

Statutory Requirements

Section 7114(b)(4) of the Federal Service Labor Relations Statute provides for agencies to furnish labor organizations with data/information related to collective bargaining. This aspect of labor law continues to evolve, causing a certain amount of confusion to all parties. We would like to provide the current position regarding this ever-changing requirement. Since the case law in this area continues to evolve, the positions taken in the guide should be used only as a beginning point in researching questions involving the release of data/information to labor organizations. Contacts to your LOB LR contact point is critical when you receive a request for information.

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

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

1. be normally maintained in the regular course of business;
2. be reasonably available and necessary;
3. not be guidance, advice, counselor training for management relative to collective bargaining.

A union has a right to the information that is necessary and relevant to its representational responsibilities. The right extends not only to information necessary to process a pending grievance, but also to information necessary to determine whether or not to file a grievance at all. The union's right to information extends to documentation that is to be used to determine whether to file an unfair labor practice (ULP) charge.

Information may be requested as the union prepares for arbitration of a grievance. The Authority has interpreted the word "furnished" in the Statute to require agencies to provide the union, "free of charge" requested data to which it is entitled. The union can also request information through the Freedom of Information Act like any other member of the public seeking information. If the union does seek information through FOIA, it can be charged for the cost of providing the information. The FAA cannot require unions to seek material that is pertinent to representational duty under 5 USC 7114 through an FOIA request.

The union occupies a unique position under 7114(b)(4) in requesting information to fulfill its representational duties and cannot be forced to use the FOIA for material necessary to these responsibilities.

Necessary and Relevant

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

Particularized Need Standard

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

The Authority has adopted the "particularized need" standard for determining the necessity of all requested information. Under the Authority's analytical approach, a union must show a particularized need for the information by specifically

stating why it needs the information, to what uses it will put the information, and the connection between those uses and the union's representational responsibilities. It is not enough for the union to say the information would be relevant or useful.

The union must establish that it needs the data to adequately represent its members. Among other things, the union must provide enough information for management to make a reasoned judgment on whether the information must be disclosed under the Statute.

Management cannot simply say no to the union's request. We must assert and establish "any countervailing anti-disclosure interests." The Authority will find an unfair labor practice if the union established a particularized need for the information and management either did not establish a countervailing interest or its interest did not outweigh the union's demonstrated need.

Management and the union are expected to consider alternative forms of disclosure that may satisfy both a union's information needs and management's countervailing anti-disclosure interests in information. The Authority itself, in determining whether or not disclosure is required, will consider alternative forms of disclosure.

Reasonably Available

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

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

If you believe that a request is unduly burdensome, you are encouraged to meet with your union representative so you may discuss alternative arrangements in order to meet the union's request. The agency failure to discuss alternative arrangements with the union could be the basis for determining an unfair labor practice has occurred. Keep a record of all discussions and meetings with the union.

Why is it so important to communicate with the union and attempt to resolve any unduly burdensome concern? Simply because the Authority's standard on what constitutes unduly burdensome is much different than that of most FAA managers and supervisors. Two decisions are helpful in examining the Authority's standard for unduly burdensome. In one case, it was estimated by an agency that it would take approximately three weeks of work to accumulate the information. The Authority determined that reasonable was defined as not extreme or excessive. The Authority ruled that complying with a request that would take three (3) weeks to accumulate the information might be "somewhat onerous" but was not extreme or excessive. The Authority determined that the information was reasonably available. In another case, the evidence presented stated it would take 150 employee hours to complete and copy the data requested. The estimated cost of \$1,500.00 or somewhat higher, if a significant amount of over-time pay were to be involved, was not an excessive burden according to the Authority and it determined the data was "reasonably available."

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

Normally Maintained by the Agency

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

The scope of "normally maintained by the agency" was reviewed by the Authority in a case on the release of "memory joggers." These memory joggers are personal notes kept by supervisors. In this case, the agency argued that these memory joggers should not be released because they were supervisor's personal and private notes which were not within the

control of an agency's record keeping system. However, the Authority concluded that these memory joggers were notes prepared by supervisor in the course of employment for the purpose of making a contemporaneous record regarding, an employee's conduct during an official awards ceremony. The Authority ruled that the memory joggers were normally maintained by the agency in the regular course of business and ordered these supervisory notes be released to the union. Remember there is a potential that your personal notes may be released to the union. Therefore, they should be written with an eye on potential future release.

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

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