

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL DETENTION CENTER HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1030, COUNCIL OF PRISON LOCALS, AFL-CIO Charging Party	Case No. DA-CA-02-0242

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 her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 2, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: July 31, 2003

Washington, DC

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

MEMORANDUM

DATE: July 31, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
HOUSTON, TEXAS

Respondent

and

Case No. DA-CA-02-0242

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1030, COUNCIL OF
PRISON LOCALS, 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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-40
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL DETENTION CENTER HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1030, COUNCIL OF PRISON LOCALS, AFL-CIO Charging Party	Case No. DA-CA-02-0242

Steve Simon, Esquire
Andrea Geigers, Esquire
For the Respondent

Ayo A. Glanton, Esquire
For the General Counsel

Lonnie Roberts
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1030, Council of Prison Locals, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Dallas Regional Office. The complaint, as

clarified at the hearing,¹ alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston, Texas (Respondent), violated section 7116 (a) (1), (5) and (8) of the Statute by failing to comply with section 7114(b) (4) of the Statute, by failing to furnish to the Union a copy of the SIS Manual and the investigative files concerning bargaining unit employees Renee Oglesbee and Gloria Brown. Respondent filed an Answer admitting in part and denying in part the allegations set forth in the Complaint.

A hearing was held in Houston, Texas, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

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

Findings of Fact

At all times material herein, the Respondent is an agency under 5 U.S.C. § 7103(a) (3). At all times material herein, the Union is a labor organization under 5 U.S.C. § 7103(a) (4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent. (G.C. Ex. 1(c), 1(g)).

On or about September 5, 2001, a female correctional officer and bargaining unit employee, Renee Oglesbee, was assigned to escort a female inmate on a medical trip. (G.C. Ex. 3; Tr. 64-65) On that same day, another female correctional officer and bargaining unit employee, Gloria Brown, was working in the Federal Detention Center's control center. (Tr. 65) Employees working in the control center administer access in and out of the secured side of the Federal Detention Center ensuring that only authorized people have access through secure doors. (Tr. 65) When Officer Oglesbee appeared at the control center with the inmate, Officer Brown opened the secure doors allowing them to walk through to the unsecured side of the facility.

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At the beginning of the hearing, Counsel for the General Counsel clarified that Paragraph 11(b) of the Complaint was no longer an issue in this matter. Further, with regard to Paragraph 11(a) of the Complaint, the General Counsel was only seeking the SIS Manual and no other memoranda, program statements or manuals. (Tr. 6, 9, 10)

(Tr. 65) After this occurred, an investigation was launched concerning the allegation that both correctional officers failed to follow policy based on the inmate being allowed to exit to the unsecured side of the facility. (Tr. 66) Subsequently, Respondent's Warden issued Officer Oglesbee a letter of reprimand, while Officer Brown received a one-day suspension. (G.C. Ex. 3, 4; Tr. 20-21) After receiving proposed disciplinary letters, both employees approached the Union for representation. (Tr. 18-20, 40)

Diego Leal is a special investigative agent at the Respondent's facility and is responsible for staff misconduct investigations and inmate misconduct investigations. He conducted the investigations on the incident involving Officers Oglesbee and Brown and created the investigative file which is secured in his office. The investigative file includes the actual referral to the Office of Internal Affairs (OIA), the investigative report that he compiled based on the affidavits that he took in the investigation, and any other evidence or information collected during the investigation. (Tr. 64, 66) When completed, the investigative file is turned over to the Warden so that he can propose discipline. (Tr. 68, 75) According to the Warden, the disciplinary file is created from the investigatory file by the Human Resources management staff. (Tr. 75) The disciplinary files in this matter included the Bureau of Prisons regulations on the standards of conduct and the individual officer's affidavits in the matter. (Tr. 57)

As a result of the disciplinary actions administered to the two bargaining unit employees, the Union made a written request for information dated December 21, 2001. (G.C. Ex. 5; Tr. 16-17) The Union stated that it needed the information within ten calendar days in order to evaluate and process the materials to determine if a grievance or other action was warranted. (G.C. Ex. 5; Tr. 22)

Specifically, the Union requested a copy of the SIS Manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled, and the complete investigative files on Officers Oglesbee and Brown. (G.C. Ex. 5; Tr. 23).2

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The Union also requested a listing of prior disciplinary actions and disciplinary procedures information. These items were provided to the Union and are not at issue in this matter.

The Union stated that it needed the SIS Manual and documents concerning investigation procedures in order to determine whether the investigation was conducted properly and in accordance with BOP policies and procedures. (G.C. Ex. 5; Tr. 24-25) The Union further stated that it needed to determine what evidence is required to be gathered, and whether all evidence was gathered in order to determine whether or not a grievance should be filed as to the manner in which the investigation was conducted. (G.C. Ex. 5) The Union stated that it needed the information to determine whether Officers Oglesbee and Brown were treated differently than other employees and to determine if there was exculpatory evidence that was overlooked. (G.C. Ex. 5)

As to the investigative file, the Union stated that it needed the information to determine if there was exculpatory evidence in the file that was not made available to either Officer Oglesbee, Officer Brown, or the Union. (G.C. Ex. 5) The Union stated that it had reason to believe that the Warden has access to the complete investigative file, as well as the disciplinary files on which his decision was based. (G.C. Ex. 5) The Union stated that it needed the information to determine if there was exculpatory information in the investigative file and to determine if all of the evidence was gathered. In addition the Union stated that it needed to be apprized of all of the information available to the Warden in determining his final decision to issue the reprimand and suspension actions. Finally, the Union stated that the requested information would allow it to determine if a grievance under the contract or other action was warranted. (G.C. Ex. 5; Tr. 26)

Respondent denied the Union's request for the SIS Manual and investigative files in a response dated January 11, 2002. (G.C. Ex. 6; Tr. 27-29) Concerning the SIS Manual, Respondent stated that the request was denied because the SIS Manual is a restricted document critical to institution security. (G.C. Ex. 6; Tr. 27-28, 57, 72) In addition, Respondent claimed a "law enforcement privilege" as it relates to the SIS Manual. (G.C. Ex. 6) As for the complete investigative files of Officers Oglesbee and Brown, Respondent denied the request, stating that the investigative files are not part of the disciplinary record or disciplinary process. (G.C. Ex. 6; Tr. 28) Respondent further stated that due to the sensitivity of the information in the investigative files that they are under the custody of the Office of Internal Affairs and the Union should seek access through the Freedom of Information Act office in Central Office (Washington D.C.). (G.C. Ex. 6; Tr. 28-29) Respondent also advised that the complete

disciplinary file was available to the employee or their representative at any stage of the disciplinary process, but did not include a copy of the disciplinary files for the Union. (G.C. Ex. 6)

The Union has not received the SIS Manual or the investigative files for Officers Oglesbee and Brown. These documents were furnished to me for *in camera* review. With regard to the SIS Manual, my review shows that Chapter 9 of the SIS Manual deals with staff investigations. With regard to the investigative file, my review shows that there is one investigative file for the September 5, 2001 incident, and two disciplinary files, one for Oglesbee and one for Brown. Not all evidence gathered in the investigative file is contained in the disciplinary files, although the affidavit of each individual employee is included in their individual disciplinary file.

Positions of the Parties

General Counsel

Counsel for the General Counsel asserts that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Union with Chapter 9 of the SIS Manual and with the investigative file for Officers Oglesbee and Brown. Counsel for the General Counsel asserts that the Union's data request of December 21, 2001 meets all of the requirements of Section 7114(b)(4) of the Statute: that the data is normally maintained by the agency in the regular course of business, is reasonably available and 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. Counsel for the General Counsel cites to *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, 57 FLRA 808 (2002) (DOJ Forrest City)*, appeal filed with the D.C. Circuit and withdrawn on February 24, 2003, (Authority found on facts nearly identical to the instant case that the Union was entitled to the SIS Manual and complete investigative file on a bargaining unit employee, items which the Union requested to represent the employee on a suspension action.)

Counsel for the General Counsel further asserts that the Union set forth a "particularized need" for the data requested, pursuant to the guidelines set forth in *Internal Revenue Service, Washington, D.C. and Internal Revenue*

Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995) (IRS Kansas City). With regard to the request for the SIS Manual, Counsel for the General Counsel further asserts that the Respondent has failed to show that the disclosure of the SIS Manual is prevented by law - specifically the Law Enforcement Privilege as set forth in 5 U.S.C. § 301.

Respondent

Respondent asserts that it did not violate the Statute by refusing to furnish the requested data to the Union and asserts that the Union's request for data did not meet the standards as set forth in section 7114(b)(4).

With regard to the investigative file for Officers Oglesbee and Brown, Respondent asserts that disclosure of the file is barred by the Privacy Act, citing *U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Dallas, Texas, 51 FLRA 945, 953 (1996) (VA Dallas)*, and that the Union did not submit any Privacy Act waivers from the employees, *U.S. Department of the Air Force, 56th Support Group, MacDill Air Force Base, Florida, 51 FLRA 1144, 1150, 1152 (1996) (MacDill AFB)*.

Respondent also argues that employee misconduct investigative files are internal "guidance, advice, counsel" under section 7114(b)(4)(B). *National Labor Relations Board v. Federal Labor Relations Authority, 952 F. 2d 523, 532 (D.C. Cir. 1992) (NLRB v. FLRA)* and *National Park Service, National Capital Region, United States Park Police, 48 FLRA 1151, 1161 (National Park Service)*. Under such circumstances Respondent has a presumptive counter disclosure interest against the release of such documents. *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 51 FLRA 545, 549 (1995) (INS Dallas)*.

Respondent further argues that the Union failed to establish a "particularized need" for the information. Respondent notes that no grievance was filed with regard to either disciplinary action and argues that without a grievable complaint, there is no particularized need to compel disclosure. *U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 51 FLRA 1467, 1480, 1481 (1996) (INS Twin Cities)*.

With regard to the SIS Manual, Respondent asserts that it established and properly invoked its Law Enforcement Privilege which precludes disclosure of the SIS Manual and constitutes a controlling countervailing non-disclosure

interest, specifically citing to 5 U.S.C. § 301 and 28 C.F.R. Part 16.3 Respondent argues that the Authority's decision in *DOJ Forrest City, supra*, did not properly address the issue of the Law Enforcement Privilege and should not be followed in this matter.

Analysis and Conclusions

Section 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

A. SIS Manual

1. Whether the Information was Normally Maintained by Respondent in the Regular Course of Business

The Authority has found that requested information is "normally maintained" by an agency, within the meaning of section 7114(b)(4) of the Statute, if the agency possesses and maintains the information. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 1277 (1990) (*SSA Baltimore*).

The SIS Manual is normally kept in the office of the Special Investigative Agent with the Captain and the Warden having access to it. (Tr. 52-53, 62, 67)

Accordingly, it is found that the SIS Manual requested by the Union on December 21, 2001 was normally maintained by the Respondent in the regular course of business. *DOJ Forrest City*, 57 FLRA 808.

2. Whether the Information was Reasonably Available.

Availability under section 7114(b)(4) has been defined as that which is accessible or attainable. *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943 (1990) (*HHS, SSA*); *U.S. Department of Justice*,

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The relevant text of each of these provisions is set forth in the Appendix to this decision.

Washington, DC and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 46 FLRA 1526 (1993) (INS Northern Region).

Respondent's witnesses established that the SIS Manual is accessible and attainable at the Houston facility in the Special Investigative Agent's office. (Tr. 52-53, 62, 67) Accordingly, it is found that the SIS Manual was reasonably available. *DOJ Forrest City, 57 FLRA 808.*

3. Whether the Information Constituted Guidance, Advice, Counsel or Training Provided for Management Officials or Supervisors, Relating to Collective Bargaining

Section 7114(b)(4)(C) exempts from disclosure to the exclusive representative information which constitutes guidance, advice, counsel, or training for management officials relating specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or unfair labor practice charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive representative. *National Labor Relations Board, 38 FLRA 506 (1990) aff'd sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992).*

Respondent's witnesses testified that the SIS Manual is a guideline for investigative staff to follow whenever they conduct investigations of staff and inmates. (Tr. 42, 49, 50). Respondent asserts in its brief that the Authority recognized that agency guidance constitutes intra management guidance, advice and counsel concerning matters within the scope of collective bargaining under 5 U.S.C. 7114(b)(4)(B) and cited *INS Dallas, 51 FLRA at 549 (citing NLRB v. FLRA, 952 F. 2d at 532, and National Park Service, 48 FLRA at 1160).*

The SIS Manual, while guidance to investigative staff, is not related to collective bargaining. In *INS Dallas*, the Union sought from the Agency memoranda relating to the agency's policy governing disciplinary and adverse actions. Both parties agreed that such documents constituted "intra management guidance" within the meaning of section 7114(b)(4) as set forth in *National Park Service (INS Dallas, Fn 2)*. In *DOJ Forrest City* the Agency did not dispute and the Administrative Law Judge and the Authority held that the same information, i.e. the SIS Manual, did not constitute guidance, advice and counsel under section 7114(b)(4) of the

Statute. In the instant matter, the Respondent has not adequately argued its latest theory and makes no reference to the Authority's previous ruling. Further Respondent did not deny the Union's request for the information on the basis of section 7114(b)(4)(B), but rather asserted that the SIS Manual was a "restricted document critical to institution security". Respondent also asserted a law enforcement privilege which will be discussed below.

Accordingly, it is found that the SIS manual does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.⁴

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Even assuming the SIS Manual should be found to be guidance, advice or counsel under section 7114(b)(4)(B) of the Statute, as set forth below, the Union has met its particularized need burden in this matter. Further, while under such circumstances the Respondent would have a presumptive anti-disclosure interest in such document, I find that the Respondent's interest does not outweigh the Union's demonstration of particularized need. *INS Dallas*, 51 at 548.

4. Whether the Union Articulated a "Particularized Need" for the Information in its December Data Request

The Authority set forth guidelines in *Internal Revenue Service, Washington, DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) (*IRS Kansas City*) for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute. The Authority held that a union requesting information under that section must establish a particularized need for the information by articulating, with specificity, why it needs the information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The requirement that a union establish such need can not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, it must be established that the information is required for the union to adequately represent unit employees. An agency denying a request for information under the Statute has a comparable responsibility as it must assert and establish any counter-vailing anti-disclosure interests. Its responsibility can not be satisfied through broad or general claims.

Similar to *DOJ Forrest City*, the Union in this matter clearly informed the Respondent that it needed the requested information for several reasons. The Union explained that it needed the SIS Manual in order to determine whether the investigation was conducted properly and in accordance with Bureau of Prison policies and procedures. The Union further stated that it needed the information to find out what evidence was required to be gathered and to determine whether all evidence was gathered in this case. The Union stated that this information was necessary in order to determine whether or not a grievance should be filed as to the manner in which the investigation was conducted (G.C. Ex. 5, Tr. 24) In short, the Union's explanation established a connection between the particular information that it was requesting, the uses to which that information would be put, and the representational purposes for which it was requested. *DOJ Forrest City*, 57 FLRA at 812.

Respondent asserts that the Law Enforcement Privilege and the security interests it represents precludes release of the SIS Manual. Respondent asserts that the Law Enforcement Privilege was not properly considered by the Authority in *DOJ Forrest City* and that the Authority misunderstood Respondent's argument on exceptions. Respondent asserts the Law Enforcement Privilege protects the confidentiality of the methods by which both

administrative and criminal law enforcement investigations are conducted.

Respondent's argument that the Law Enforcement Privilege precludes release of the SIS Manual remains unpersuasive. As stated by the Authority in *DOJ Forrest City*, "5 U.S.C. § 301 [the Housekeeping Act] merely authorizes heads of agencies to prescribe regulations, among other things, governing the use of the agencies' records and papers. The provision also specifically states that it does not 'authorize withholding information from the public or limiting the availability of records to the public.' In short, 5 U.S.C. § 301 does not prohibit the disclosure of information." *DOJ Forrest City*, 57 at 815. Further Department of Justice regulations, 28 C.F.R. Part 16 (Part 16) contains Respondent's regulations governing the processing of requests for information under the Freedom of Information Act (FOIA). As this case does not involve a request under FOIA, Part 16 is not applicable to the request. The Authority in *DOJ Forrest City* discussed 28 C.F.R. § 16.26, finding that "subsection pertains to the considerations that should guide agency officials in deciding whether to disclose requested information and includes guidance concerning investigatory records compiled for law enforcement purposes. 28 C.F.R. § 16.26(b) (5). However, by its own terms, the provision applies to records compiled for law enforcement purposes, not for internal disciplinary proceedings." The Authority also noted that Part 16 does not prohibit the disclosure even of the records to which it applies. *DOJ Forrest City*, 57 at 815.

In its brief the Respondent argues that the Authority misread the provisions when it stated that it only applied to law enforcement investigatory records. A reading of 28 C.F.R. § 16.26(b) (5), which states "Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.", clearly supports the Authority's analysis of the section that it related to investigatory records compiled for law enforcement purposes. The Respondent's reading of the section is therefore rejected.

Consequently, the Respondent has failed to demonstrate that disclosure of Chapter 9 of the SIS Manual is prohibited by law. Therefore as the Union articulated a particularized need for the requested information, the Respondent's failure to furnish the information is violative of the Statute.

B. Investigative Files on Unit Employees Oglesbee and

Brown

In its December 21, 2001 request, the Union requested the complete investigative file on Oglesbee and Brown, noting in their request that this would include the disciplinary files for each employee. (G.C. Ex. 5) Respondent would separate the two types of files, investigative and disciplinary, while the General Counsel considers them interconnected. As stated above, my *in camera* review shows two separate files: the investigative file is maintained by the Special Investigative Agent and contains all evidence, including affidavits, generated during the investigation. The disciplinary files (one for each employee) are maintained by Human Resources and were created by Human Resources from the investigative file. It is clear that the two files, while maintained separately, pertain to the same September 2001 incident and are considered together in this matter.

1. Whether the Information was Normally Maintained by Respondent in the Regular Course of Business

With respect to the complete investigative file and the disciplinary files, Respondent's witnesses admitted that it possesses and maintains both files at the Federal Detention Center in Houston, Texas. The investigative files are normally kept in a secured locked cabinet in the office of the Special Investigative Agent. The disciplinary files are maintained by Human Resources. (Tr. 66, 68)

Accordingly, it is found that the investigative file and the disciplinary files requested by the Union on December 21, 2001 were normally maintained by the Respondent in the regular course of business. *SSA, Baltimore*, 37 FLRA 1277.

2. Whether the Information was Reasonably Available.

Respondent's witnesses established that the complete investigative file and the disciplinary files for Oglesbee and Brown are accessible and attainable at the Houston facility in the Special Investigative Agent's office. The Special Investigative Agent creates the investigative file as a result of the investigation that it conducts on the incident. (Tr. 57) As part of the disciplinary process, the investigative file is turned over to the Warden following the completion of the investigation. (Tr. 26, 29, 67-68, 74-75) Respondent's witnesses further established that Human Resources assembles the disciplinary file from the investigative file. (Tr. 66-68, 75)

Accordingly, the complete investigative file and the disciplinary files on Oglesbee and Brown were reasonably available. *HHS, SSA*, 36 FLRA 943; *INS, Northern Region*, 46 FLRA 1526.

3. Whether the Information Constituted Guidance, Advice, Counsel or Training Provided for Management Officials or Supervisors, Relating to Collective Bargaining

Respondent asserted in its brief that the Master Agreement recognizes that employment misconduct investigations are intra-management deliberative documents. (R. Ex. 1, page 63, Article 30 d.1.)⁵ Therefore it argues that employment misconduct investigative files, such as the one at issue in this case, are intra management documents which constitute internal guidance, advice, and counsel ". . . within the scope of collective bargaining" under 5 U.S.C. 7114(b)(4)(B). *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992); *National Park Service and Police Association of D.C.*, 48 FLRA 1156, 1161 (1993). In *National Park Service* the Authority adopted the court's decision in *NLRB v. FLRA* and concluded that an agency is not obligated to provide a union with requested documents containing advice, guidance, counsel, or training materials provided for management officials under section 7114(b)(4)(B) of the Statute unless the Union demonstrates a particularized need, as discussed by the court, for such information.

In *FCI, Forrest City*, the Authority found that a similar investigative file did not constitute guidance, advice or counsel.

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Article 30 - Disciplinary and Adverse Actions, Section d.1. states:

Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and

Accordingly, it is found that the investigative file of Oglesbee and Brown does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.⁶

4. Whether the Union Articulated a "Particularized Need" for the Information in its December Data Request

As stated above, the Authority set forth guidelines in *Internal Revenue Service*, 50 FLRA 661, for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute. The Authority held that a union requesting information under that section must establish a particularized need for the information by articulating, with specificity, why it needs the information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute.

In this case, the Union explained that it needed the information in order to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on both Oglesbee and Brown. The Union further stated that it needed the information to determine if there was exculpatory evidence in the file that was not made available to the two employees and the Union and to determine if all the evidence was gathered. The Union also stated that it needed to be apprized of all the information available to the Warden, who made the decision on the disciplinary proposal, to determine if the affected employees and the Union had the opportunity to present a complete defense before the decision was made, and whether there were factors considered in the decision that the employees and the Union were not aware of.

Respondent argues that the decision to discipline Oglesbee and Brown was based on the evidence in the disciplinary files as opposed to the investigative file. Arguing that the two employees were charged with conduct that was admitted in their own affidavits, which were contained in the disciplinary files, Respondent asserts that there was no issue relating to potential exculpatory evidence or the thoroughness of the investigation. Respondent did not deny, however, that the Warden, who imposed discipline, had access to both the investigative

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Even assuming the investigative file should be found to be guidance, advice, or counsel under section 7114(b)(4)(B) of the Statute, as set forth below, the Union has met its particularized need burden in this matter.

file and disciplinary files. In any event the Union did not request that the Respondent review the file and make a determination that there was not any exculpatory evidence and to determine if all the evidence was gathered, rather the Union clearly requested the opportunity to review and compare both the investigative file and the disciplinary files in order to make those determinations itself. Respondent cannot avoid the duty to furnish information by merely telling the Union that the investigation at issue was complete and the information was therefore not needed.

Respondent also argues that no grievance was filed over either disciplinary action and asserts that without a grievable complaint, there is no particularized need to compel disclosure. In this case, both Oglesbee and Brown sought the Union's assistance in connection with the disciplinary actions. The Union's request for information directly related to the two employee's conditions of employment and specifically noted that it needed the information in order to determine whether to file a grievance. Respondent's reply to the Union's request for information did not raise any concern that the two employees were not, in fact, represented by the Union. The fact that no grievance was filed for either employee is not relevant to the Union's showing of particularized need at the time of its request for information.

It is the Respondent's position that the Union had no valid Privacy Act waiver to support its request for a copy of the complete unsanitized SIS Investigation. An agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the information requested is contained in a "system of records," within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. *FAA*, 50 FLRA at 345. Respondent cites *DOL*, wherein the Authority found that the agency had established employees' privacy interests with respect to disciplinary information which can be embarrassing and stigmatizing to the employees. Here, the two employees sought representation from the Union regarding the imposed discipline. In this respect, the Authority has held that the Privacy Act does not preclude release of information concerning an employee when the information is sought by a union as the employee's representative. *Federal Employees Metal Trades Council and U.S. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California*, 38 FLRA 1410 (1991). In such circumstances, the union's access to the relevant records would not be a clearly unwarranted invasion of personal privacy. *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022 (1992).

Respondent did not submit any evidence as to any other employees' privacy interests that were of concern to them here.

In conclusion, the Union stated with specificity why it needed the requested information, including the uses to which it would put the information and the connection between those uses and its representational responsibilities under the Statute. Based on all of the foregoing, it is found and concluded that Respondent violated section 7116(a) (1), (5) and (8) of the Statute by failing to provide Chapter 9 of the SIS Manual and the complete investigative file on Oglesbee and Brown which the Union requested for representational purposes.

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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish Chapter 9 of the SIS Manual and the complete investigative file on Oglesbee and Brown as requested by the American Federation of Government Employees, Local 1030.

(b) In any like or related manner, interfering with, restraining, or coercing unit 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) Furnish to the American Federation of Government Employees, Local 1030, the exclusive representative of certain of its employees, Chapter 9 of the SIS manual and the complete investigative file on Oglesbee and Brown.

(b) Post at its facilities in Houston, Texas, where bargaining unit employees represented by the American Federation of Government Employees, Local 1030, are located, copies 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 Warden, and shall be posted and maintained for 60 consecutive days thereafter.

Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, July 31, 2003.

SUSAN E. JELEN
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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston, Texas, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish Chapter 9 of the SIS Manual and the complete investigative file on Oglesbee and Brown as requested by the American Federation of Government Employees, Local 1030, the exclusive representative of certain of our employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish Chapter 9 of the SIS manual and the complete investigative file on Oglesbee and Brown as requested by the American Federation of Government Employees, Local 1030, the exclusive representative of certain of our employees.

(Agency)

Dated: _____ By: _____
(Signature) Warden

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 its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465.

APPENDIX

1. 5 U.S.C. §§ 301 provides as follows:

§§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting availability of records to the public.

2. 28 C.F.R. Part 16 provides in relevant part as follows:

§§ 16.1 General provisions.

(a) This subpart contains the rules that the Department of Justice follows in processing requests for records under the Freedom of Information Act (FOIA), **5 U.S.C. 552**.

. . . .

§§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

. . . .

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose

investigative techniques and procedures the
effectiveness of which would thereby be impaired.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-02-0242, were sent to the following parties:

—
CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Ayo A. Glanton, Esquire
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

7000 1670 0000 1175 2249

Steve Simon, Esquire
Andrea Geigers, Esquire
Federal Bureau of Prisons
522 N. Central Ave., Suite 243
Phoenix, AZ 85004

7000 1670 0000 1175 2256

Lonnie Roberts, President
AFGE, Local 1030
P.O. Box 52129
Houston, TX 77052

7000 1670 0000 1175 2263

DATED: July 31, 2003
Washington, DC