

January 5 , 1996

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.

^{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.

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 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 Tracon, 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-intramangement 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, Westbury.

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.² 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, 51 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., 46 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 the 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, Westbury 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 and 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 these 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 IRS, 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 an 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
Union 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

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.) _____

REASONABLY AVAILABLE: 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 to 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.

Plases 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 needs 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. _____
