 7114(b)(4) of the Statute would constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6 and, therefore, is prohibited from disclosure by the Privacy Act. The Authority concluded that an agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the information sought is contained in a “system of records” within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If an agency in an unfair labor practice proceeding makes the requisite showings, the Authority found that the burden then shifts to the General Counsel to: (1) identify a public interest cognizable under the FOIA; and (2) demonstrate how disclosure will serve that public interest.

2 The Privacy Act regulates the disclosure of any information contained in an agency “record” within a “system of records,” as those terms are defined in the Privacy Act, that is retrieved by reference to an individual’s name or some other personal identifier. 5 U.S.C. §552a(1),(4),(5). With certain enumerated exceptions, the Privacy Act prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the requested information would be required under the Freedom of Information Act, 5 U.S.C. §552 (FOIA). Exemption (b)(6) of the FOIA (Exemption 6) provides, in turn, that information contained in “personnel and medical files and similar files” may be withheld if disclosure of the information would result in a “clearly unwarranted invasion of personal privacy.” 5 U.S.C. §552(b)(6). If such an invasion would result, then disclosure is not required by the FOIA. In addition to the exception relating to the FOIA, Exception (b)(3) of the Privacy Act permits disclosure of information “for a routine use as defined in subsection (a)(7) of this section...” 5 U.S.C. § 552a(b)(3). Subsection (a)(7), in turn, defines routine use as “the use of such record for a purpose which is compatible with the purpose for which it was collected[.]”
The Authority explained that the only relevant public interest to be considered under the FOIA is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens concerning the activities of the Government. In particular, the Authority held that the public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, will no longer be considered in analyzing the application of Exemption 6 of the FOIA.

If both the public interest cognizable under the FOIA and privacy interests are established, the Authority will balance the privacy interests of employees against the public interest in disclosure. If the balance leads to the conclusion that the privacy interests are greater than the public interest at stake, the requested disclosure would constitute a clearly unwarranted invasion of personal privacy under FOIA Exemption 6 and, therefore, that disclosure would be prohibited by law (the Privacy Act) under section 7114(b)(4) of the Statute. Accordingly, the agency would not be required to furnish the information, unless disclosure was permitted under another exception to the Privacy Act. If the public interest in disclosure is greater than the privacy interests that disclosure would be required under the FOIA (since it does not fall within FOIA Exemption 6). Since disclosure under the FOIA is an exception to the Privacy Act, disclosure of the information would not be prohibited by the Privacy Act.

Routine Use

In U.S. Department of Transportation, Federal Aviation Administration, Little Rock, Arkansas, FLRA No. 24 (1995) (FAA, Little Rock), the Authority addressed the routine use in the OPM/GOVT-2 system of records. This system of records covers most personnel related matters. OPM's routine use statement governing that system of records, identified as routine use "e," provides that records may be disclosed "to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation." 57 Fed. Reg. 35710 (1992). Accordingly, when requested information is contained in OPM/GOVT-2, it must be determined whether the requested information is "relevant and necessary" within the meaning of routine use "e."

The Authority had previously in National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., FLRA No. 22, 46 FLRA 234, 243 (1992), adopted and applied OPM's interpretation of the routine use contained in FPM Letter 711-164 (September 17, 1992). In FAA, Little Rock, the Authority stated that it would continue to apply OPM's interpretation of the terms "relevant and necessary" for purposes of applying routine use "e" to all cases arising from conduct prior to the December 31, 1994 expiration of the FPM Letter.

As to those pending cases arising from conduct prior to December 31, 1994, the FPM Letter contains two requirements that a union must satisfy in order to establish that disclosure of requested information is consistent with routine use "e": (1) the information must be "relevant" to the express purpose for which it is sought, meaning that the nature of the information must bear a traceable, logical, and significant connection to the purpose to be served; and (2) the
information must be "necessary," meaning that there are no adequate alternative means or sources for satisfying the union's informational needs. In clarifying this second requirement, the FPM Letter explains that it is to be determined on a case-by-case basis; the union "must show that it has a particularized need for the information in a form that identifies specific individuals, and that its information needs cannot be satisfied through less intrusive means, such as by releasing records with personally-identifying information deleted."

Based on OPM's interpretation of its routine use, the "relevance" of requested information must be shown for any requested information, including those portions of the information which identify particular individuals. It also must be established to trigger routine use "e" that the union has a particularized need for the information in a form that identifies specific individuals and that the union's interests in the information cannot be satisfied by any less intrusive means which does not identify particular individuals, such as deleting personally identifying information.

Note the different approaches used in determining whether there is a particularized need for information under section 7114(b)(4) of the Statute and whether information is "necessary and relevant" within the meaning of OPM routine use statements. Necessity under the Statute is determined under the IRS KC particularized need standard, while "necessary and relevance" is determined consistent with the FPM letter.

The Authority also stated in footnote 10 in FAA, Little Rock that "[t]he consequence, if any, of the abolishment of the FPM Letter in cases arising after December 31, 1994, is not at issue in this case." Should a situation arise concerning a request for information after December 31, 1994: where the Region has determined a particularized need under IRS KC exists for personally identifying information; the FOIA exception is determined not to be applicable; and OPM/GOVT-2 is the controlling system of records, the Region should submit the case for advice to determine whether the OPM routine use is applicable. Similarly, any information cases concerning whether another routine use is applicable should be discussed with the Office of the General Counsel prior to taking dispositive action.

SECTION 2 - INVESTIGATING WHETHER THE PRIVACY ACT BARS DISCLOSURE OF THE REQUESTED INFORMATION

The Regional Offices must ascertain whether the requested information is barred from disclosure by the Privacy Act. When investigating unfair labor practice charges alleging a refusal to supply information under section 7114(b)(4) of the Statute, the Regions should initially inquire whether the requested information is contained in a "system of records" under the Privacy Act, and if so, whether the information is disclosable either under: the FOIA (usually analyzing Exemption 6); a routine use for that system of records; or some other Exception to the Privacy Act.

The prohibition against disclosing information prohibited from disclosure by law is a statutory prohibition which cannot be waived by an agency. In pleading unfair labor practice complaints alleging violations of section 7114(b)(4) of the Statute, the Regions allege that the information
which is the subject of the complaint is not barred from disclosure by law. Thus, even if not specifically raised by the agency in response to the union's request or during the investigation, the Regions should investigate and determine whether the Privacy Act bars disclosure of the requested information.

This requires the Regions when investigating a refusal to furnish requested information to determine:

1. Whether the requested information is contained within a system of records under the Privacy Act;
2. If so, whether disclosure of that information would implicate privacy interests;
3. If so, the nature and significance of those privacy interests;
4. If there are employee privacy interests, whether there is a public interest in the requested information cognizable under the FOIA; and
5. If so, how disclosure of the information requested will serve that public interest.

**Personal Identifiers**

In cases subsequent to *FAA Wescourt* which concern requests for information containing personal identifiers, such as United States Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base, Missouri, 50 FLRA No. 66, 50 FLRA 455, 460-61 (1995) (*Richards-Gebaur AFB*), the Authority has yet to find any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Rather, the Authority consistently has found, as most recently in *Department of Transportation, Federal Aviation Administration, Fort Worth, Texas*, 51 FLRA No. 31 (1995), that "the public interest that would be served by disclosure of the requested information also could be substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information." In addition, the Authority has held that when requested documents concern only one name-identified employee, "it is not possible to redact the documents to protect the identity whose privacy is at stake." The fact that the "employees' identity is known to the Union does not lessen [the employee's] privacy interests." *U.S. Department of Justice, Federal Correctional Facility, El Reno, Oklahoma*, 51 FLRA No. 52 (1995).

Please contact the Office of the General Counsel prior to issuing complaint in any case where a requested document is contained in a system of records and the information request encompasses personal identifiers.
Regional Office Decision Making Process

When an unfair labor practice charge is filed alleging a violation of section 7114(b)(4), the Privacy Act is implicated and the parties are unable with the Region’s assistance to agree on whether or to what extent requested information must be provided, the Regions should be guided by this decisional process:

Not contained in a system of records under the Privacy Act - If the requested information is not contained in a system of records under the Privacy Act, the Privacy Act is not a bar to disclosure and, if the other elements of section 7114(b)(4) are met, the Regions should issue an unfair labor practice complaint, absent settlement, consistent with the Office of the General Counsel Settlement Policy.

Contained in a system of records but no FOIA public interest in disclosure or applicable routine use - If the requested information is contained in a system of records and the investigation does not reveal any cognizable public interest under the FOIA or any applicable routine use, the charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

Contained in a system of records and FOIA public interest established - If the requested information is contained in a system of records and the investigation reveals a cognizable public interest under the FOIA, the Regions should balance the privacy interest of employees against the public interest in disclosure. If the public interest in disclosure outweighs the employee privacy interests, the information is disclosable under the FOIA and thus, as an exception to the Privacy Act, that law does not bar disclosure. If the balance tips in favor of the employee privacy interests, the FOIA Exemption is triggered and the information is not releasable under the FOIA. As such, the Privacy Act exception is not triggered and the Privacy Act bars disclosure. The Regions should then dismiss the charge, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

Please contact the Office of the General Counsel prior to issuing complaint in a case where a requested document is contained in a system of records and the Region concludes that a routine use is applicable.

Agency failure to articulate its privacy interests to the union - In situations where the Region finds a sufficient request and a particularized need for requested information, as well as satisfaction of the other elements in section 7114(b)(4), and the agency has refused to communicate to the union that it is relying on the Privacy Act as a bar and has failed to explain to the union its privacy interests,
any complaint which issues should allege an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute.

Similarly, even if the Region determines that there is no statutory requirement to furnish requested information because disclosure is barred by the Privacy Act, an agency refusal to articulate to the union its reliance on the Privacy Act and to explain to the union its privacy interests, should be alleged to be an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. As a remedy the Region should seek an order requiring the agency to engage in such communication for future requests, but should not require disclosure of the information.

PART 3 - GUIDANCE TO THE REGIONAL DIRECTORS WHEN ASSISTING PARTIES IN RESOLVING INFORMATION DISCLOSURE DISPUTES.

This part describes the manner in which labor organizations and agencies may accommodate each other's needs and interests in which the parties may avoid the Privacy Act bar to disclosing information. To assist the parties in articulating and communicating their respective interests in the disclosure of information, and to provide the parties with a framework to accommodate those respective interests without the need for filing an unfair labor practice charge with a Regional Office, we have attached a model form for union's to submit to agencies when requesting information under section 7114(b)(4) of the Statute. We also have attached a model form for agencies to reply to unions when seeking clarification of a request or when communicating countervailing anti-disclosure interests or employee privacy interests. In addition, we have completed a sample hypothetical request on the form to illustrate a request fulfilling the statutory requirements. The use of these forms is not required by the Statute or the Authority and General Counsel Regulations. Rather, the forms were developed to assist the parties in articulating their interests about the disclosure of information.

Regions Should Use An Interest-based Approach to Resolve Particularized Need Disputes

In IRS. KC, the Authority, in discussing particularized need, stated at p. 670:

[A]pplying a standard which requires the parties to articulate and exchange their respective interest in disclosing information serves several important purposes. It "facilitates and encourages the amicable settlement of disputes ..." and thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. § 7101(1)(c). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.
When assisting parties in resolving information disputes, the Regions should view the Authority’s rule in B.S. KC that the parties attempt to accommodate the union’s need for information and an agency’s anti-disclosure interests, as an invitation to allow the parties to communicate their respective interests and to seek ways in which those competing interests may be accommodated in a timely manner, without the need for formal litigation and the creation of an adversarial relationship. The duty to furnish information is contained in the subsection of the Statute which sets forth the duty to bargain in good faith. Indeed, the section 7114(b)(4) duty to furnish information is described as a part of “[t]he duty of an agency and an exclusive representative to negotiate in good faith.” As such, the Authority standard emphasizing the articulation and exchange of interests allows the parties to act in good faith and in a reasonable manner to resolve disputes over the disclosure of information, rather than leading the parties into an adversarial and litigious process.

I emphasize that the disclosure of information under the Statute should not be viewed by the parties as a purely legal matter concerning rights and obligations, but rather as an essential element of the collective bargaining process. As such, the parties are encouraged to meet and discuss their respective interests, as opposed to merely passing paper containing positions and arguments back and forth.

The Regions should use an interest-based approach in attempting to resolve information disputes which are the subject of unfair labor practice charges. An interest-based approach should also be used to resolve disputes over whether there is a particularized need for the information or whether disclosure is prohibited by law, as well as disputes over whether the information is normally maintained by the agency in the regular course of business; is reasonably available; or constitutes guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. The Authority has emphasized that it expects the parties to consider alternative forms or means of disclosure that satisfy both a union’s information needs and an agency’s countervailing anti-disclosure interests.

To assist the parties to resolve their information dispute after a charge has been filed, the Regions initially should assist the parties in identifying the particular information which is the subject of the disputed request. Often, the parties do not have the same common understanding of exactly what information the union is requesting. The Regions should then assist the union in articulating exactly why it has requested the information, and the agency in articulating why it has denied the request. Again, parties sometimes are in dispute over the disclosure of information because an agency does not understand why the union requested certain information and the union does not understand why the request was denied.

Thus, under an interest based approach, the issue to be resolved is not whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how can that information be furnished to accommodate competing agency anti-disclosure interests and employee privacy interests. To resolve the issue, it is necessary for the parties to work together to articulate and explain those interests; i.e., how does the union intend to use the information and what is driving the agency’s
anti-disclosure interests. The Regions should then assist the parties in brainstorming alternatives as to how the union may obtain the information it requires, while accommodating the agency’s anti-disclosure interests and protecting any employee privacy interests.

This facilitated communication may either resolve the underlying issue or focus the matter away from a “right” to information to an attempt to mutually accommodate competing interests. By assisting the parties in defining exactly what the information will be used for, how that use is connected to the union’s representational obligations, and why disclosure may interfere with anti-disclosure interests or employee privacy interests, the Regions may assist the parties in arriving at an accommodation that takes all interests into consideration.

Regions Should Use An Interest Based Approach to Resolve Privacy Act Disputes

The Authority also emphasized in FAA Westbury, when discussing the impact of the Privacy Act on disclosure of information under the Statute, that the Authority “encourage[s] labor and management, insofar as legally possible, to accommodate both the privacy interests of employees and their exclusive representatives’ acknowledged need for meaningful information.” FAA Westbury, at p. 344.

The Authority has encouraged the parties to attempt to accommodate employee privacy interests and the union’s interests in disclosure. When assisting parties in resolving information disputes, the Regions should similarly view the Authority’s suggestion in FAA Westbury, that the parties attempt to accommodate privacy interests and the union’s need for information, as an invitation to allow the parties to communicate their respective interests and to seek ways in which those competing interests may be accommodated in a timely manner, without the need for formal litigation and the creation of an adversarial relationship.

When assisting the parties in resolving any information dispute where the Privacy Act is alleged as a bar, the Regions should inform the parties that in cases subsequent to FAA Westbury such as in Richards-Gebaur AFB, which concern personal identifiers, the Authority has yet to find any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Rather, the Authority consistently has found that “the public interest that would be served by disclosure of the requested information also could be substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information.” Department of Transportation, Federal Aviation Administration, Fort Worth, Texas, 51 FLRA No. 31 (1995).

Thus, when assisting the parties in their attempt to accommodate the union’s need for information for which they have established a particularized need with employee privacy interest’s in information contained in a system of records under the Privacy Act, the Regions should explore the possibilities of sanitizing personal identifiers and coding the documents in a manner that allows for the grouping of the documents by category which does not identify individuals; e.g., designation by union membership if the union’s need is to determine if
members received disparate treatment or by supervisor if the union’s need is to determine if specific supervisors violated the contract.

The deletion of personal identifiers normally would lessen the employee privacy interest and thus tip the balance under FOIA Exemption 6 in favor of the public interest, thus requiring disclosure under the FOIA and in compliance with the Privacy Act. In addition, coding the information could allow for “later identification of specific individuals if the Union requested such identification and established a need therefor.” “Under this method, any requisite additional information could be obtained in a more targeted way.” U.S. Department of the Interior, Bureau of Mines, Pittsburgh Research Center, 51 FLRA No. 28 (1995). This approach also could satisfy OPM routine use “e,” and thus allow disclosure consistent with the Privacy Act.

**Parties Can Use an Interest Based Approach to Resolve Information Disputes Prior to the Filing an Unfair Labor Practice Charge**

The Regions should also encourage the parties to utilize an interest based approach to resolve themselves disputes over information requests prior to the filing of an unfair labor practice charge. The parties may follow these steps in resolving any dispute or the disclosure of information:

1. Identify the particular information which is the subject of the disputed request. Both parties should have the same understanding of exactly what information the union is requesting; including whether personal identifiers are to be included or may be deleted and the time period covered by the request.

2. The union should articulate exactly why it needs the requested information. The union should explain exactly how the union intends to use the requested information and how that use of the information relates to the union’s role as the exclusive representative. This explanation should extend to each different type of information requested, as well as for the time period(s) covered by the request and the need for personal identifiers, if applicable.

3. The agency should articulate exactly what concerns it has about disclosing the information. The agency should explain exactly what are its countervailing anti-disclosure interests; i.e., what concerns does the agency have in disclosing the information.

4. The parties should then brainstorm alternatives as to how the union may obtain the information it requires while accommodating the agency’s anti-disclosure interests. The parties should explore alternative forms or means of disclosure. Again, the parties should focus not on whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how
can that information be furnished to accommodate competing agency anti-
disclosure interests.

5. If the requested information is contained in a system of records under the
Privacy Act, the union should explain how disclosure of the requested
information, including any personal identifiers and the time period
encompassed by the request, would shed light on the agency’s performance
of its statutory duties or otherwise inform citizens of the activities of the
Government.

6. The agency should then explain the employee privacy interests in the
information which are behind the agency’s concerns in disclosing the
information.

7. If the agency’s concerns relate to the identification of particular employees
the parties should jointly explore alternative ways to release the information
without those personal identifiers. For example, the agency could delete the
personal identifiers and code the documents in a manner that allows for the
grouping of the documents by category which does not identify individuals and
which allows for later identification of the documents if further more targeted
information is needed.

Attached is a model issue analysis sheet to assist the parties in using an interest based approach
to resolve information disputes prior to filing an unfair labor practice charge.

Regional Directors should contact the Office of the General Counsel if there are any questions
concerning the application of the particularized need standard or the Privacy Act to unfair labor
practice charges. Similarly, any issues concerning a Region’s attempt to assist the parties in
resolving a pending unfair labor practice charge or complaint concerning section 7114(b)(4) of
the Statute should be raised with the Office of the General Counsel.

Attachments: Union request for Information model form
Agency response to union request model form
Agency hypothetical request on model form
Issue analysis model form for interest based problem solving
The following is a model form created by the FLRA Office of the General Counsel to assist unions in articulating their interests in information requested from agencies under section 7114(b)(4) of the Federal Service Labor Management Relations Statute.

Union Request for Information Under Section 7114(b)(4) of the Statute: A Model for Use When Requesting Information

DATE: Date of the Information request.

REQUESTER: Name of the requesting union.

UNION CONTACT: Name, position, mailing address and phone number of the union contact submitting the request:

AGENCY CONTACT: Name, position, mailing address and/or phone number of the agency representative to whom the request is being made.

INFORMATION REQUESTED: Description of information requested. (Include whether personal identifiers (such as names, social security numbers or other matters identifying individual employees) are included or may be deleted.)

PARTICULARIZED NEED: Specific statements explaining exactly why the union needs the requested information. (Explain exactly how the union intends to use the requested information and how that use of the information relates to the union’s role as the exclusive representative. Include a specific statement for each type of information requested, as well as for the time period(s) encompassed by the request and the need for personal identifiers, if applicable.)
PRIVACY ACT: Do you know if the requested information is contained within a system of records under the Privacy Act? (If so, identify that system of records.)

PUBLIC INTEREST: If you know or think that the requested information is within a system of records under the Privacy Act, describe how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency’s performance of its statutory duties or otherwise inform citizens of the activities of the Government.

OTHER MATTERS: Other matters related to the request for information. (Discuss any other matters not listed above which relate to the union’s information request and which may assist the agency in responding to the request.)

Please contact me if the agency requires further clarification of our request or wants to meet to discuss the request, or a format or means of furnishing this information to the union, or the issues giving rise to this request.

2
The following is a model form created by the FLRA Office of the General Counsel to assist agencies in articulating any countervailing anti-disclosure interests or employee privacy interests in information requested by unions under section 7114(b)(4) of the Federal Service Labor Management Relations Statute.

Agency Response to a Union Request For Information Under Section 7114(b)(4) of the Statute: Model Form for Use When Seeking Clarification of a Request or When Communicating Countervailing Anti-disclosure Interests or Employee Privacy Interests

DATE: Date of the information request and date received by the agency. ____________________________

DATE: Date of the agency’s response. ____________________________

REQUESTER: Name of the requesting union. ____________________________

AGENCY CONTACT: Name, position, mailing address and/or phone number of the agency representative responding to the union request. ____________________________

UNION CONTACT: Name, position, mailing address and/or phone number of the union representative to whom this response is being made. ____________________________

INFORMATION REQUESTED: Agency’s understanding of the information requested. (Include the time periods encompassed by the request and whether personal identifiers are being requested or may be sanitized.) ____________________________

ANTI-DISCLOSURE INTERESTS: Specific statements explaining any countervailing anti-disclosure interests. ____________________________
PRIVACY ACT: Is the requested information contained within a system of records under the Privacy Act? If so, identify that system of records:


EMPLOYEE PRIVACY INTERESTS: If within a system of records, would the disclosure of that information implicate privacy interests? If so, specifically describe the nature and significance of those privacy interests.


DISCLOSURE FORMAT: In what format is the agency willing to disclose the requested information? (Include whether the agency would disclose the requested information with personal identifiers deleted.)


PROHIBITED BY LAW: Is the requested information prohibited by law? (If so, identify the specific provisions of that law and specifically explain why disclosure is prohibited by that law.)


NORMALLY MAINTAINED: Is the information normally maintained by the agency in the regular course of business? (If not, specific statements explaining why the requested information is not normally maintained.)


2
REASONABLE ABILITY: Is the information reasonably available? (If not, specific statements explaining why the requested information is not reasonably available.)

STATUTORY EXEMPTION: Does the information constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining? (If it does, specific statements explaining why the requested information falls into that category.)

NEED FURTHER INFORMATION: The union request is not specific enough to permit the agency to make a reasoned judgment as to whether the information must be disclosed under the Statute. To make this determination, the agency requires specific answers to the following questions:

OTHER MATTERS: Other matters related to the request for information. (Discuss any other matters not listed above which relate to the union’s information request and which may assist the union in understanding the agency’s response.)

The agency is willing to discuss the request, or a format or means of furnishing this information to the union, or the issues giving rise to this request.
The following is a sample hypothetical request on a model form created by the FLRA Office of the General Counsel to assist unions in articulating their interests in information requested from agencies under section 7114(b)(4) of the Federal Service Labor Management Relations Statute.

Union Request For Information Under Section 7114(b)(4) of the Statute: A Model for Use When Requesting Information

DATE: Date of the information request. October 10, 1995.

REQUESTER: Name of the requesting union. (union name)

UNION CONTACT: Name, position, mailing address and phone number of the union contact submitting the request: (name, position, address and phone).

AGENCY CONTACT: Name, position, mailing address and/or phone number of the agency representative to whom the request is being made: (name, position, address and phone).

INFORMATION REQUESTED: Description of information requested. (Include whether personal identifiers (such as names, social security numbers or other matters identifying individual employees) are included or may be deleted.) Copies of all final disciplinary actions taken against unit employees during the one year period October 1, 1994 through September 30, 1995, including any documents attached to the final decision which discuss or refer to the specific discipline was imposed. All personal identifiers (such as names, social security numbers and other matters which identify a particular employee) should be sanitized. The documents, however, should be coded to reflect whether or not the employee is a union member and they should be numbered sequentially.

PARTICULARIZED NEED: Specific statements explaining exactly why the union needs the requested information. (Explain exactly how the union intends to use the requested information and how that use of the information relates to the union’s role as the exclusive representative. Include a specific statement for each type of information requested, as well as for the time period(s) encompassed by the request and the need for personal identifiers, if applicable.) The Union needs this information to determine if the agency is imposing disparate discipline on union members than on non-union members for similar conduct. Article 3, Section 2 of the Contract provides that discipline will be imposed without regard to union membership and that similar discipline will be imposed for similar offenses. Bargaining unit employees who are union members have recently complained to the union that they believe they have received disparate discipline. The requested information will enable the union to fulfill its representational responsibilities to represent employees under the Statute and administer the contract by allowing the union to compare the discipline imposed on Union and non-union members to determine if grievances under the contract or other action is warranted. The requested documents attached to the final action which discuss or refer to the discipline imposed.
will enable the Union to determine if the agency either intentionally or unintentionally treated members differently from non-members and imposed like discipline or like offenses. Coding the documents for member and non-members will allow the union to make the comparison. Coding and sequential numbering will also allow the Union to make a more specific request in the future if deemed necessary. The one year time period encompassed by the request tracks the time period that the contract has been in effect.

PRIVACY ACT: Do you know if the requested information is contained within a system of records under the Privacy Act? (If so, identify that system of records.) The Union believes that the documents are covered by the Privacy Act, but the union does not know which specific system of records.

PUBLIC INTEREST: If you know or think that the requested information is within a system of records under the Privacy Act, describe how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency’s performance of its statutory duties or otherwise inform citizens of the activities of the Government. The disclosure of these documents would enable the public to monitor the manner in which the Government disciplines Federal employees and to assess the job conduct of public servants. Disclosure of the requested information would serve the public interest by allowing the public to compare the discipline imposed by the agency on employees for similar offenses and to thus determine if the agency is carrying out its management responsibilities in a fair and equitable manner. Disclosure would also serve the public interest by allowing the public to determine if the agency is discriminating against public servants for exercising rights provided in Federal law, such as the right to join, form, and assist a union, and whether the agency is complying with its legal contractual requirements. The time period is limited to the time that the current contract has been in effect and thus serves the public interest by allowing the public a reasonable time frame upon which to base its determinations. Since the personal identifiers will be omitted, we believe that the public interest outweighs any privacy interests.

OTHER MATTERS: Other matters related to the request for information. (Discuss any other matters not listed above which relate to the union’s information request and which may assist the agency in responding to the request.) The Union is willing to meet with appropriate agency officials to discuss the events giving rise to the Union’s perception that Union members are being treated in a disparate manner by certain supervisors.

Please contact me if the agency requires further clarification of our request or wants to meet to discuss the request, or a format or means of furnishing this information to the union, or the issues giving rise to our request.
The following is a model form created by the FLRA Office of the General Counsel to assist the parties in using an interest based approach to resolve information disputes arising under section 7114(b)(4) of the Federal Service Labor Management Relations Statute prior to filing an unfair labor practice charge.

Issue Analysis To Be Jointly Completed by the Requesting Union and the Agency

ISSUE: Identify the particular information which is the subject of the disputed request. (Both parties should have the same understanding of exactly what information the union is requesting, including whether personal identifiers are to be included or may be deleted and the time period covered by the request.)

INTERESTS: 1. Exactly why does the union need the requested information. (Exactly how does the union intend to use the requested information and how does that use of the information relate to the union’s role as the exclusive representative. This explanation should extend to each different type of information requested, as well as for the time period(s) covered by the request and the need for personal identifiers, if applicable.)

2. Exactly what concerns does the agency have about disclosing the information. (Exactly what are the agency’s countervailing anti-disclosure interests; i.e., what concerns does the agency have in disclosing the information.)
3. If the requested information is contained in a system of records under the Privacy Act, how would disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, shed light on the agency's performance of its statutory duties or otherwise inform citizens of the activities of the Government.

4. What are the employee privacy interests in the information which are behind the agency's concerns in disclosing the information.

OPTIONS: What are alternatives as to how the union may obtain the information it requires while accommodating the agency's anti-disclosure interests and any employee privacy interests. (The parties should explore alternative forms or means of disclosure. The parties should focus not on whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how can that information be furnished to accommodate competing agency anti-disclosure interests. If the agency's concerns relate to the identification of particular employees, the parties should jointly explore alternative ways to release the information without those personal identifiers; for example, can personal identifiers be deleted and documents coded in a manner that allows for the grouping of the documents by category which does not identify individuals and which allows for later identification of the documents if further more targeted information is needed.)

CONSENSUS: The parties agree that the agency will furnish the following information by the date, and in the format, indicated.
MEMORANDUM

January 5, 1996

TO: Regional Directors

FROM: David L. Feder
Deputy General Counsel

SUBJECT: Pending Information Cases

Attached is a model letter with an attached questionnaire to be sent to all charging parties in pending information cases where the investigation is not complete. The Region also should enclose with the letter and the questionnaire the enclosed Guidance (with the attached model forms) and the Executive Summary.

This letter is only to be sent when additional information is needed due to the new requirements set forth in the Authority decisions discussed in the Guidance. If the Regional Office case file contains sufficient information to make a determination on the merits, the Region should expeditiously make that decision and take the appropriate dispositive action. Of course, the Regions have discretion to telephone the charging party before sending the letter and attempt to resolve the information dispute if the Region deems it practicable under the circumstances of the particular case. Similarly, the Regions should use their judgment to determine whether the letter should be sent when there are multiple unfair labor practice allegations in the charge which may better be processed at the same time.

Similarly, the Regions should reevaluate any complaints pending hearing to determine if the request was sufficient and the facts otherwise establish that the requirements of section 7114(b)(4) as now interpreted by the Authority have been met.

Please contact me if there are issues that have not been addressed.

Attachments: Model letter and attached questionnaire
Guidance to Regional Directors and attached forms
Executive Summary
Press Release
Dear Charging Party:

This letter transmits a questionnaire to you which you must complete in order to complete processing the above pending case. The more quickly you respond to us the more quickly we are able to process your charge.

This questionnaire constitutes the Region's investigation of your charge pursuant to section 2423.7 of the Regulations. It therefore is important that you complete this questionnaire and return it to the Regional Office. Do the best you can in answering these questions. You can contact the agent named below if you need assistance in filling out the questionnaire. The Regional Director will rely upon the answers you give and any documents you attach to the questionnaires in deciding your charge.

We are asking for the completion of this questionnaire because recent Authority decisions have significantly impacted the manner in which unfair labor practice charges alleging a refusal to furnish information should be investigated and decided. Based on Authority rulings, although these decisions may not have been issued before you made your request, or you may not have been aware of these decisions at the time you made your request, the requirements in these Authority decisions apply to your case.

In order that we may quickly review these charges to determine if they meet these new requirements, we have prepared a questionnaire which is being sent by all Regional Offices to all the charging parties in pending information cases where the investigation has not been completed. Again, we ask that you complete the attached questionnaire as it relates to your charge and submit it to the Region as soon as possible.

If the Regional Director determines that your charge lacks merit after applying the new decisions, you may withdraw your charge and resubmit your information request to the agency. If you resubmit your request, you must make sure that you follow the guidelines set forth in the two Authority decisions. Attached is a public memorandum from the General Counsel to the Regional Directors and an Executive Summary discussing these new Authority decisions and describing the assistance the Regional Directors can afford the parties in narrowing and resolving their disputes, without time consuming and costly litigation. Sample forms also are provided for unions when submitting information requests and for agencies when responding, and for both parties to use to resolve information disputes prior to filing an unfair labor practice charge. This guidance and these forms may be useful to you in making future requests for information under the Statute.

The failure to submit the questionnaire (within a reasonable period of time or by a date certain) constitutes a failure to provide the Region with the evidence which is necessary to continue to process your case.
If your answer to any question does not fit in the space provided, you may attach additional sheets. Please indicate which sheet corresponds to which question.

Case Name and Number: __________________________________________

I, __________________________________________, in cooperation with an official investigation being conducted by the Federal Labor Relations Authority pursuant to the Federal Service Labor-Management Relations Statute, supply the following information voluntarily.

My full name is __________________________________________
My Union position/title is __________________________________________
My mailing address is __________________________________________
My phone number is (____) __________________________________________

1. On what date(s) did you make the information request? __________________________________________

2. What is the name of the requesting union? __________________________________________

3. If not you, what is the name, position, mailing address and phone number of the union representative who submitted the request? __________________________________________

4. What is the name, position, mailing address and phone number of the agency representative to whom the request was made? __________________________________________

5(a). How was the request made: _____ in writing; _____ orally; or _____ both in writing and orally?

5(b). If in writing, please attach a copy of the request.

5(c). If orally, either instead of a written request or in addition to a written request: state to whom you spoke, the date of the conversation(s); and, as closely as you can, exactly HOW YOU DESCRIBED the information that you were requesting.

_________________________________________________________________
_________________________________________________________________
6(a). Did you specifically request that the agency either include or delete personal identifiers (such as names, social security numbers or other matters identifying individual employees)?
   ___ Yes ___ No.

6(b). Was this done: ___ in writing; ___ orally; or ___ both in writing and orally?

7(a). Did you explain why the union needed the requested information: ___ in writing;
   ___ orally; or ___ both in writing and orally?

7(b). If in writing, please attach a copy of the request.

7(c). If orally, either instead of a written request or in addition to a written request: state to
   whom you spoke; the date of the conversation(s); and, as closely as you can, exactly WHAT
   YOU SAID to explain why the union needed the information you were requesting.

8(a). Do you know if the requested information is contained within a system of records under
   the Privacy Act? ___ Yes ___ No. If you do know, please identify that system of records?

Only answer the next two questions, 8(b) and 8(c), if your answer to number 8 is Yes.

8(b). If you know that the requested information is within a system of records under the Privacy
   Act, why doesn't the Privacy Act bar disclosure of the requested information, including any
   personal identifiers?

8(c). Did you state this to the agency representative? ___ Yes ___ No. If yes, describe as best
   you can exactly WHAT YOU SAID, to whom and when.

9(a). Did the agency respond to your request: ___ in writing; ___ orally; ___ both in writing
   and orally; or ___ not at all?
9(b). If in writing, attach a copy of the written response.

9(c). If orally, either instead of a written response or in addition to a written request: state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly what the agency representative SAID TO YOU.

10(a). Does the Union still want copies of the information as requested? Yes  No.

10(b). If yes, please explain how the Union intends to use the information.

11. Have the parties attempted to resolve this dispute themselves? Yes  No. If yes, please describe as specifically as you can what efforts have been undertaken, by whom, when, and the results.

12. Discuss any other matters not listed above which relate to the union's information request and any agency response.

I have read the information above consisting of (number) pages, including any attachments, and affirm to the best of my knowledge and belief that it is true.

(Date)  (Name)
FLRA General Counsel Issues Guidance on Investigating, Deciding and Resolving Information Disputes

FLRA General Counsel Joseph Swerdzewski today issued guidance to FLRA Regional Directors on investigating, deciding and resolving information disputes. The guidance is part of a series issued by the Office of General Counsel to serve its customers.

"Questions concerning what information a union may properly receive from an agency and, on the other hand, what information an agency may properly withhold from a union, constitute a good part of the unfair labor practice disputes in the federal service," General Counsel Swerdzewski said when issuing the guidance. "The guidance offers some practical guidelines on making and responding to requests for information and on using alternative dispute resolution techniques to resolve these information disputes without litigation. In those cases that go to litigation, the guidance helps ensure quick and effective resolution of the disputes on the merits," said Swerdzewski.

The General Counsel's Memorandum to Regional Directors concerns the duty of an agency to furnish information to a union under section 7114(b)(4) of the Federal Service Labor Management Relations Statute. It focuses primarily on two recent cases decided by the Authority in the area. The Memorandum first discusses how unions and agencies can follow the new approaches to information requests set forth by these recent Authority cases. It includes sample request and response forms for use by labor and management. It also provides guidance on how Regional Directors can help unions and agencies, and how unions and agencies can help themselves, in narrowing and resolving disputes over information requests, without engaging in time consuming and costly litigation. A sample issue analysis form is included to assist the parties in resolving their information dispute prior to filing an unfair labor practice charge.

The Office of the General Counsel is the independent investigative and prosecutorial component of the Federal Labor Relations Authority (FLRA) which investigates, settles and prosecutes unfair labor practice charges. The Regional Directors, under the direction of the General Counsel, make the initial determination whether to issue an unfair labor practice complaint. The General Counsel periodically issues guidance to the Regional Directors on how to process and resolve unfair labor practice disputes. The Authority is the three-member adjudicatory body within the FLRA which, among other things, decides appeals from unfair labor practice cases investigated and prosecuted by the Office of General Counsel.
An Executive Summary of the General Counsel’s Memorandum to Regional Directors entitled “Investigating, Deciding and Resolving Information Disputes” is attached. Copies of the complete memorandum, with sample forms, are available by faxing a request to the Office of the General Counsel at 202-482-6608 or by writing to 607 14th St. NW, Suite 210, Washington, D.C. 20424-0001, attention: Information Guidance. Requests should include name, title, organization, address, telephone and fax numbers. Questions or comments concerning this information should be directed to FLRA Deputy General Counsel David Foder at (202) 482-6680, extension 203.
EXECUTIVE SUMMARY

FLRA GENERAL COUNSEL JOSEPH SWERDZEWSKI’S MEMORANDUM TO REGIONAL DIRECTORS ON “INVESTIGATING, DECIDING AND RESOLVING INFORMATION DISPUTES”

This Executive Summary of the Federal Labor Relations Authority’s (FLRA) General Counsel’s Memorandum to Regional Directors concerns the duty of an agency to furnish information to a union under section 7114(b)(4) of the Federal Service Labor Management Relations Statute (Statute). The memorandum focuses on two recent Authority decisions in this area.

The Memorandum first discusses how unions and agencies can follow the new approaches set forth in these cases for resolving information questions, and includes sample request and response forms for use by labor and management. The Memorandum also provides guidance on how Regional Directors can help unions and agencies, and how unions and agencies can help themselves, in narrowing and resolving disputes over requests for information, without engaging in time consuming and costly litigation. Also attached to the memorandum is a sample issue analysis form to assist the parties in resolving their information dispute prior to filing an unfair labor practice charge.

I.

ESTABLISHING THAT THE REQUESTED INFORMATION IS “NECESSARY”

The Authority decision in Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA No. 86, 50 FLRA 661 (1993) discussed the parties’ obligation to communicate and articulate their respective interests in disclosing information, and set forth a new approach to determining whether information is “necessary” under section 7114(b)(4) of the Statute. The case addressed: (1) what unions must show to establish their need for information; (2) what agencies must show to establish the interests they may have against providing the requested information; (3) what both parties must communicate to each other; and (4) when an unfair labor practice will be found to occur. Each of these matters are discussed in turn.
Q #1: WHAT MUST A UNION ESTABLISH TO CREATE A SUFFICIENT REQUEST FOR INFORMATION?

Particularized Need in General: A union requesting information under section 7114(b) of the Statute must now establish a "particularized need" for the requested information. This requires more than a conclusory or bare assertion that the information is or would be relevant or useful. Rather, the union's request for information must, at the time the request is made, articulate and explain the union's interests in disclosure of the information. This articulation by the union must be sufficient to permit an agency to make a reasoned judgement as to whether the information must be disclosed under the Statute.

How to Show Particularized Need: To create a sufficient request for information, which triggers the agency's duty to disclose information if the other elements of section 7114(b)(4) also have been met, a union must articulate, with specificity, at the time it makes the request:

1. Why the union needs the requested information;
2. How the union will use the requested information; and
3. How the articulated use of the information relates to the union's representational responsibilities under the Statute.

A union must also respond properly to any agency request for further clarification concerning the union's need for the information, without requiring the union to reveal its strategies or compromising the identity of a potential grievant who wishes anonymity.

Personal Identifiers: The requirement for "particularized need" applies to not only the information requested, but to personal identifiers contained in the requested information as well. These include, for example: name, social security numbers or other information identifying a particular employees. To date, the Authority has rarely found that a union has shown the "particularized need" necessary to entitle it to information containing personal identifiers.

Q #2: WHAT MUST THE AGENCY ESTABLISH WHEN REFUSING TO DISCLOSE THE INFORMATION?

To avoid an unfair labor practice, an agency denying a request for information under section 7114(b)(4) because it asserts that the information is not necessary must establish its countervailing anti-disclosure interest. Like a union, an agency does not satisfy its burden by merely making conclusory or bare assertions. An agency cannot simply say "no", but rather must:

1. Assert a countervailing anti-disclosure interest; and
2. Establish its anti-disclosure interest.
Similarly, if an agency refuses to disclose information asserting that some other requirement of section 7114(b)(4) has not been met, the agency must establish that reason.

An agency’s failure to communicate and articulate to the union any countervailing anti-disclosure interests or other reasons for not disclosing requested information constitutes a failure to bargain in good faith and an independent unfair labor practice. See Q #4 below.

**Q #3: WHAT MUST BOTH THE AGENCY AND UNION DISCUSS?**

In addition to the above, the agency and union are also expected to discuss the following when determining whether and/or how disclosure of the information is required:

1. Alternative forms or means of disclosure that may satisfy the unions’ need for the information; and
2. Alternative forms or means of disclosure that satisfy the agencies’ countervailing anti-disclosure interest.

**Q #4: WHEN WILL AN UNFAIR LABOR PRACTICE BE FOUND?**

If the parties are unable to agree on whether or to what extent the requested information will be provided, and the other requirements in section 7114(b)(4) have been met, an unfair labor practice will be found if:

1. The union has established a particularized need for the information; and
2. The agency has not established a countervailing interest in non-disclosure; or
3. The agency’s established countervailing interest does not outweigh the union’s demonstration of a particularized need.

An agency’s refusal to properly respond to an information request by failing to communicate and articulate to the union its reasons for denying the disclosure of requested information constitutes a refusal to bargain in good faith in violation of the Statute, even if disclosure is not required under section 7114(b)(4).

**II. THE PRIVACY ACT AND DISCLOSURE OF INFORMATION**

Q #5: WHAT MUST THE AGENCY SHOW TO PROPERLY ASSERT THAT THE PRIVACY ACT BARS DISCLOSURE OF THE REQUESTED INFORMATION?

An agency asserting that the Privacy Act bars disclosure of the requested information is required to demonstrate:

1. That the information sought is contained in a “system of records” within the meaning of the Privacy Act;
2. That disclosure of the information would implicate employee privacy interests; and
3. The nature and significance of those privacy interests.

Q #6: WHAT MUST THE UNION THEN SHOW TO ESTABLISH THAT THE INFORMATION IS WITHIN EXEMPTION 6 OF THE FOIA AND THUS IS AN EXCEPTION TO THE PRIVACY ACT?

If the agency makes its requisite showing, the union must then establish:

1. That there is a public interest in the requested information cognizable under the FOIA, and
2. How disclosure of the specific information will serve that public interest; or
3. That the information is covered by a “routine use”. See Q #8

Definition of Public Interest: The only relevant “public interest” to be considered under the FOIA is the extent to which the requested disclosure would shed light on the agency’s performance of its statutory duties, or otherwise inform citizens concerning the activities of the Government. The public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, will no longer be considered in analyzing the application of Exemption 6 of the FOIA.

Personal Identifiers: The Authority rarely finds any support to establish that the release of personal identifiers enhances any public interest. Rather, the Authority consistently has found that the public interest that would be served by disclosure of requested information containing personal identifiers also could be substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information.
Q #7: WHAT HAPPENS WHEN BOTH THE AGENCY AND THE UNION MEET THEIR REQUIRED SHOWINGS?

Once the agency and union establish their respective interests, then:

1. The privacy interests of the employees against disclosure must be balanced against the public interest in disclosure.

2. If the privacy interests are greater than the public interest, the agency is not required to furnish the requested information because it is prohibited by the Privacy Act (unless another exception to the Privacy Act applies -- see Q #8 below)

3. If the public interest in disclosure is greater than the privacy interests, disclosure of the information is not prohibited by the Privacy Act and the agency is required to furnish the requested information (assuming, of course, that the other requirements in section 7114(b)(4) are met.)

Q #8: WHAT IF THE REQUESTED INFORMATION IS COVERED BY THE ROUTINE USE EXCEPTION TO THE PRIVACY ACT?

The above exception pertains to the interplay between Exemption 6 of the FOIA and the Privacy Act. Another Privacy Act exception that may require disclosure of the information concerns the “routine use” exception of the Privacy Act. OPM/GOVT-2 is a system of records under the Privacy Act which covers many personnel related matters. Requested information in this system of records may be disclosed if the information is determined to be “relevant and necessary” within the meaning of OPM routine use “e”. This routine use requires a showing that the information bears a traceable, logical and significant connection to the purpose to be served and that there are no adequate alternative means or sources for satisfying the union’s informational needs, such as deletion of personal identifiers. Note that this is a different standard than whether there is a “particularized need” for the information under section 7114(b)(4) of the Statute.

III.

RESOLVING DISPUTES OVER THE DISCLOSURE OF INFORMATION

Q #9: HOW CAN REGIONAL DIRECTORS ASSIST THE PARTIES IN RESOLVING INFORMATION DISPUTES?

Interest Based Approach To Resolve Particularized Need Disputes: The Regions should assist the parties in communicating their respective interests and in seeking ways in which those competing interests may be accommodated in a timely manner. The articulation and exchange of interests allows the parties to act in good faith and in a reasonable manner to resolve disputes
over the disclosure of information, rather than leading the parties into an adversarial and litigious relationship. The parties are encouraged and expected to consider alternative forms or means of disclosure that satisfy both a union’s information needs and an agency’s countervailing anti-disclosure interests.

To assist the parties to resolve their information dispute after a charge has been filed, the Regions initially should assist the parties in identifying the particular information which is the subject of the disputed request. Often, the parties do not have the same common understanding of exactly what information is subject to the request. The Regions should then assist the union in articulating exactly why it has requested the information, and the agency in articulating why it has denied the request. Again, parties sometimes are in dispute over the disclosure of information because an agency does not understand why the union requested certain information and the union does not understand why the request was denied.

Thus, under an interest based approach, the issue to be resolved is not whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how can that information be furnished to accommodate competing agency anti-disclosure interests and employee privacy interests. To resolve the issue, it is necessary for the parties to work together to articulate and explain those interests; i.e., how does the union intend to use the information and what is driving the agency’s anti-disclosure interests. The Regions should then assist the parties in brainstorming alternatives as to how the union may obtain the information it requires while accommodating the agency’s anti-disclosure interests and protecting any employee privacy interests.

Interest Based Approach To Resolve Privacy Act Disputes: The parties also are encouraged to attempt to accommodate employee privacy interests and the union’s interests in disclosure. The Regions should inform the parties that the Authority rarely finds any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Thus, the Regions should explore the possibilities of sanitizing personal identifiers and coding the documents in a manner that allows for the grouping of the documents by category which does not identify individuals; e.g., designation by union membership. Coding the information could allow for later identification of specific individuals if the union requested such identification and established a particularized need. Under this method, any requisite additional information could be obtained in a more targeted way.

Q #10:

HOW CAN THE PARTIES USE AN INTEREST BASED APPROACH TO RESOLVE INFORMATION DISPUTES PRIOR TO THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE

The Regions should also encourage the parties to utilize an interest based approach to resolve disputes themselves over information requests prior to the filing of an unfair labor practice charge. The parties may follow these steps in resolving any dispute over the disclosure of information:
1. Identify the particular information which is the subject of the disputed request;

2. The union should articulate exactly why it needs the requested information;

3. The agency should articulate exactly what concerns it has about disclosing the information;

4. The parties should then brainstorm alternatives as to how the union may obtain the information it requires while accommodating the agency’s anti-disclosure interests;

5. If the requested information is contained in a system of records under the Privacy Act, the union should explain how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency’s performance of its statutory duties or otherwise inform citizens of the activities of the Government;

6. The agency should then explain the employee privacy interests in the information which are behind the agency’s concerns in disclosing the information; and

7. If the agency’s concerns relate to the identification of particular employees, the parties should jointly explore alternative ways to release the information without those personal identifiers.