

GUIDANCE ON INFORMATION REQUESTS¹

OGC GUIDANCE MEMORANDUM 12-01

FROM: Julia Akins Clark, General Counsel

SUBJECT: Information Requests Under Section 7114(b)(4)

DATE: October 31, 2011

The purpose of this Guidance is to assist Unions and Agencies in understanding and applying Authority case law concerning Union information requests under the Statute, specifically the “particularized need” standard.

When must an Agency provide information requested by a Union?

Under Section [7114\(b\)\(4\)](#) an Agency must provide information to a Union, upon request and “to the extent not prohibited by law,” if that information is:

- normally maintained by the agency in the regular course of business;
- reasonably available;
- necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and
- does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

¹ This Guidance primarily addresses the issue of “particularized need” in information requests, with a brief treatment of Privacy Act issues. Other issues, including the issues of whether requested information is “normally maintained,” “reasonably available,” or whether it constitutes “guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining,” are addressed in the ULP Caselaw Outline on the [OGC page of the FLRA website](#) and also may be the subject of future Guidance Memos.

In 1995, the Authority adopted the “particularized need” standard to determine whether requested information is “necessary” under the Statute (3rd bullet above). *IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.*;² *SSA*.³ This Guidance will assist parties in addressing issues that may arise in connection with the particularized need standard.

What is the “Particularized Need” Standard?

To show that requested information is “necessary,” a union must establish a particularized need for the information by stating, with specificity:

- Why it needs the information;
- How it will use the information; and
- How its use of the information relates to carrying out its representational responsibilities under the Statute.⁴

Another way to put this is that, to establish particularized need, a Union must:

- Tell the Agency what the Union wants.
- Tell the Agency why it wants that information.
- Tell the Agency what the Union intends to do with the information.

In establishing “necessity” a union must also establish:

The “particularized need” for the scope of the request. *U.S. Dep’t of Justice, INS, N. Region, Twin Cities, Minn.*,⁵ which includes establishing the need for

² 50 FLRA 661, 669 (1995).

³ 64 FLRA 293 (2009).

⁴ 50 FLRA at 669.

⁵ 51 FLRA 1467, 1472 (1996).

- The particular time period requested, and
- The particular geographic area requested

*U.S. Customs Serv., S. Cent. Reg., New Orleans Dist., New Orleans, La.*⁶ For example, if a union requests information spanning 10 years covering an agency's facilities nationwide, it must establish why it needs 10 years of information and why it needs that information nationwide.

How specific must the Union's Request be?

The Authority does not require the request to "be so specific as, for example, to require a union to reveal its strategies or compromise the identity of potential grievants who wish anonymity."⁷ Nor is a union required in its request to describe the exact nature of any alleged misapplication or violation of policy, procedure, law or regulation by the agency. *See Health Care Fin. Admin.*⁸ In assessing the degree of specificity required, the Authority takes "into account the fact that, in many cases, a union may not be aware of the contents of a requested document."⁹ Also, whether requested information would accomplish a union's stated purpose is not determinative of whether it is necessary within the meaning of the Statute.¹⁰ In short, the Authority expects a union to explain its interests in disclosure of the information, and to do so with some support, not just by a bare assertion. A union's request must be sufficient to permit an agency to make a "reasoned judgment as to whether information must be disclosed under the Statute."¹¹

If an agency is unclear about the Union's stated reason for needing the requested information, the Agency should ask the Union to clarify the request. If the

⁶ 53 FLRA 789 (1997) (requested information for 4-year period is not necessary under the Statute).

⁷ 50 FLRA at 670, n.13.

⁸ 56 FLRA 156, 162 (2000).

⁹ 50 FLRA at 670, n.13.

¹⁰ *Id.* at 673.

¹¹ *Id.* at 670.

Agency's request for clarification is reasonable, and the Union does not respond, the Union risks failing to meet its burden of establishing a particularized need for the information. *Health Care Fin. Admin.*¹²

What Subjects are "Within the Scope of Collective Bargaining?"

To be "necessary," information must relate to subjects within the scope of bargaining. The Authority gives a broad reading to subjects that are "within the scope of collective bargaining." The duty to provide information to a union applies not only to information needed to negotiate an agreement, but also to data relevant to its administration and the "full range" of a union's representational responsibilities under the Statute. *Dep't of HHS, SSA.*¹³ The full range of union representational responsibilities under the Statute includes:

- Contract administration;
- Processing a grievance;
- Representing an employee in response to proposed discipline
- Determining whether to file a grievance or ULP

FAA, 55 FLRA 254, 259-60 (1999); *Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Weather Serv.*¹⁴

What if the Agency has an Interest in Not Disclosing Requested Information?

An agency is responsible for timely responding to a union's information request. If an agency has other concerns with respect to providing the information, it must state its interest in not disclosing the information at the time that it denies the request. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*;¹⁵ *Health Care Fin. Admin.*¹⁶ Like a union, an agency may not satisfy its burden by

¹² *56 FLRA 503*, 507, n. 3 (2000).

¹³ *36 FLRA 943*, 947 (1990) (quoting *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1345 v. FLRA*, 793 F.2d 1360, 1363 (D.C. Cir. 1986)).

¹⁴ *30 FLRA 127*, 141 (1987).

¹⁵ *57 FLRA 808*, 812 (2002).

¹⁶ *56 FLRA 156*, 159 (2000).

making a statement without any support; its burden extends beyond simply saying “no.”¹⁷ An agency must support any claimed countervailing anti-disclosure interests with evidence of those interests. *See U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*¹⁸

Examples of matters found to constitute countervailing anti-disclosure interests include privacy, confidentiality, and possible misuse of the information by the requesting union. *See U.S. Dep’t of Justice v. FLRA*;¹⁹ *U.S. Dep’t of the Air Force, Scott Air Force Base, Ill.*²⁰

How does the Authority Balance the Parties’ Competing Interests?

When the parties do not agree on whether, or to what extent, requested information must be provided and the matter results in adjudication, the union must establish its reasons for requesting and the agency must establish its reasons for denying the information. *U.S. Dep’t of Transp., FAA, Wash., D.C.*²¹ The Authority will find that an agency has unlawfully withheld information if the union has established a particularized need for the 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.²²

Why is it Important that the Parties Communicate Effectively?

To assess the parties’ rights and obligations with respect to information requests, the General Counsel is guided by the Authority’s emphasis on the importance of

¹⁷ 50 FLRA, at 670 (1995).

¹⁸ 60 FLRA 91, 93-94 (2004).

¹⁹ 988 F.2d 1267, 1271 (D.C. Cir. 1993).

²⁰ 51 FLRA 675, 684-89 (1995).

²¹ 65 FLRA 950, 955 (2011).

²² *Id.*

effective communication to minimize areas of dispute. For example, in *IRS, Kansas City*,²³ the Authority said:

We conclude that applying a standard which requires parties to articulate and exchange their respective interests in disclosing information serves several important purposes. It "facilitates and encourages the amicable settlements of disputes . . ." and, thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. § 7101(a)(1)(C). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.

Does an Agency Have Responsibilities Even if the Union Has Not Established Particularized Need?

An agency has certain statutory responsibilities even if a union has not established particularized need for the data sought. If management fails to perform any of these responsibilities, a violation of Section 7116(a)(1), (5) and (8) of the Statute may be found, even if a union has not shown a particularized need:

- An agency is required to respond to a data request. *U.S. Naval Supply Ctr.*²⁴
- An Agency is also required to inform a Union that the requested data does not exist. *Soc. Sec. Admin., Balt., Md.*²⁵
- An Agency is not permitted to destroy information that has been requested while the underlying matter is being litigated. *Soc. Sec. Admin., Dallas, Tex.*²⁶

Information Requests and The Privacy Act

²³ 50 FLRA at 670-71 (1995).

²⁴ 26 FLRA 324 (1987).

²⁵ 39 FLRA 659 (1991).

²⁶ 51 FLRA 1219 (1996).

The release of information under section 7114(b)(4) has to be consistent with “law,” which includes the Privacy Act. *U.S. Dep’t of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*²⁷

The Privacy Act regulates the disclosure of any information contained in an agency “record” within a “system of records,” that is retrieved by reference to an individual’s name or some other personal identifier.²⁸ With certain exceptions, the Privacy Act prohibits the disclosure of personal information about Federal employees without their consent. Therefore, if an employee has consented to the release of the requested information, the Privacy Act does not prevent that disclosure. *U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*²⁹ In addition, if the information is revised to remove the personal identifying information, then the Privacy Act would not prohibit disclosure. *HCFA II*.³⁰

One of the exceptions to the Privacy Act is the FOIA. If the information is subject to disclosure under FOIA, then the Privacy Act does not prohibit its release. *DOD v. FLRA*, 510 U.S. 487 (1994). As relevant to personal information about Federal employees, exemption 6 of FOIA protects from disclosure “personal and medical files and similar files” if their release would constitute a “clearly unwarranted invasion of personal privacy”.³¹ To determine if the release of information would result in a clearly unwarranted invasion of personal privacy, the Authority uses the following framework:

Initially, an agency must demonstrate:

- (1) that the information sought is contained in a system of records within the meaning of the Privacy Act;
- (2) that disclosure would affect employee privacy interests; and

²⁷ 50 FLRA 338 (1995).

²⁸ 5 U.S.C. § 552a(a)(4), (5).

²⁹ 60 FLRA 91, 94 (2004).

³⁰ 56 FLRA at 506.

³¹ 5 U.S.C. § 552(b)(6).

(3) the nature and significance of those privacy interests.³²

If the agency makes these showings, the burden shifts to the union to:

(1) identify a public interest recognized under the FOIA; and

(2) demonstrate how disclosure of the requested information will serve that public interest.³³

The definition of a public interest under the FOIA does not include collective bargaining under the Statute, but rather information that would shed light on the agency's performance of its statutory duties which informs citizens of what the government is up to. *New York TRACON*.³⁴

Once the parties have made their respective showings under the Privacy Act, the Authority will balance the privacy interests that may argue against disclosure against the public interest that favors disclosure. If the privacy interests outweigh the public interest, the Authority will find that disclosure is prohibited by the Privacy Act.³⁵ If the Authority finds that the public interest outweighs the privacy interests, then disclosure is not barred by the Privacy Act.³⁶

³² *Id.*

³³ 51 FLRA at 1151.

³⁴ 50 FLRA at 342-44.

³⁵ *Id.* at 346.

³⁶ *Id.*

Attached to this Guidance are two Model forms: a Model Form for Use When Requesting Information and a Model Form for Agency Use in Responding to an Information Request.

Application of Particularized Need Concepts

Sample Data Requests that Satisfied Particularized Need

Example 1

The Agency issued a “Recruitment Notice” for a GS-13 position in the bargaining unit represented by the Union. The Agency referred to this Notice as an “External Recruitment” because both employees and non-employees were eligible to apply for this position. A bargaining unit employee who had applied for this job and was not selected went to the Union because the employee believed that he should have been placed on the best qualified list.

The Union then requested certain information under Section 7114(b)(4) of the Statute, including the recruitment announcement, position description, the rating and ranking worksheet and scores of each applicant, the selection certificate, all applications, and the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate. The Union VP stated that the information was needed to determine whether to file a grievance and he needed the data “to determine whether the Agency misapplied and violated established merit promotion procedures in the rating and ranking of applicants.”

The Agency refused to provide the information on the basis that the Union had not “articulated a particularized need” and “demonstrated any connection to its representational responsibilities under the Statute.”

The Authority found that the Union did establish particularized need by telling the Agency it needed the information:

- (1) to determine whether the Agency had misapplied and/or violated established merit principles, policies, and procedures in the rating and ranking of applicants under the vacancy announcements and

(2) to determine whether or not to file a grievance.

A violation was found by the Authority.

Health Care Fin. Admin., 56 FLRA 503 (2000).

Example 2

Management and the Union were renegotiating their contract. The Union wanted to retain a provision that required bargaining over certain changes in when breaks took place. Management wanted to replace that provision with one that would allow it to set breaks based on “operational needs.”

The Union sought documents that listed the normal times when each employee in the bargaining unit took breaks by office location, and stated that such a list could exclude the actual names of the employees. The Union told the Agency it wanted the information to have a full understanding of the Agency’s proposal so that it could prepare counter proposals. The Union later told the Agency that it needed the information to determine if there was a legitimate operational need for the Agency’s proposal regarding breaks.

The Agency did not provide the information and told the Union in a letter that it believed that the Union had not established a particularized need for the data sought.

The Authority found that the Union established a particularized need for the data sought because it told the Agency the data was needed to determine whether there was a legitimate operational need for the proposed change in the contract.

Soc. Sec. Admin., 64 FLRA 293 (2009).

Sample Data Request that Did Not Satisfy Particularized Need

An agency suspended an employee for being AWOL. The Union then made a data request, seeking from the agency “copies of all disciplinary and adverse action files on all employees,” including the “charges, actions taken, and the pay grades of each individual.”

The Agency rejected the request because it claimed that “the Union failed to provide enough information to create a particularized need.”

With then-Member Pope dissenting, the Authority found that the Union failed to explain why it needed information for *all* employees and for *all* types of disciplinary and adverse actions. Nor did the Union identify the uses to which that information would be put. *U.S. Dep’t. of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808 (2002).