U.S. Railroad Retirement Board
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# Legal Opinion L-2006-03
# January 11, 2006

TO : Keith B. Earley
Director of Human Resources

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Employment Applications

This is in response to your memorandum dated October 6, 2005 requesting a legal opinion to determine whether allowing the American Federation of Government Employees (AFGE) to review "B" posting materials or any application materials from other external job announcements violates the Privacy Act or other statutes and/or regulations. For the reasons set forth below, it is my opinion that the applications of the applicants on the Status Candidates register, or any outside register, should not be disclosed to the AFGE.

As background you provided the following information:

Whenever there is a vacancy that needs to be filled, Human Resources (HR) posts the position. Sometimes the positions are posted internally; at other times the positions are posted both internally and externally. As a result of the posting of positions, there are a number of ways that potential applicants can apply for a vacant position. Applicants may apply for positions under one or more announcements. The staffing section makes determinations on an applicant's eligibility for a particular position and for some external announcements, also does the ranking of applicants.

The agency has a negotiated Merit Promotion Program that was established between management and the union. As part of the merit promotion plan, a union observer is appointed to any merit promotion panel where the position being filled is in the collective bargaining unit. For internal postings only, the material goes to a "panel," consisting of 2 management members who do the ranking and a union representative (observer). The Negotiated Procedure for Promotion Panels and Selecting Officers states in part, "The management panel members are responsible for the evaluation and ranking of candidates and the referral of the best qualified candidates to the selecting officer. The union representative shall have the right to discuss with the panel all of its proposed actions and decisions…." After ranking the candidates, the panel sends the names to the selecting officer who has the option of choosing a candidate from the list of candidates or any of the following registers:

Delegated Examining Unit (DEU) – Applicants who apply for positions under this hiring authority are external candidates from the general public; however, federal employees may apply for a position under this authority if they choose to do so. For DEU postings, there is no "panel" work. HR specialists trained in DEU procedure make eligibility determinations and rank the applicants. In addition, OPM's DEU handbook states: The following materials should not be disclosed to the public including the applicant concerned:

- Answer keys,
- Rating schedules/crediting plans,
- Rating sheets,
- Test booklets or items, and
- Transmutation tables.

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HR specialists frequently consult subject matter experts when completing the ranking. The subject matter expert may be serving on the merit promotion panel to fill the same vacancy. The certificate (list of ranked applicants) is then sent to the selecting officer.

Administrative Careers with America (ACWA) – Under this program, certain positions are designated as "ACWA positions". The applicants are usually external candidates with no previous federal service. So far the agency has contracted with the Office of Personnel Management (OPM) to use their ranking tool to rank candidates who apply for positions under this program. OPM then sends the RRB the certificates; HR reviews them and forwards them to the selecting officer. For future ACWA postings, HR has trained specialists and may process these postings in-house. Either way, no panel is involved and HR does not rank the candidates. They are ranked by the OPM instrument.

Outstanding Scholar (OS) – Under this program, applicants can apply for position as long as they have a 3.5 grade point average or better on a 4.0 system in all undergraduate college work, or rank in the upper 10% of their class. The applicants are usually external candidates with no previous federal service. HR specialists determine eligibility and send a certificate to the selecting officer. No panel work is involved.

Status Candidates (B List) – Open to applicants who are current former federal employees and veterans entitled to veterans' preference. The general public cannot apply for positions under this type of posting. HR specialists determine eligibility. Since these are external candidates, a panel without a union member will determine ranking and forward the certificate to the selecting officer.

My understanding of the current issue is as follows: It has recently come to the attention of HR that in some cases the union has been allowed to review, prior to that register being sent to the selecting officer, the applications of individuals that are listed on the Status Candidate (B) register. This has occurred when a position has been posted internally and externally (B) and there is an internal applicant. It is HR's understanding of the situation that in these cases that the Resource Management Center (RMC) would contact the union to see if they wanted to review the Status Candidates register. Recently, the AFGE has also expressed an interest in reviewing applications for external announcements in cases where an RRB employee has applied under that announcement as an outside candidate. The union has not been allowed to review DEU, ACWA, or OS applications and accompanying material.

On July 28, 2005, you and your staff met with the AFGE to discuss the issue and at that meeting you informed the union that they could not see the Status Candidates (B announcement) register. You also informed the AFGE that it should not have been allowed to review the register in the first place.

The union has argued that since it has been allowed to see the register in the past, there is a past practice that must continue. HR disagrees with that argument. You defined a past practice as an unwritten rule or a way of doing things that is agreed to by both the union and management but has not been put in writing. You stated that, in your opinion for a past practice to exist, there must be an established pattern that is clear and consistent, long standing, accepted by both parties and consistent with applicable laws and regulations.

The union has also argued that it needs to see the applications of the people on the Status Candidates register so that they can determine whether the bargaining unit employees are being treated fairly when compared with external candidates. The Merit Promotion Program clearly states that the only role the union plays in the process is that of an observer. The union does not have a role regarding the hiring of agency employees. The Federal Service Labor-Management Statute, Section 7106, clearly states that the responsibility for hiring employees as well as the

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ranking and selecting of candidates is a management right. Additionally, HR does not believe that the union has a right to see the applications of the applicants on the Status Candidates register or any outside register due to privacy concerns. You stated your belief that the agency could possibly get into trouble if outside applicants found that a third party, such as the AFGE, saw their personal information without their written consent. You stated that the AFGE does not represent the people on that register and should have no right to review the personal information that those applicants have submitted. It is my understanding that HR and the union have been unable to reach an agreement regarding this matter.

As an independent agency in the executive branch of the United States Government, the Railroad Retirement Board, being a Federal agency, is restricted with respect to the disclosure of information and records which pertain to an individual and which identify the individual to whom they pertain by the Privacy Act (5 U.S.C. § 552a). The Privacy Act generally prohibits disclosure of information concerning individuals to third parties, while the Freedom of Information Act (FOIA) generally requires disclosure of any documents or information. Both Acts specify exceptions which allow disclosure in the case of the Privacy Act, or prohibit disclosure in the case of the FOIA. In particular, the Privacy Act generally requires agencies to furnish individuals documents concerning themselves (5 U.S.C. § 552a(d)), while the FOIA allows agencies to withhold from third party requesters information which would invade an individual's privacy (5 U.S.C. § 552(b)(6)).

Of even more importance, the Freedom of Information Act requires that agencies make available to the public any records they maintain unless the records fall within one or more of the stated exemptions to mandatory disclosure contained in the Act. Where disclosure of personally identifiable records is in question (as in this case), the pertinent exemption is the sixth (5 U.S.C. § 552(b)(6)), which permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The question of whether particular information must be disclosed requires "a balancing of interest between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); see also Department of the Air Force v. Rose, 425 U.S. 352, 370-82, (1976). The private interest which is at issue is the right of an individual not to have disclosed his or her personal and professional life without his or her consent. The public interest is the right of the public to know that those engaged to carry out the public's business are competent and that the agency adhered to its regulations and its procedures in filling the position.

The Office of Information Policy (OIP) of the Department of Justice has official authority to issue guidance to agencies in their administration of the FOIA. OIP guidance on privacy protection considerations includes the following advice:

> Information which should be withheld from third parties pursuant to Exemption 6 generally pertains to an employee's personal life and family status. Matters capable of causing embarrassment and or harassment and which are not pertinent to the employee's duties should also be protected under Exemption 6. Such privacy interests specifically include, but are not limited to: place and date of birth; age; marital status; home address and telephone number; medical records; details of health and insurance benefits; the substance of promotion recommendations; supervisory assessments of professional conduct and ability; information concerning or provided by relatives and references; prior employment not related to the employee's occupation; primary secondary and collegiate education; allegations of misconduct or arrests; and military

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service number and Social Security Number. FOIA Update, Vol. III, No. 4, September 1982).

Upon review, it is our opinion that the employment applications sought by the AFGE constitute "personnel * * * files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" within the sixth exemption of the FOIA, and accordingly would not allow disclosure to third parties.

Additionally, in 1989, the Supreme Court issued a landmark FOIA decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), which for the past fifteen years has governed all privacy-protection decision making under the Act. The Reporters Committee case involved FOIA requests from members of the news media for access to any criminal history records – known as "rap sheets" – maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt Congressman. 489 U.S. at 757. In holding "rap sheets" entitled to protection under Exemption 7(C) of the Act, which protects records or information compiled for law enforcement purposes, the Supreme Court set forth five guiding principles that govern the process by which determinations are made under both Exemptions 6 and 7(C) alike:

First, the Supreme Court made clear in Reporters Committee that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time. Establishing a "practical obscurity" standard (Id. at 762, 780), the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to them. Id. At 764.

Second, the Court articulated the general rule that the identity of a FOIA requester cannot be taken into consideration in determining what should be released under the Act. With the single exception that of course an agency will not invoke an exception when the particular interest to be protected is the requester's own interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." Id. at 771.

Third, the Court declared that in determining whether any public interest would be served by a requested disclosure, one should no longer consider "the purposes for which the request for information is made." 489 U.A. at 774. Rather than turn on a requester's "particular purpose," circumstances, or proposed use, the Court ruled, such determinations "must turn on the nature of the requested document and its relationship to" the public interest generally. Id. at 773.

Fourth, the Court narrowed the scope of the public interest to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA." 489 U.S. at 774. This "core purpose of the FOIA," as the Court termed it,(Id. at 775), is to "shed light on an agency's performance of its statutory duties." Id at 773.

Fifth, the Court established the proposition, under Exemption 7(C), that agencies may engage in "categorical balancing" in favor of nondisclosure. 489 U.S. at 776-80. Under this approach, which builds upon the above principles, it may be determined, "as a categorical matter," that a certain type of information always is protectible under an exemption, "without regard to individual circumstances." 489 U.S. at 780.

Under the standards set forth above, once it has been determined that a personal privacy interest is threatened by a requested disclosure, an assessment of the public interest in disclosure is required. I do not believe that disclosure of the applications sought by the AFGE is in furtherance of the public interest. Further, I find that the interest of those applicants on the Status Candidates

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register, in shielding their individual personal information from the AFGE, or other public view, is "substantial." Accordingly, it is my opinion that the applications of the applicants on the Status Candidates (B List) register, or any outside register, should not be disclosed to the AFGE as a third party requester.

Last, in your memorandum, you advised that the in support of its right to view the Status Candidates register, the union has also argued that it needs to see the applications of the people on the Status Candidates register so that it can determine whether its bargaining unit employees are being treated fairly when compared to external candidates. As you stated in your memorandum, Section 7106 of the Federal Service Labor-Management Relations Statute clearly states that the responsibility for hiring employees as well as the ranking and selecting of candidates is a right of management. Further, regarding the union's allegation of a "past practice" existing regarding the prior allowance by RMC of the viewing of the Status Candidates register by the union, revocation of an alleged past practice with the AFGE may not be considered, since the past way of doing things clearly was in conflict with applicable law and government-wide regulation as set forth above.

In summary, the Privacy Act generally prohibits disclosure of information concerning individuals to third parties. Moreover, under the Freedom of Information Act, the sixth exemption permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Last, a past practice does not exist where the action is clearly in violation with applicable laws and regulations.

Accordingly, it is our opinion that the applications of the applicants on the Status Candidates register, or any outside register, should not be disclosed to a third party, such as the AFGE.