UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

GENERAL SERVICES ADMINISTRATION REGION 9 SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2275, AFL-CIO Charging Party	Case No. SF-CA-00804

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 1, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____

RICHARD A. PEARSON
Administrative Law Judge

Dated: September 30, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 30, 2004

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: GENERAL SERVICES ADMINISTRATION
REGION 9
SAN FRANCISCO, CALIFORNIA

Respondent

Case No. SF-CA-00804

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2275, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

GENERAL SERVICES ADMINISTRATION REGION 9 SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2275, AFL-CIO Charging Party	Case No. SF-CA-00804

Deborah Finch
For the Respondent

Vanessa G. Lim
John R. Pannozzo, Jr.
For the General Counsel

La Donna Williams
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This proceeding was initiated on September 5, 2000, when the American Federation of Government Employees, Local 2275 (the Union or Charging Party) filed an unfair labor practice charge against the General Services Administration, Region 9, San Francisco, California (the Agency or Respondent). After an investigation, the General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of its San Francisco Regional Office, issued an unfair labor practice complaint on January 26, 2001, alleging that the Respondent violated §7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to provide necessary information to the Union. The Respondent filed a timely answer, admitting that it had refused to furnish the cited information to the Union but denying that this constituted an unfair labor practice.

A hearing in this matter was held in San Francisco, California, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. At the hearing, I granted two motions by the General Counsel to amend the complaint.[1] The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Background

The American Federation of Government Employees, AFL-CIO, (AFGE) is the exclusive representative of a nationwide consolidated bargaining unit of employees of the General Services Administration (GSA). The Union is an agent of AFGE for representing employees of the Respondent located in South San Francisco, San Francisco, Oakland and Sacramento, California (Tr. 19).[2] At all relevant times,

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[1] The first amendment, to which the Respondent did not object, deleted from the complaint an allegation that the Agency failed to provide information specified in Item 1 of the Union's information request pertaining to "employee B." (Transcript (Tr.), pages 3-6.) The second amendment, to which the Respondent did object, alleged as a separate and independent violation of section 7116(a)(1), (5) and (8) that Respondent failed to inform the Union that certain requested documents did not exist. Specifically, the General Counsel alleged in this amendment that Respondent failed to inform the Union that: no additional information responsive to Item 2 existed pertaining to employee B; no additional information responsive to Item 5 existed; and no documents responsive to Item 7 existed. (Tr. 6-10.)

[2] In its answer to the complaint and at page 15 of its post-hearing brief, Respondent denied that Local 2275 was an agent of AFGE for representing unit employees of the Respondent. At the hearing, however, the Respondent offered no evidence to rebut testimony that Local 2275 represented bargaining unit employees in this geographic area and that GSA officials regularly dealt with Local 2275 officials on labor-management matters. I therefore find that Local 2275, as agent of AFGE, performed representational duties on behalf of bargaining unit employees.

AFGE and GSA have been parties to a nationwide collective bargaining agreement (CBA).

The information request that is the subject of the complaint in this case had its origins in a disciplinary action taken against Juanita Jackson, a Realty Specialist employed by the Agency, for alleged misconduct relating to her administration of two lease contracts. On July 29, 1999, the Agency issued a proposal to suspend Jackson for 14 calendar days (G.C. Exhibit 3), and on August 2, it provided the Union, which was representing Jackson, with the material that it relied on to support the proposed disciplinary action. By e-mail dated August 4, 1999, the Union submitted an information request seeking the number of employees (including managers) who had committed similar offenses in the preceding 5 years, along with the grade level, gender, race and penalty imposed on each offender. G.C. Exhibit 4.

The Agency responded to the Union's information request on August 31, 1999, by stating that two employees had been disciplined for similar matters during the 5-year period. G.C. Exhibit 6. The response described the alleged offenses and penalties imposed and referred to the two as Employee A and Employee B. Employee A was described as GS-12, asian/ pacific islander, and male, and he received a written reprimand. Employee B was described as GS-12, white, and male, and he received a warning notice. *Id.*[3]

On November 10, 1999, Richard B. Welsh, Jr., the Assistant Regional Administrator of the Public Buildings Service, issued his decision on the proposed action against Jackson, approving the full 14-day suspension. The Union then filed a grievance at step 2 of the contractual grievance procedure on November 24, 1999. G.C. Exhibit 8. In the grievance, the Union asserted that Jackson's suspension was inappropriately punitive, unduly harsh, and appeared to be discriminatory when compared with the penalties imposed on the two males who had been disciplined for similar matters, specifically citing the information previously given to the Union. By memorandum dated December 10, 1999, the Respondent denied the grievance. In a letter dated January 13, 2000, La Donna Williams, the president of Local 2275, informed the Agency that the Union was invoking arbitration in Jackson's grievance.

The information request

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[3] Prior to receiving this information, the Union replied to the proposed suspension, arguing that Jackson be given additional training and supervisory guidance, rather than a suspension.

By letter dated May 4, 2000, Williams submitted a new request for information "[p]ursuant to Ms. Jackson[']s upcoming] arbitration." G.C. Exhibit 2. The request included a numbered, nine-item list of data that was needed "in order to represent Juanita Jackson on the 14-day suspension issue." (The General Counsel issued complaint on only five of those nine items, but my decision retains the original numbering of the Union's request.) With respect to the five parts of the list that are at issue in this case, the Union sought the following:

> 1. The proposal, reply and decision letters pertaining to employees A and B as identified in management's August 31, 1999, response to a prior union data request.
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> 2. The evidence files pertaining to the two actions against employees A and B, including GSA Forms 225, notes of oral reply, supervisor's notes pertaining to the actions, and records of any grievance or appeal filed by the employees.
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> . . .
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> 5. All records of input given to, and deliberations by, Richard Welch with respect to Ms. Jackson's alleged misconduct or the penalty to be imposed for it.
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> . . .
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> 7. All records of any complaints from GSA customers about the alleged misconduct of Ms. Jackson referenced in the proposed 14-day suspension.
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> . . .
>
> 9. All decisions on proposed discipline of any kind by Richard Welch, identified by race and sex of the offender. (This information is needed to discover if there is a pattern whereby minorities or women tend to receive more severe discipline).

G.C. Exh. 2. In the request, Williams also stated that, if necessary, personal information could be removed from the documents.

In a May 17, 2000 letter addressed to Carl Yates, the president of AFGE Council 236 of GSA Locals and Regional

Vice President of AFGE, the Agency denied Williams's information request. In its denial, the Agency asserted that: (1) the Union's arbitration request was untimely; (2) Williams lacked authority to invoke arbitration; and (3) because the Union had failed to pursue the arbitration properly, there was no arbitration scheduled, and thus the information request was neither relevant nor necessary. G.C. Exhibit 12.

In a response dated May 30, 2000, Yates disputed each of the Agency's arguments and insisted that the arbitration would proceed. He asserted that the arbitration request was timely and that Williams had properly acted as his designee in invoking arbitration. With regard to the information request, Yates contended that under the CBA "any data requested that the Agency have in their possession must be turned over. The issue of relevancy or necessary [sic] is not a criteria for turning over information." G.C. Exhibit 13. Lastly, Yates asserted that any arbitrability issues should be decided by the arbitrator.

On September 5, 2000, having still received none of the data it had requested on May 4, the Union filed its unfair labor practice charge against the Respondent. In a letter dated September 15, 2000, Phillip L. Anderson, the Respondent's Director of Human Resources, responded again to the Union's request for information.[4] G.C. Exhibit 14. The Agency continued to argue that the grievance was not arbitrable, and that as a result, the information request was improper. It also noted that because the Union had not grieved the denial of its May 4 request, the Agency was no longer obligated to provide the information. The letter went on, however, to explain, "for the Union's future information," why the Union would not have been entitled to any of the requested information "even if arbitration . . . had been timely and authoritatively invoked." *Id.* at 1-2.

With respect to the material encompassed by Item 1 of the Union's May 4 request, Anderson stated that documents relating to employee A's written reprimand could not be provided, even in sanitized form, without compromising employee A's privacy. He asserted that if the documents were properly sanitized, the remaining information would be of no use to the Union in seeking to compare employee A's case to Jackson's. The factors cited by the Agency in this regard were: (1) its practice of providing a great amount

[4] The Agency's letter indicates that Williams had resubmitted the Union's May 4 data request on August 30, 2000. The Union's August 30 letter was not offered into evidence, however.

of specificity and detail as to the facts involved in its proposal and decision letters and (2) the small community in which the discipline and underlying incidents occurred. The same problem would therefore exist with the Union's reply letters. As to employee B, Anderson informed the Union because that employee had received a warning letter, there was no proposal, reply, or decision letter.

With respect to Item 2 requested by the Union (the evidence files for the disciplinary actions against employees A and B), the Agency asserted the same privacy considerations that it had expressed in conjunction with Item 1 applied.

Concerning Item 5 (records of Welsh's input and deliberations), the Agency stated, "Mr. Welsh was provided the same 'material relied upon' which was furnished to Jackson's representative on August 2, 1999." G.C. Exhibit 14 at 5. It further asserted that the Union was not entitled to guidance, advice, counsel, or training provided management officials and that no need for any records of deliberations was articulated by the Union.

With respect to Item 7 (complaints from GSA customers about Jackson), Anderson told the Union that the material relied on for the disciplinary action had already been furnished to the Union on August 2, 1999.

As to Item 9 (records of all disciplinary actions decided by Welsh, identified by race and sex), the Agency stated that GSA does not maintain such data in the regular course of business.

At the hearing in this case, Williams testified on behalf of the General Counsel, and Michelle Clow, the current Director of Human Resources for the Agency, testified for the Respondent. Williams further described the Union's purposes in requesting each item in its data request. Clow described the Agency's record-keeping system and articulated the Agency's argument that producing and sanitizing the documents and information requested would be so time-consuming that they cannot be considered "reasonably available." Clow testified that the files pertaining to disciplinary actions are commingled with files relating to other employee relations matters. They are not labeled by the nature of the action or subject matter to which they pertain but, rather, by name of the subject employee. According to Clow, the employee relations files are initially placed in file cabinets in a file room on the 5th floor of the regional office in San Francisco. Once those cabinets become full, files are shifted to a store room on

the 2nd floor of that building, where they are kept in cardboard boxes in no particular order. Clow asserted that retrieving the information requested in Item 9 would require a manual search of employee relations files to identify which pertained to disciplinary actions in which Welsh was the deciding official.5 Clow estimated that searching and redacting the files stored on the 5th floor would take 300 hours and that searching the files stored on the 2nd floor would require much longer.

At the hearing, it was revealed that an arbitration hearing on the grievance protesting Jackson's suspension was held in October 2000, and that the arbitrator reduced her penalty from a 14-day suspension to a letter of reprimand.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute in two ways: first, by refusing to provide the Union with Items 1, 2, 5, 7 and 9 of its May 4, 2000 information request, and second, by failing to inform the Union that some of the data requested did not exist. The General Counsel argues the evidence demonstrates that all elements of a valid data request under section 7114(b)(4) were met for each of the items: the data is normally maintained by the Agency; it is reasonably available; it is necessary for full and proper discussion of subjects within the scope of bargaining; does not constitute guidance or advice to supervisors relating to collective bargaining; and its disclosure is not prohibited by law.

Relying on the standard set forth in *Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) (*IRS, Kansas City*), the General Counsel maintains that the Union articulated its particularized need for these five items of information in its May 4, 2000 request, while the Respondent failed in its obligation to inform the Union of any countervailing anti-disclosure interests. Specifically, the Agency's initial reply to the Union on May 17, 2000 cited no reasons for refusing to furnish the data, other than that the grievance was not

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5 Clow stated that about 900 of the approximately 1400 employees in Region 9 come under Richard Welsh's supervision.

arbitrable. However, citing *Department of Health and Human Services, Social Security Administration, Region X, Seattle, Washington*, 39 FLRA 298, 309 (1991) (*SSA, Region X*) the non-arbitrability of a grievance is not a legitimate reason to refuse a data request. Only in its September 15, 2000 letter (sent after the Union had already filed its ULP charge) did the Agency offer any substantive reasons why the information should not be disclosed, and the General Counsel argues that this reply by the Agency, coming four months after the Union's request, was too late to meet the burden set forth in *IRS, Kansas City.*

With respect to Item 1 on the Union's request list, the General Counsel notes that proposal, reply and decision letters are retained by the Respondent in its San Francisco facility; hence, they are "normally maintained" within the meaning of section 7114(b)(4) of the Statute. Additionally, since the Respondent had already located these documents for employee A in response to the Union's August 1999 data request, it is clear that they are "reasonably available" within the meaning of that section. This is also true regarding the evidence files for employees A and B, sought in Item 2 of the Union's request.

The General Counsel contends that the Union met the requirements of *IRS, Kansas City,* for articulating with specificity its need for the documents relating to employee A. The Union explained to the Agency that it was seeking the documents in conjunction with a specific arbitration case in which they would be used to determine whether an employee against whom a disciplinary action was taken was discriminated against based on race or gender. The need for the information was established by the very information concerning this employee that the Agency had previously furnished the Union.

The General Counsel disputes the Agency's claim that disclosure of Items 1, 2 or 9 was prohibited by the Privacy Act. Since the Union asked for the documents in sanitized form, the Privacy Act is not even applicable to this situation. Even if the Privacy Act were applicable, the General Counsel notes that the Agency never offered any evidence as to what "system of records" the requested information was contained in. Further, the General Counsel argues that the documents requested in Items 1, 2 and 9 would likely constitute a "routine use" and therefore their disclosure would not be prohibited by the Privacy Act.

With respect to the documents encompassed by Item 2 of the information request, the General Counsel essentially cross-references the arguments that it made with respect to

Item 1. The General Counsel asserts that the claim made by Respondent at the hearing, that documents pertaining to employee B did not exist, was unsubstantiated by any witness testimony. According to the General Counsel, the Agency's prior responses to the Union left the impression that documents pertaining to employee B existed, and if such documents did not exist, the Agency should have explicitly told that to the Union in a timely manner.

With respect to documents concerning Welsh's input and deliberations in the Jackson disciplinary action (Item 5), the General Counsel notes that when the Agency initially responded to the Union's request in May 2000, it did not inform the Union that there were no such documents beyond those already given to the Union in August 1999. Moreover, the General Counsel maintains that in its September 2000 letter, the Agency gave the impression (by referring to management guidance) that responsive documents may have existed that were not being turned over to the Union. The General Counsel contends that a claim by Respondent's counsel at the hearing that no further responsive documents existed was unsubstantiated by supporting evidence. The General Counsel argues that if Respondent was confused about whether the Union was requesting it to create documents rather than simply provide existing documents, it should have sought clarification from the Union at the time of the request and cannot shield itself now by claiming confusion.

With respect to Item 7, the General Counsel contends that the Agency maintains records of complaints by GSA customers, and if such a complaint existed alleging the misconduct referenced in Jackson's disciplinary action, it could easily be retrieved. The General Counsel asserts that this particular information was necessary for the Union to adequately represent Jackson in the grievance over the disciplinary action triggered by the alleged complaint.

As to the material requested in Item 9, the evidence shows that the Agency normally maintains files on disciplinary actions taken in Region 9, as well as records showing the race and gender of employees in the region. The General Counsel argues that this part of the request would not have required the Respondent to create a document, but merely to attach an existing race and gender document to an existing disciplinary action document or, alternatively, to annotate the disciplinary action document with race and gender. All of the information requested in Item 9 is maintained at a single facility, and thus in the General Counsel's view, it is "reasonably available". As for the testimony at the hearing to the effect that retrieval of that information would be time-consuming and labor-

intensive, the General Counsel asserts that any difficulty in retrieving the relevant disciplinary files is a consequence of Respondent's choice of how it maintains its records and files. The General Counsel also contends that Clow's estimate of the time it would take to accomplish retrieval is unreliable, given the absence of any effort on Respondent's part to comply with the Union's request. The General Counsel asserts that, even assuming the estimate is accurate, that is not extreme or excessive relative to other cases in which the Authority found information to be reasonably available.

The General Counsel further argues that the disciplinary data requested in Item 9 was necessary for the Union to fulfill its obligation as exclusive representative and that the Union adequately articulated its need for the information in its request to the Agency. Although the Union did not narrow the request to a specific time frame, it had previously specified a 5-year time frame when it requested (and received) similar information in August 1999, and Williams testified at the hearing that she was only interested in information going back five years. The General Counsel asserts that, in any event, the Agency never communicated to the Union that the absence of a specified time frame presented a problem.

The General Counsel contends that Respondent also violated section 7116(a)(1), (5) and (8) by failing to inform the Union that some of the information requested did not exist. The General Counsel argues that section 7114(b)(4) requires an agency to tell an exclusive representative when information requested does not exist. In its May 17, 2000 response to the Union's information request, the Respondent did not inform the Union that any of the requested information did not exist. The General Counsel further argues that the Respondent's September 15, 2000 letter did not satisfy its obligation, because it was not provided until 4 months after the first reply and 10 days after the unfair labor practice charge had been filed.

The General Counsel further argues that even the Agency's September 15 letter communication did not clearly advise the Union that some of the information it sought did not exist. The General Counsel notes that the Agency had previously provided a detailed response to the Union concerning the discipline of employee B. It was in response to this that the Union sought the evidence file concerning employee B's action. The General Counsel argues that the information initially given by the Agency gave the Union the impression that some type of records existed, and the Agency's September 2000 letter failed to clearly inform the

Union that, in fact, responsive documents did not exist. With respect to the material requested in Item 5, the General Counsel asserts that request encompassed not just the "input" on which Welsh relied but also his "deliberations." The General Counsel argues that although the September letter informed the Union no further documents fell into the category of "input," it gave the impression there were records relating to "deliberations" that the Agency would not provide because they constituted guidance or training to supervisors. As for the requested records of complaints in Item 7, the General Counsel suggests there could have been records of complaints that fell into the category identified by that item but not into the category of "material relied upon for the proposed suspension." The General Counsel asserts that the Respondent's September letter failed to indicate there were no records of complaints responsive to Item 7 that had not been previously provided to the Union.

As remedy, the General Counsel seeks an order requiring Respondent to cease and desist, and to post a notice to employees. The General Counsel states it is no longer necessary for the requested information to be furnished to the Union, because the arbitration has been decided.

The Respondent

The Respondent denies that it violated the Statute in any respect.

With respect to Items 1, 2 and 9, the Agency asserts that the degree of redaction necessary to protect the employees' identity would leave virtually nothing of use to the Union in the documents. According to the Respondent, the small number of employees of the same gender and race as employees A and B, combined with widespread knowledge of events in the small community of Realty Specialists employed in Region 9, would make identification of employees A and B very easy if any facts contained in the disciplinary action documents or evidence files were revealed. Respondent specifically points out that in Region 9, employee A's gender and race was common to only about six GS-12 Realty Specialists and employee B's gender and race was common to

only about 16 GS-12 Realty Specialists.[6] Additionally, the Agency contends that during the hearing it became evident that the Union already knew the identity of employee A because it had represented him in the disciplinary action taken against him. Citing *U.S. Department of Justice, Federal Correctional Facility, El Reno, Oklahoma and American Federation of Government Employees, Local 171*, 51 FLRA 584, 589 (1995), the Respondent further argues that the fact that the Union already knew the identity of employee A does not lessen the employee's privacy interest in his records. Additionally, the Union's refusal of the offer of the arbitrator hearing the grievance over Jackson's disciplinary action to delay the arbitration until the dispute over the information request was resolved, demonstrates that the information was not necessary to the Union at all.

With respect to Item 5 of the Union's request, the Respondent does not squarely address whether any responsive documents exist in addition to those previously given to the Union in August 1999. Rather, the Respondent focuses on the Union's alleged failure to clarify its request and Williams's testimony at the hearing regarding whether she was asking that a document be created. In this latter regard, Respondent contends that although Williams was initially equivocal, she ultimately conceded that she was effectively requesting that a document be created which provided further justification for Welsh's decision. The Respondent asserts that section 7114(b)(4) does not entitle the Union to obtain responses to interrogatories.

Concerning Item 7, the Respondent denies it failed to inform the Union that the requested material did not exist. The Respondent contends it responded to this particular request in its September 15 letter when it advised the Union that the material relied upon had already been given to it in August 1999. According to Respondent, the material provided on that date included a declaration from Jackson's supervisor recounting how he became aware of the problem for which Jackson was disciplined when another Realty Specialist working with a lessor on another project informed the supervisor of a complaint the lessor had about the lease

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[6] Throughout the hearing in this case, the Respondent's representative was evasive as to whether there were any existing documents that pertain to employee B and come within the ambit of Item 2 of the Union's request. I take the Respondent's inclusion of employee B in arguments contained in its post-hearing brief with respect to Item 2 as a tacit acknowledgment that documents exist pertaining to employee B that come within the scope of Item 2.

under Jackson's responsibility. Respondent asserts this was the only complaint mentioned in the documents involved in the disciplinary action.

With respect to Item 9, the Respondent faults the Union for failing to articulate a particularized need for such a broad range of documents relating to offenses quite different from Jackson's. Moreover, it argues that annotating the discipline files with information as to the race and sex of the subject would require the creation of a record it does not normally maintain in the regular course of business. And in addition to its claim that sanitizing disciplinary documents is impossible, it asserts that identifying and sanitizing the files responsive to this request, out of its hundreds of disciplinary files, would be so time-consuming that the information is not "reasonably available."

If the documents sought in Items 1, 2 and 9 cannot be sanitized to protect the identity of the employees, then Respondent cites the Privacy Act as prohibiting their disclosure to the Union. While it acknowledges that the Office of Personnel Management has identified, as "routine uses" of documents within the systems of records designated OPM-GOVT-1 and OPM-GOVT-3, the disclosure of those documents to labor organizations, Respondent notes that the Union must still demonstrate that the information is relevant and necessary to its duties as exclusive representative. Respondent asserts that the Charging Party, Local 2275, has no "duties of exclusive representative" within the meaning of the routine use statements because AFGE and AFGE Council 236, not Local 2275, hold exclusive representation for employees at GSA. And citing *U.S. Department of Veterans Affairs Medical Center, Dallas, Texas and AFGE Local 2437*, 51 FLRA 945 (1996), the Respondent argues that the Union has not demonstrated a particularized need for the information in Item 9 in a form that identifies the specific employees.

Finally, citing Article 5, section 4D, and Article 33, sections 8D4 and 10D of the CBA, Respondent argues that the Union waived any statutory right to information in a name-identifiable form. In Respondent's view, those CBA provisions, which give employees the right to authorize disclosure of personnel documents to the Union in certain

situations, supercede any statutory right the Union might otherwise have to personnel information.[7]

Analysis

General Principles Applying to section 7114(b)(4)

Section 7114 of the Statute provides:

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

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[7] Respondent raised this "waiver" argument for the first time in its post-hearing brief. Pursuant to section 2423.23 of the Authority's Regulations, parties are required to exchange, among other things, a brief statement of their theory of the case including any and all defenses to the allegations in the complaint prior to the hearing. Other than Respondent's argument in its post-hearing brief, this claim was not addressed in the proceedings relating to the complaint in this case. As Respondent failed to raise "waiver" at a time that would have permitted litigation of that issue, I will not consider it further. *See, United States Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston, Texas*, 60 FLRA No. 22, *Ms. op.* at 11 (July 15, 2004).

This provision thus establishes several requirements that must be met for a union to be entitled to a document. The Respondent has cited each of these requirements, except section 7114(b)(4)(C),[8] in objecting to one or more of the items contained in the Union's request that remain in dispute in this case. The Authority has developed standards for evaluating each of these requirements.

In making determinations whether information sought by a union is "normally maintained by the agency in the regular course of business," the Authority examines whether the information is within the control of the agency. *See, e.g., Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, New, Bedford District Office, New Bedford, Massachusetts*, 37 FLRA 1277, 1285 (1990). In evaluating claims that information is not "reasonably available," the Authority has generally required the furnishing of information unless the agency shows that it would be available only through "extreme or excessive means." *See, e.g., Federal Bureau of Prisons, Washington, D.C.*, 55 FLRA 1250, 1254 (2000). Although that standard has been criticized by the Fifth Circuit Court of Appeals and by the Authority's current Chair, the Authority has not yet abandoned or modified it. *See, id.* at 1254-55 (majority opinion) and at 1262 (dissenting opinion). Consequently, that remains the applicable standard for determining whether requested information is reasonably available.

In response to several court decisions, the Authority in its 1995 *IRS, Kansas City* decision reviewed its policy for determining whether information is "necessary" under section 7114(b)(4)(B). In that decision, the Authority adopted an analytical framework for determining necessity that requires unions requesting information to show a particularized need for the information and agencies to show countervailing anti-disclosure interests. The determination of whether requested information is "necessary" is made

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[8] Although the agency's September 15, 2000 letter suggested that the provisions set forth at section 7114(b)(4)(C) might apply to some of the items of information sought by the Union, the Respondent has not espoused such a claim in litigating the unfair labor practice complaint in this case. In fact, in its answer to the complaint, the Respondent admitted that the information that was the subject of the complaint did not constitute guidance, advice, counsel or training for management officials or supervisors, relating to collective bargaining.

based on weighing the needs and interests articulated by the parties to the request.

Under the framework adopted in *IRS, Kansas City*, a union has the initial responsibility of establishing a particularized need for information requested. To establish a particularized need, a union must articulate with specificity why it needs the information requested including the uses to which it will put the information and the connection between those uses and the union's responsibilities as exclusive representative. 50 FLRA at 669. Generally, the question of whether a union has met its responsibility will be judged by whether it adequately articulated its need at or near the time of its request, as contrasted with at the hearing in any litigation over the request. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 51 FLRA 1467, 1473 (1996) (*INS, Twin Cities*), *Decision and Order on Reconsideration*, 52 FLRA 1323, *affirmed*, 144 F.3d 90 (D.C. Cir. 1998).

Once a union makes a request and articulates its need, an agency must respond. In responding, an agency cannot simply say "no." Rather, the agency must in denying a request for information identify and articulate its countervailing anti-disclosure interests. *IRS, Kansas City*, 50 FLRA at 670. As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. *See, e.g., Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*); *INS, Twin Cities*, 51 FLRA at 1472-73; *Social Security Administration, Dallas Region, Dallas, Texas*, 51 FLRA 1219 (1996) (*SSA, Dallas Region*); *Social Security Administration, Baltimore, Maryland*, 39 FLRA 650, 656 (1991) (*SSA, Baltimore*).

Moreover, an agency must fulfill these responsibilities in a timely manner. For example, it must articulate its anti-disclosure interests to the union at or near the time it denies the union's information request. *See, e.g., FAA*, 55 FLRA at 260. It cannot wait months after the request to raise anti-disclosure interests or do so for the first time during litigation of any dispute over the information request. *See. e.g., United States Department of Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California,* 58 FLRA 656, 659 (2003) (*INS, Laguna Niguel*); *FAA*, 55 FLRA at 260. Once an agency requests clarification or raises legitimate

anti-disclosure interests, it is incumbent on the union to respond in a timely and constructive manner. *See, e.g., U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C.*, 51 FLRA 1391, 1396 (1996).

As interpreted by the Authority, section 7114(b)(4) requires parties to engage in an exchange or dialogue with respect to the information request for the purpose of communicating respective interests and attempting to work out an accommodation of those interests and agreement on disclosure of information. Often, one party's satisfaction of its responsibilities will depend on the degree to which it has responded to the interests and concerns raised by the other party, rather than simply saying "no" or resorting to litigation.

If the parties do not reach agreement and the dispute proceeds to litigation,

> an unfair labor practice will be found if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need.

50 FLRA at 671.

With these guidelines in mind, I will evaluate the five items of requested information that remain in dispute.

Alleged Failure to Provide Information

Item 1

What remains in dispute as to Item 1 are the proposal, reply and decision letters pertaining to employee A. I find that the Union articulated a particularized need for this material at the time of its request on May 4, 2000. In making this finding, I note that in its request the Union specifically stated that it needed this information in order to represent Jackson in an upcoming arbitration of the grievance over her suspension. By this date, the Union and Agency had already exchanged a considerable amount of correspondence regarding Jackson's suspension. The Union had asked for, and received, information showing that two other employees (employees A and B) had been previously disciplined for similar conduct and received significantly lesser penalties. In the grievance itself, the Union had

specifically identified among its theories that Jackson's suspension was discriminatory when compared with the penalty imposed on employees A and B. In its May 4 data request, the Union sought to take the next logical step in representing Jackson: it sought the details of the actual disciplinary cases involving employees A and B, so that it could evaluate whether their treatment really was distinguishable from Jackson's treatment. Based on the Union's statements in its May 4 request and its prior correspondence regarding Jackson's case, the Union demonstrated a clear relevance and need for obtaining details about the prior cases involving employees A and B.

The Respondent, however, failed to articulate in a timely manner a countervailing interest that would have outweighed the Union's need. When the Agency initially replied on May 17 to the Union's May 4 data request, it contended only that the information was not "necessary" because the underlying grievance was not arbitrable. As noted by the General Counsel, the alleged non-arbitrability of a grievance is not a valid basis for refusing a data request. *SSA, Region X*, 39 FLRA at 309. Promptly after receiving the Agency's reply, the Union disputed the Agency's position and reasserted its intention to proceed to arbitration. More than three months then passed without any further response from the Agency, until September 15, before the Respondent first articulated any countervailing interests. This belated response did not satisfy the Agency's statutory obligation to inform the Union of any interests against disclosure at or near the time of the information request. *See INS, Laguna Niguel*, 58 FLRA at 659. Since the Union established a particularized need for the Item 1 information relating to employee A and the Respondent failed to rebut that need in a timely manner, I find that the Agency was required to furnish that information to the Union.[9]

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[9] In its September 15 letter to the Union, the Agency objected to Item 1 on the ground that the documents in employee A's case could not feasibly be sanitized. This relates to the issue of whether the information can be disclosed under the Privacy Act, and I will address that issue later in this decision. The Agency also noted generally that "GSA does not maintain records showing what disciplinary actions have been taken for specific offenses." G.C. Exhibit 14 at page 2. This would appear to relate to Item 9 in the Union's information request, and I will address that question under Item 9. Since I reject both of these objections, I would therefore have required the Agency to furnish Item 1 to the Union, even if I had considered its September 15 letter.

Item 2

For much the same reasons as I expressed regarding Item 1, I find that (1) the Union demonstrated a particularized need for the material encompassed in Item 2 (the evidence files relating to the actions taken against employees A and B), and (2) the Respondent failed to articulate in a timely manner any countervailing anti-disclosure interest. Specifically, in order to evaluate whether Jackson was treated disparately in comparison to employees A and B, the Union needed to understand the evidence in the latter two cases. The notices of proposed discipline, the Union's replies, and the Agency's determination letters certainly would contain discussions of that evidence, but the evidence files themselves would be the best source for the Union to determine whether Jackson was treated unfairly. Moreover, since the Agency stated that there was no proposal, reply or decision letter for employee B, the evidence file might be the only source of information for the Union to compare Jackson's case to employee B's. Thus I find that, as with Item 1, the information encompassed in Item 2 was necessary for the Union to represent Jackson in her grievance, and that the Agency articulated no valid countervailing interest.[10]

Item 5

The record reflects that immediately after the Agency proposed to suspend Jackson in August 1999, it supplied the Union with the material relied upon by the Agency. The Union does not dispute this, and there is no claim the Union was seeking by Item 5 to have the Respondent provide that material a second time. What emerged from Williams's testimony at the hearing with respect to Item 5 was that the Union was seeking information, beyond what it had already been given, that would explain and document the decision-making process utilized by Richard Welsh, the deciding official, with respect to the discipline and the particular penalty imposed on Jackson. Put another way, Williams' testimony indicates that what the Union really wanted was a paper-trail showing Welsh's analytical and thought process, regardless of whether that trail had already been reduced to paper. However, I find that the record does not support a finding that any documents beyond those already given to the Union existed. The Statute does not require an agency to provide documents that don't exist. *See, e.g., Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol*, 23 FLRA 239 (1986) (*Border Patrol*). In this respect, therefore, I conclude

[10] See footnote 9, *supra*.

that the Respondent did not violate the Statute. While the Statute does require an agency to inform a requesting union of the non-existence of requested information, I will address that allegation later in this decision.

Item 7

The record fails to establish that records of customer complaints about the misconduct alleged in Jackson's suspension, beyond those previously given the Union in August 1999, existed. In the documents submitted to the Union, the Respondent consistently cited only one external complaint that related to the alleged misconduct for which Jackson was disciplined. Specifically, that was a complaint about GSA's handling of a lease, expressed to another GSA Realty Specialist by the property management company for the space subject to the lease. Williams acknowledged in her hearing testimony that in the information request she was trying to find out whether any other complaints had been made against Jackson, but there is no basis to suggest that any such information existed. I therefore conclude that the Agency did not withhold any required data regarding Item 7.

Item 9

In conjunction with its request for all decisions on proposed discipline made by Welsh, the Union specifically stated that it was seeking to discover whether there was a pattern of disparate treatment toward women and minorities. This expressed purpose dovetailed with the Union's earlier identified theory that Jackson's discipline was discriminatory, and it was based at least in part on the limited information previously given to the Union about employees A and B. At least superficially, the information received by the Union showed that Jackson had received much more severe punishment for a similar offense than an Asian male and a white male, and it is understandable that the Union sought to follow up on this lead by obtaining more detailed information. That is why I previously concluded that the Union had a particularized need for the documents relating to the disciplinary actions against employees A and B. Similarly, I conclude that the Union met its burden by explaining to the Agency that the requested records concerning other disciplinary actions in which Welsh was the deciding official were relevant to the Union's role in presenting Jackson's arbitration case. Indeed, the Union

even identified the theory of its case to which the requested information related.11

The Respondent, on the other hand, failed to demonstrate any countervailing interest in a timely manner. In its September 15 letter (which, as noted above, came 3½ months after the initial exchange relating to the Union's request), the Agency's only objection to Item 9 was that it did not maintain records showing what disciplinary actions were taken for specific offenses. At the hearing, Respondent also presented evidence to show that retrieving the information would require a search through its employee relations files to identify those that involved disciplinary actions in which Welsh was the deciding official. Also, at the hearing and post-hearing stage of this case, the Respondent made much of the fact that information showing the race and sex of the subject employee is not maintained in conjunction with the disciplinary action files. Citing this fact, the Respondent asserted that documents showing both the disciplinary action and the race and sex of the employee were not "normally maintained." Additionally, the Respondent argued in its post-hearing brief that the information sought was not "reasonably available" in light

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The Authority has stated that a union requesting information under section 7114(b)(4) bears the burden of articulating particularized need with respect to the "temporal and geographic" aspects of the request. *See, e.g., U.S. Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana*, 53 FLRA 789, 799 (1997). In the request itself, the Union did not specify any temporal limit on the material requested. The Respondent, however, did not in its responses to the information request seek clarification of the time period intended or express objection to the absence of a defined time period. The Union was not queried as to the temporal scope of the request in Item 9 until the hearing in this case. At that point, Williams testified that, consistent with her request made the prior year for information regarding similar offenses, she intended the request to encompass a five-year period. In its post-hearing brief, the Respondent raised no objection to the temporal scope of the request. Rather, insofar as the scope of Item 9 is concerned, the Respondent argued only that the Union failed to articulate a particularized need for copies of decision letters involving offenses that are not similar to that alleged against Jackson. In the absence of any objection or challenge by the Respondent to the temporal scope of the request, I find that it is not at issue in this case, and that Williams's testimony adequately identifies the time period requested.

of the difficulties involved in retrieving the requested information from its files.

I reject the Respondent's objections to Item 9 for several reasons. First, as I noted with respect to other items, the issues cited in the Agency's September 15 letter were not raised in a timely manner. *See INS, Laguna Niguel*, 58 FLRA at 659. Second, the record reflects that the information requested in Item 9 is "normally maintained" by the Agency, as that term is applied by the Authority. The Respondent essentially argues that information does not exist in the form requested by the Union, but would require the creation of a unified document showing both the decision in disciplinary actions and the race and sex of the subject. But testimony at the hearing showed that the Agency does indeed maintain records of decisions in disciplinary actions and records showing the race and sex of employees. Thus, the Respondent could extract the information sought by the Union from existing records physically maintained by the Respondent. The fact that Respondent may have had to combine information from two separate records in some manner in order to respond to the Union's request does not relieve it of its obligation to provide information under section 7114(b)(4). *See*, *U.S. Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 37 FLRA 987, 993 (1990). Finally, with regard to its argument that the information in Item 9 was not "reasonably available," the Agency asserted this for the first time in its answer to the ULP complaint and submitted evidence on this theory only at the hearing. This does not comport with the principles expressed in *IRS, Kansas City*. If the Agency felt that the request would impose unreasonable burdens on its staff, it was obligated to express those concerns at the time of the request, so as to allow the Union to respond and hopefully reach a mutual accommodation of the parties' interests. Thus I conclude that the Respondent was obligated to furnish the information requested in Item 9.

Applicability of the Privacy Act

The Respondent asserts that privacy issues prevent it from providing the information requested in Items 1, 2 and 9. The Privacy Act regulates 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(a)(4) and (5). With certain exceptions identified therein, the Privacy Act prohibits the disclosure of personal information about Federal employees contained in those records without their consent. Each exception to the Privacy Act operates independently. *Internal Revenue Service, Austin District Office, Austin, Texas*, 51 FLRA 1166, 1176 (1996) (*IRS, Austin*). There are two exceptions to the prohibition on disclosure of information under the Privacy Act that are most commonly encountered in litigation relating to section 7114(b)(4) of the Statute.

The first exception is found at 5 U.S.C. §552a(b)(2), which permits disclosure of information if it would be required under the Freedom of Information Act (FOIA). Exemption 6 of FOIA provides, in turn, that information contained in "personnel and medical 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. §552b(b)(6). In consideration of these statutory provisions, the Authority follows an analytical framework for determining whether disclosure is permitted under the section 552a(b)(2) exception that involves weighing employee privacy interests that would be jeopardized against the public interest that would be served by disclosure. *See, e.g., U.S. Department of Transportation, Federal Aviation Administration, New York TRACON, Westbury, New York*, 50 FLRA 338, 342 (1995) (*TRACON*). If after balancing these interests, an unwarranted invasion of privacy would result, disclosure is not required by FOIA.

In addressing this FOIA-based exception to the Privacy Act, the Authority has held that if documents are "sanitized" or redacted to delete personal identifying information, then those otherwise objectionable documents can be disclosed. *See, e.g., Health Care Financing Administration*, 56 FLRA 503, 506 (2000) (*HCFA*). In sanctioning the release of redacted documents, the Authority reasoned that if identifying information is redacted, there is no unwarranted invasion of privacy; thus the information is required to be disclosed under FOIA, and the Privacy Act does not prohibit its release. *Id.*

The second exception commonly encountered in litigation over section 7114(b)(4) is found at 5 U.S.C. §552a(b)(3), which permits disclosure for a "routine use." Routine use is defined by the Privacy Act as the use of covered information "for a purpose which is compatible with the purpose for which it is collected[.]" 5 U.S.C. §552a(a)(7). Each agency that maintains a system of records is required to publish notices in the Federal Register that define the systems and their contents and identify each routine use of the records contained in the system, including the categories of users and purpose of such use. 5 U.S.C. §552a (e)(4). In addressing the "routine use" exception, the Authority examines the relevant routine use statement to determine whether disclosure of the requested documents is permitted under the terms of that statement. *See, e.g., U.S. Department of Transportation, Federal Aviation Administration, Little Rock, Arkansas*, 51 FLRA 216, 223-27 (1995) (*FAA, Little Rock*).

Although the Respondent in this case has asserted that privacy concerns bar disclosure of the information sought in Items 1, 2 and 9, it did not cite or refer to any "system of records" that allegedly contain the requested information, except for a rather equivocal reference in its post-hearing brief to OPM/GOVT-1 and OPM/GOVT-3. The General Counsel correctly asserts that an agency defending against a refusal to provide information on the basis that disclosure is prohibited by the Privacy Act bears the burden of demonstrating, among other things, that the information requested is contained in a "system of records." *See, e.g., TRACON*, 50 FLRA at 345. The Authority has also stated, however, that it will, where appropriate, "consider matters that are otherwise apparent." *Id.* Consistent with this last statement, the Authority has in some cases taken official notice of the fact that requested information is contained in a "system of records." It is clear from Authority precedent that some records pertaining to disciplinary actions are contained in OPM/GOVT-1 and OPM/ GOVT-3, two systems of records maintained by Office of Personnel Management (OPM). *See, e.g., U.S. Department of Labor, Washington, D.C.*, 51 FLRA 462, 473 (1995) (*Department of Labor*); *IRS, Austin*, 51 FLRA at 1169 n.7 (1996); *Department of the Air Force v. FLRA*, 104 F.3d 1396, 1401 (D.C. Cir. 1997).

It is clear from a review of the current notice of the government-wide systems of records managed by OPM that some of the documents encompassed by Items 1, 2 and 9 are indeed contained within OPM/GOVT-1 and OPM/GOVT-3. Without seeing the actual documents in Items 1, 2 and 9, it is impossible to tell whether all of them come within the ambit of OPM/

GOVT-1 and OPM/GOVT-3, but since the Respondent has failed to identify any other system of records that they are contained in, any documents outside of these two systems of records would not be protected by the Privacy Act at all.

The system name for OPM/GOVT-1 is "General Personnel Records." As relevant here, that system includes but is not limited to the contents of the Official Personnel Folder (OPF) and contains "records reflecting Federal service. . . . Such records contain information about . . . notices of all personnel actions, such as . . . demotions . . . suspensions . . . and removals." 65 Fed. Reg. 24732, 24733 (April 27, 2000). The purpose of the general personnel files that is identified by OPM in describing this system of records is to serve as the "official repository of the records, reports of personnel actions, and the documents and papers required in connection with these actions effected during an employee's Federal service." *Id.*

The system name for OPM/GOVT-3 is "Records of Adverse Actions, Performance Based Reduction in Grade and Removal Actions, and Termination of Probationers." The categories of individuals covered by this particular system are "current and former Federal employees . . . against whom such an action has been proposed or taken in accordance with 5 CFR parts 315 (subparts H and I), 432, 752 or 754 of [OPM's] regulations." *Id.* at 24739. The categories of records in this system are records and documents on the processing of adverse actions, performance based reductions in grade and removal actions and terminations during probationary periods. *Id.* at 24740. The records in this system include copies of the notice of proposed action, materials relied on by the agency to support the reasons in the notice, replies by the employee, statements of witnesses, hearing notices, reports, and agency decisions. *Id.*

Having reviewed OPM's "routine use" statements for OPM/GOVT-1 and OPM/GOVT-3, I find that to the extent that Items 1, 2 and 9 encompass materials relating to the processing of proposed suspensions and other "adverse actions" within the meaning of part 752, those materials constitute "records" contained within a "system of records" for purposes of the Privacy Act. I also take official notice of OPM's Operating Manual, The Guide to Personnel Recordkeeping, which permits letters of reprimand or caution to be maintained in Official Personnel Folders, and thus I find that they too constitute such a record. *See,* Guide to Personnel Recordkeeping, at page 3-4. To the extent that any document sought in Items 1, 2 and 9 does not come

within the ambit of OPM/GOVT-1 or OPM/GOVT-3, there is no basis for finding that it constitutes a "record" for purposes of the Privacy Act.

Although the Union specifically agreed to accept the requested data in sanitized form, the Agency argues that sanitizing the documents would eliminate virtually all factual information and make the documents meaningless. While I was not given the actual documents in dispute for examination, I reject the Agency's claim. Looking at the proposed suspension letter to Jackson (G.C. Exhibit 3) as an example of the type of document sought in Items 1 and 9, I find that very little substantive information would need to be redacted in order to protect Jackson's identity. On page 1 of the letter, only Jackson's name and personal identifying information, and the identity of the Federal tenant on the lease in question would need to be deleted, and the same is true on page 2 of the letter. This would allow the Union to understand the facts of the incidents for which Jackson was being charged, yet it would protect Jackson's identity from being definitively known. I reject the notion that the Agency must delete any information that might remotely enable other employees to speculate or guess as to the identity of the offending employee. The Privacy Act does not require judges or Federal personnel officials to be mind readers. Once these minimal deletions are made in G.C. Exhibit 3 (and similar documents), Jackson's identity would be protected; accordingly, there would be no unwarranted invasion of her privacy, the document could be disclosed under FOIA Exemption 6, and the Privacy Act would not prohibit the disclosure.

Additionally, Items 1, 2 and 9 are disclosable to the Union pursuant to the "routine use" exception to the Privacy Act. Both OPM/GOVT-1 and OPM/GOVT-3 expressly permit, as a routine use, disclosure "to officials of labor organizations . . . when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices and matters affecting working conditions." 65 *Fed. Reg.* at 24734 and 24740. Prior to 1995, OPM had issued interpretive guidelines for applying the Privacy Act to its government-wide systems of record, and both the Authority and the Federal courts gave broad deference to those guidelines. *See Department of the Air Force v. FLRA*, 104 F.3d 1396, 1402 (D.C. Cir. 1997) (*Air Force v. FLRA*); *FAA, Little Rock*, 51 FLRA at 223. Although the OPM guidelines were abolished effective December 31, 1994, they are nonetheless a useful reference in applying OPM's "routine use" statements for OPM/GOVT-1 and OPM/GOVT-3 to the facts of this case.

Quoting from the now-expired OPM guidelines, the Authority held in *FAA, Little Rock* that a union must satisfy two requirements in order to establish that disclosure is authorized as a routine use. It stated:

> (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. . . . [T]he 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."

51 FLRA at 226.

In our case, the Union explained it needed the information in Items 1, 2 and 9 to provide a basis for comparison between the treatment afforded Jackson with other employees in Region 9, with an eye toward supporting a disparate treatment argument in the arbitration of her grievance. I find that documents pertaining to disciplinary actions against other employees in the same division of GSA Region 9 bore a traceable, logical and significant connection to the purpose to be served. My reasons for this conclusion are similar to those cited in finding the Union had a particularized need for the information, *supra*. *See* also, *Department of Labor*, 51 FLRA at 474.

I also find that the Union's information needs could not be satisfied through a less intrusive means, and that the information was therefore "necessary." By asking for Items 1, 2 and 9 in sanitized form, the Union was making it clear that it did not seek name-identified material. While the Agency contends nevertheless that redaction would fail to sufficiently mask the identity of the individual whose records were sought, I have already explained why I do not accept that argument. Once the Agency has removed employee names and information such as the identity of specific contracts, customers, or lease agreements, that would directly, unmistakably and solely link the document to an individual employee, the affected employees could only be identified by sheer speculation. Thus, by providing the documents to the Union in sanitized form, there would be no less-intrusive means available to satisfy the Union's

legitimate need, and the information sought by the Union was accordingly "necessary" under the "routine use" exception. *See, Air Force v. FLRA*, 104 F.3d at 1402 (documents sought by a union to pursue a claim over a grievable subject were relevant and necessary under OPM's routine use guidelines).

For all these reasons, I conclude that disclosure of the information encompassed by Items 1, 2 and 9 of the Union's information request was not prohibited by the Privacy Act.

In summary, I find that under section 7114(b)(4) the Union had a right to the information requested in Items 1, 2 and 9. I find that Respondent's failure to provide that information violated section 7116(a)(1), (5) and (8) of the Statute. To the extent that the complaint alleges that Respondent violated the Statute by failing to provide the information encompassed by Items 5 and 7, I find that information did not exist and recommend that those portions of the complaint be dismissed.

Failure to inform Union that information did not exist

The Authority has held that when information requested by a union from an agency does not exist, the agency is obligated under section 7114(b)(4) to inform the union of that fact. *SSA, Dallas Region,* 51 FLRA at 1226-27. As discussed earlier, as a general matter, obligations under section 7117(b)(4) must be carried out in a timely manner. *FAA*, 55 FLRA at 260. The requirement of timely fulfillment of obligations extends to informing the union that requested information does not exist. *See, e.g., Department of Health and Human Services, Social Security Administration, New York Region, New York, New York*, 52 FLRA 1133, 1150 (1997). Failure to inform a union that requested information does not exist constitutes a violation of section 7116(a)(1), (5) and (8). *SSA, Dallas Region,* 51 FLRA at 1226-27.

In its initial response to the Union's May 2000 request, Respondent made no specific mention of Items 5 and 7. It was not until months later in Respondent's September 15, 2000, letter that any response specific to those two items was provided. The parties dispute whether the statements with respect to Items 5 and 7 that were contained in the September 15 letter should have put the Union on notice that information it was seeking in those items did not exist.[12] In its post-hearing brief, Respondent implies that any failure on its part to inform the Union that information did not exist was attributable to the lack of clarity on the part of the Union in making its request. It may be that Items 5 and 7 of the Union's request were not as clear as they could have been. What is significant, however, is that the Respondent failed to seek clarification of the Union's request or otherwise engage in a dialogue that might have clarified matters in a timely manner, despite the fact that the Union's May 4 request specifically invited the Agency to contact Williams if it had any questions. *See, HCFA*, 56 FLRA at 507 n.3. Even assuming that the Agency's September 15 letter was adequate to inform the Union that the information requested in Items 5 and 7 did not exist, the Respondent failed to do so in a timely manner. Consequently, I find that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to inform the Union in a timely manner that the requested information did not exist.

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[12] I find that on their face, the statements in the September letter concerning Item 5, although somewhat cryptic, are suggestive that documents in addition to those already provided the Union existed. With respect to Item 7, although again cryptic, the statement is less suggestive that additional documents exist but does not rule that possibility out.

To the extent that the complaint, as amended, alleges that Respondent failed to inform the Union that documents encompassed by Item 2 pertaining to employee B did not exist, I recommend that it be dismissed. As discussed earlier, I find that the Respondent has tacitly acknowledged that such documents did exist.

THE REMEDY

Neither the General Counsel nor the Union seeks to have the requested information provided to the Union as part of the remedy in this case. In the absence of a request that the information be provided, I recommend that the Authority order the Respondent to cease and desist and post a Notice to Employees. The Notice to Employees shall be signed by the Regional Director of the General Services Administration, Region 9.

I therefore recommend that the Authority issue the following remedial order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the General Services Administration, Region 9, San Francisco, California (Agency) shall:

1. Cease and desist from:

(a) Failing or refusing to furnish, upon the request of American Federation of Government Employees,
AFL-CIO, or its agent, American Federation of Government Employees, Local 2275 (jointly referred to as the Union), data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; which does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining; and which is not prohibited from disclosure by law.

(b) Failing or refusing to inform the Union that information requested in connection with its representation of unit employees does not exist.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at all Agency facilities a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Director of the General Services Administration, Region 9, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 30, 2004.

_____
RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the General Services Administration, Region 9, San Francisco, California, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish, upon the request of American Federation of Government Employees, AFL-CIO, or its agent, American Federation of Government Employees, Local 2275 (jointly referred to as the Union), data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; which does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining; and which is not prohibited from disclosure by law.

WE WILL NOT fail or refuse to inform the Union that information requested in connection with its representation of unit employees does not exist.

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

_____
_General Services
Administration
Region 9
San Francisco, California

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. SF-CA-00804, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: September 30, 2004
Washington, DC