

Info Requests in a Nutshell

by Dennis K. Reischl

The following presents a nutshell overview of the current state of the case law on information requests. It represents solely the personal conclusions and opinions of the author. 5/25/02

An agency is required to provide data (i.e., information) that is *normally maintained, reasonably available*, and *necessary* to perform the representational duties of a union, so long as it does not constitute guidance, advice, counsel or training for management personnel relating to labor relations. 5 U.S.C. 7114 (b)

The representational responsibilities for which a union is entitled to obtain information include not only bargaining, but also contract administration and grievance investigation. See *FAA*, 55 FLRA 254

In plain English, this requires an agency to determine, in response to a request for information, whether:

1. The information actually exists and is maintained in the normal course of business. Agencies are not required to create information in response to a request, though they may be required to compile information gathered from several locations.
2. What would be involved in gathering the information; i.e., how much time, effort, expense would be required to comply with the request. This may provide the basis for a successful contention that the information is not "reasonably available." Although that argument has not fared well in past disputes, there are indications in the dissent opinions of the current Chair that the standard may be open to revision.
3. Whether the requested info appears to meet the "particularized need" standard established by the FLRA; i.e., whether it is "necessary," as opposed to "helpful," "nice to have," or merely "relevant" to the accomplishment of a union's representational functions. That is, whether the information is "*required in order for the union adequately to represent its members.*" See *IRS*, 50 FLRA 661, and *Justice v. FLRA*, 991 F.2d 285.
4. Whether the information, regardless of its relevance and necessity, would impermissibly infringe on privacy rights.
5. A fifth criterion is sometimes applicable; specifically, whether the info requested constitutes purely intra-management guidance, advice or training material. If so, it may be exempted from disclosure unless it is essential to the investigation or prosecution of a grievance. See *NLRB v. FLRA*, 952 F.2d 523.

In recent years the FLRA, motivated by a few strong nudges from the D.C. Circuit, has interpreted the statutory requirements for information disclosure to require a higher standard of communication regarding such matters from both unions and management. Specifically:

Unions can no longer rely on a simple demand for info accompanied by a blanket assertion that it is relevant or necessary. It must now provide a statement of "particularized need," with

“sufficient specificity” for the agency to determine whether the info is, in fact, disclosable. That is, the statement must indicate the particular *uses* to which the information would be put, and the *connection* between those uses and the union’s statutory responsibilities. This applies to *all* union info requests under 5 U.S.C. 7114, not just those in which there is a claim that the information involves intra-management guidance, advice or deliberations. See *IRS*, 50 FLRA 661.

A failure to provide an explanation of the need for information in response to an agency request to do so provides a sufficient basis to exempt the agency from the obligation to provide it. *EEOC*, 51 FLRA 248

The stated purpose to which the information would be put must constitute a legitimate representational function. Consequently, information that would merely be useful in a general educational sense, or would go to a matter that is not open to negotiation (e.g., management’s determination to exercise a management right) would not be disclosable. See *Customs Service, New Orleans*, 53 FLRA 789, and *SSA*, 55 FLRA 1122. (Note, however, that merely contending that requested information is not disclosable because it relates only to a non-grievable matter does not automatically exempt the agency from providing the info—unless the underlying matter is clearly not grievable as a matter of *law*. See *SSA*, 39 FLRA 298, and *IRS*, 21 FLRA 646.)

On the other hand, agencies can’t simply say “we don’t see the relevance or necessity” and thereby get off the hook. They must either a) ask for additional information as to the necessity/purpose of the information, or b) respond with a denial of the info accompanied by a statement of the reason for the denial; e.g., it doesn’t exist, it’s not normally maintained in a system of records, it’s not reasonably available, it constitutes intra-management guidance, advice or training on labor relations matters, there is no apparent “particularized need” (i.e., clear purpose) for the info, or the release would violate the privacy rights of individuals. (See *IRS*, 50 FLRA 661, and *INS, Northern Region*, 51 FLRA 1467). Note that offering the requested information in an alternative form (e.g., “sanitized”) is sometimes deemed a sufficient response to avoid culpability for claimed refusal to provide information. (*IRS*, 50 FLRA 661)

The FLRA first examines whether an information request meets the threshold requirement of stating a particularized need, and whether the need meets the standard of being “necessary” to a legitimate representational function. If so, and if the agency has raised a “countervailing interest” militating against disclosure (e.g., privacy infringement, intra-management deliberation, etc.), the FLRA will then use a balancing test, weighing the union’s particularized need against the stated countervailing interests.

Privacy interests will sometimes, but not always, provide a sufficient countervailing interest to exempt an agency from providing requested information. See, for example, *Border Patrol, Del Rio*, 51 FLRA 768.

Info that is purely intra-management guidance, advice or training is presumptively non-disclosable absent a showing that it is necessary to the investigation or processing of a grievance. See *NLRB v. FLRA*, 952 F.2d 523

Info that would be truly burdensome to accumulate may, in the future, be ruled out as not reasonably available, inasmuch as Chair Cabaniss has signaled a substantial interest in forcing the FLRA to apply a tougher standard in such cases. (See *Federal Bureau of Prisons*, 55 FLRA 1250) To date, however, that argument has not prevailed before the Authority. See *SSA*, 36

FLRA 943. The agency bears the burden of establishing that information is not reasonably available. *Bureau of Prisons*, 55 FLRA 1250

Illustrative Cases

Merely stating that information is necessary to prepare for an anticipated arbitration or other third-party proceeding doesn't meet the "particularized need" standard. *Dept. of Labor*, 51 FLRA 462

A failure to explain why it needed disciplinary records for a 5-year period—rather than a shorter period—undercut the union's request for information; i.e., the extent or time period covered by an information request is also subject to a particularized need explanation. See *Dept. of Labor*, 51 FLRA 462, and *Customs*, 53 FLRA 789.

A union's explanation that it needed several categories of information so that it could "properly respond to the allegations" in a notice of proposed adverse action was insufficient (i.e., too vague) to meet the particularized need standard. *INS, Northern Region*, 51 FLRA 1467

A request for proposed and final disciplinary and adverse action letters that had been issued to employees in a particular geographic area over a 3-year period met the particularized need standard based on an explanation that a) the info was a factor in determining the penalty in the subject case, and b) the union need it to analyze the propriety/fairness of the proposed action at hand in assessing the grievant's case and preparing a defense. *IRS, Austin*, 51 FLRA 1166

Comparative disciplinary information is disclosable at the local, regional and national levels when discipline decisions are made with input from those levels. *Bureau of Prisons*, 55 FLRA 1250

The union was required to articulate a particularized need for crediting plans it sought in order to investigate a potential grievance, and the FLRA was required to consider the agency's interest in maintaining the confidentiality of its crediting plans as a legitimate countervailing interest to disclosure. *Allenwood Prison Camp v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993)

The union did not demonstrate a particularized need for crediting plans. *Allenwood Prison Camp*, 51 FLRA 650 (decision on remand).

Additional Information Source

For additional information, see the FLRA General Counsel's *Guidance on Investigating, Deciding and Resolving Information Disputes*, January 5, 1996, which is available on the FLRA's web site at http://www.flra.gov/gc/inf_guid.html