

Office of Administrative Law Judges

Washington, D.C.

OFFICE OF THE UNITED STATES ATTORNEY

Case No. DA-CA-90591

SOUTHERN DISTRICT OF TEXAS

HOUSTON, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 3966

Charging Party

Charles M. de Chateaufvieux, Esquire Tiffany A. Foreman, Esquire For the General Counsel

Carol L. Catherman, Esquire For the Respondent

Jeanell Nero-Walker, President AFGE, Local 3966 For the Charging Party

Before: JESSE ETELSON Administrative Law Judge

DECISION

Statement of the Case

The Regional Director for the Dallas Regional Office of the Federal Labor Relations Authority (the Authority) issued an unfair labor practice complaint alleging that the Respondent violated sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by refusing to furnish the Charging Party (the Union), the exclusive representative of an appropriate bargaining unit of Respondent's employees, with certain information as required by section 7114(b)(4) of the Statute. The complaint alleges that the Union requested: (1) copies of all data used to rate Debt Collection Agent and Union President Jeanell Nero-Walker for the performance evaluation period of April 1, 1998 to March 31, 1999, including any historical data to which the current data was compared to reduce Nero-Walker's rating from "Substantially Exceeds Expectations" to "Meets Expectations; (2) sanitized copies of performance appraisal records for each Debt Collection Agent assigned to the Financial Litigation Unit; and (3) all data that was used to rate each Debt Collection in performance elements 1, 2, 5, and 6.

The complaint contains specific allegations to the effect that the requested information conformed to the criteria set forth in section 7114(b)(4), which criteria, if met, oblige an agency to furnish information to an

exclusive representative on request. The complaint's final allegations of fact are that, on June 10, 1999, Respondent denied the Union's request for information and that, since June 10, 1999, Respondent has refused to furnish the information.

Respondent's answer denies, in part, the allegation describing the information the Union requested, asserting that the request for historical data was limited to data for performance elements 2 and 5, and denies that the Union requested sanitized copies of performance appraisal records. The answer admits that the Union requested unsanitized copies but asserts that the Union's request stated that release of sanitized copies would be acceptable if the production of unsanitized copies was deemed a violation of the Privacy Act. The answer denies, "as stated," the allegations that Respondent denied the Union's request and that it refused to furnish the information. The answer asserts that Respondent informed the Union that "all third-party materials requested had to be reviewed under the Freedom of Information Act (FOIA)\Privacy Act before they could be released" and that the information was forwarded to the Department of Justice, Freedom of Information office, for review and determination of what information, if any, was releasable under FOIA and the Privacy Act.

The case came on for hearing on May 10, 2000, in Houston, Texas. At that time the parties entered into stipulations of fact which, together with the formal documents (G.C. Exh. 1(a)-(k)) and Jt. Exhs. 1-12), were to constitute the entire record in the case unless it was subsequently decided, after due consideration of the positions of the parties, that certain additional documents supplementing Joint Exhibit 9, were relevant to the disposition of the merits of the case. The stipulations of fact were transcribed as the substantive part of the transcript of the hearing. Counsel for the General Counsel and the Respondent filed post-hearing briefs.

The following findings of fact represent my restatement (paraphrasing and summarizing where appropriate) and organization of the stipulated facts, and the facts established by the exhibits, that are material to the disposition of the allegations of the complaint.

Findings of Fact

On June 3, 1999, the Union, by President Jeanell Nero-Walker, submitted to Respondent a "Request Filed Under 5 U.S.C. 7114(b)(4)" for information "for an investigation concerning the Performance Appraisal Record for the period from April 1, 1998 through March 31, 1999 of Debt Collection Agent Jeanell Nero-Walker." The items requested were:

1. Request(s) for Performance Element 1 - Case Openings

A copy of any and all data, of any kind and nature whatsoever, that was used to rate Jeanell Nero-Walker.

2. Request(s) for Performance Element 2 - Judgment Liens

A copy of any and all data, of any kind and nature whatsoever, that was used to rate Jeanell Nero-Walker.

A copy of any and all historical data, of any kind and nature whatsoever, to which the current data was compared to reduce the rating of Jeanell Nero-Walker from "Substantially Exceeds Expectations" to "Meets Expectations."

3. Request(s) for Performance Element 5 - Case Closings

A copy of any and all data, of any kind and nature whatsoever, that was used to rate Jeanell Nero-Walker.

4. Request(s) for Performance Element 6 - Prepares Legal Correspondence and Legal Documents

A copy of any and all data, of any kind and nature whatsoever, that was used to rate Jeanell Nero-Walker.

5. Request(s) for Performance Element 7 - Supports and Assists with Administrative Policies and Training of Staff

A copy of any and all data, of any kind and nature whatsoever, that was used to rate Jeanell Nero-Walker.

A copy of any and all historical data, of any kind and nature whatsoever, to which the current data was compared to reduce the rating of Jeanell Nero-Walker from "Substantially Exceeds Expectations" to "Meets Expectations."

6. Additional Request(s)

An unsanitized copy of the Performance Appraisal Record for April 1, 1998 through March 31, 1999 of each Debt Collection Agent assigned to the Financial Litigation Unit. The Union will accept a sanitized copy, if and only if the production of an unsanitized copy is determined to be a violation of the Privacy Act.

Any and all data, of any kind and nature whatsoever, that was used to rate each Debt Collection Agent assigned to the Financial Litigation Unit in Performance Element 1 (Case Openings), Performance Element

2 (Judgment Liens), Performance Element 5 (Case Closings), Performance Element 6 (Prepares Legal Correspondence and Legal Documents), and Performance Element 7 (Supports and Assists with Administrative Policies and Training of Staff).

An unsanitized copy of the Performance Appraisal Record for April 1, 1998 through March 31, 1999 of the secretary assigned to the Financial Litigation Unit with respect to any Critical Performance Element in her Performance Appraisal Record which is comparable to any Critical Performance Element in Jeanell Nero-Walker's Performance Appraisal Record. The Union will accept a sanitized copy, if and only if the production of an unsanitized copy is determined to be a violation of the Privacy Act.

Any and all data, of any kind and nature whatsoever, that was used to rate the secretary assigned to the Financial Litigation Unit with respect to any Critical Performance Element in her Performance Appraisal Record which is comparable to Critical Performance Elements 1, 2, 5, 6, and 7 in Jeanell Nero-Walker's Performance Appraisal Record.

Following the list of items requested, the June 3 request provided the following statement of "Particularized Need(s)," followed by the closing paragraphs set forth below:

Particularized Need(s):

This information will be used to determine if Jeanell Nero-Walker received improper ratings which prevented her from meeting the standards of productivity that would have made her eligible for awards under the regulations of the Department of Justice. In addition, the information will be reviewed to determine if the data reflects improper deviation or disparity in the application of the agency's regulations concerning the evaluation of performance.

It is requested that all the information sought be furnished to me within seven (7) days of your receipt of this correspondence.

If this request for information is denied, in whole or in part, please inform me in writing of the name, title, and position of each official who denied the request. Also, in writing, please describe each piece of information that was denied and cite the specific statute, regulation, or contract upon which the denial of each piece of information was based.

On June 10, 1999, Personnel Specialist William (Bill) Smith responded to Union President Nero-Walker by e-mail. His response stated that:

AFGE is requesting government documents which are covered under the Privacy Act (PA) and Freedom of Information Act (FOIA). As a result, the request was forwarded to the FOIA/PA contact for the district. Once the FOIA and PA concerns have been addressed, then a determination will be made on the particularized need and/or relevancy of the request.

Also on June 10, John Fonville, FOIA/PA contact for the district, forwarded the Union's information request to the FOIA/PA Unit of the Executive Office for United States Attorneys for further processing (Tr. 14).

The Union's request for information was referred to the FOIA/PA office because that office has the expertise to determine what documents are releasable under the Privacy Act and to ensure that Privacy Act concerns were not breached, and that release of the requested information would not constitute an unwarranted invasion of personal privacy (Tr. 13).

When Nero-Walker continued to inquire about the status of the Union's information request, Smith updated her and reiterated the information previously communicated about the forwarding of the request, as noted in Joint Exhibits 4 and 8 (Tr. 14).

Neither Nero-Walker or the Union ever submitted a FOIA request for the information the Union requested in its June 3, 1999, information request (Tr. 14).

On October 13, 1999, the Union received from the FOIA/PA Unit of the Executive Office for United States Attorneys, U.S. Department of Justice, the following letter addressed to Nero-Walker as the "Requester," along with a group of documents which, the agency states, is responsive to the Union's June 3, 1999, information request:

Dear Requestor:

Your request for records under the Freedom of Information Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official recordkeeper for all records located in this office and the various United States Attorney's Offices.

To provide you the greatest degree of access authorized by the Freedom of Information Act and/or Privacy Act, we have considered your request in light of the provisions of both laws. If applicable, excisions have been made to protect information exempt from disclosure and, the exemptions have been cited at the bottom of each page. The exemptions cited for withholding information from the requested records are marked below. An enclosure to this letter explains the exemptions in more detail.

This letter is a partial full denial.

Section 552

Section 55a

<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(5)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (j)(2)
<input checked="" type="checkbox"/> (b)(2)	<input checked="" type="checkbox"/> (b)(6)	<input type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
<input type="checkbox"/> (b)(3) —	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (b)(7)(F)	_____

A review of the material revealed documents which:

originated with another Government component. These document(s) were referred to the component(s) listed on the next page for review and direct response to you.

are public records which may be obtained from the Clerk of the Court or from this office, upon specific request, subject to copying fees.

See additional information below.

The processing of your request has resulted in a fee for copying and/or search of costs. Please submit \$83 , payable to the Treasury of the United States, in the form of a certified check or money order, within thirty days. Mail it to the Freedom of Information Act Unit, 600 E Street, N.W., Room 7100,

Washington, DC 20530.

This is the final action this office will take on this matter.

You may appeal my decision to withhold records in this matter by writing within 30 days, to:

Office of Information and Privacy
United States Department of Justice
Flag Building, Suite 570
Washington, DC 20530

Both the envelope and the letter of appeal must be clearly marked "Freedom of Information Act/Privacy Act Appeal."

After the appeal has been decided, you may have judicial review by filing a complaint in the United States District Court for the judicial district in which you reside or have your principal place of business; the judicial district in which the requested records are located; or in the District of Columbia.

Sincerely,

/s/

Suzanne Little

Assistant Director

FOIA/PA Unit

Enclosures

On an unidentified date after sending Nero-Walker the letter set forth above, FOIA/PA Unit Assistant Director sent Nero-Walker another letter in which she notified Nero-Walker that the \$83.00 processing fee had been waived.⁽¹⁾

The parties stipulated, finally, that "personnel records are contained in an official system of records under the Privacy Act" (Tr. 15-16)⁽²⁾

Discussion and Conclusions

A. Issues and Positions of the Parties

The ultimate issue, as framed by the pleadings, is whether the Respondent violated the Statute by refusing to furnish the requested data. If I understand the General Counsel's theory of the case, as gleaned from the opening statement at the hearing and from the brief, the refusal to furnish consisted of: (1) Respondent's treatment of the request as a FOIA request instead of a request under the Statute; and (2) Respondent's failure to provide the documents that it treated as FOIA documents for over four months after they were requested.

The General Counsel does not appear to be contending that the documents provided to the Union in October 1999 omitted data that was required to be furnished under section 7114(b)(4) of the Statute. With this understanding, neither party introduced, or sought to characterize the contents of, the documents that were provided. Rather, Joint Exhibit 9, the covering letter accompanying these documents, indicates only that the request for records was being denied in part, to the extent that information in those records was exempt from disclosure pursuant to 5 U.S.C. §§ 552(b)(2), (6) and (7).⁽³⁾ An attachment to the letter contains the text of each of these subsections of § 552(b), but the letter does not further explain how it was determined that these exemptions were applicable to the withheld information. I have, therefore, no basis on which to review such determination and to decide whether the contents of the data supplied comply with the requirements of section 7114(b)(4). The Respondent notes in its brief that the adequacy of its response to the Union's request is not before me. To the extent that the adequacy of the response relates to the contents of the information furnished, I find the Respondent's belief to be well founded.

The Respondent, for its part, does not dispute any of the elements that subject the requested data to disclosure under section 7114(b)(4), except for the issue of its having to determine whether furnishing of any of the data was prohibited by law, in this case the Privacy Act. Since the data request raised the question of such prohibition, Respondent argues, it was appropriate to refer the matter to the office that makes such determinations for the Respondent, and to inform the Union that it was making that referral. Therefore, it is argued, Respondent never "refused" to furnish the data.

B. Referral of the Request to the FOIA/PA Unit Did Not Constitute a Refusal to Comply With

Section 7114(b)(4) of the Statute

Whenever a record sought by a union under section 7114(b)(4) contains information that might be prohibited from disclosure by the Privacy Act because its disclosure might "constitute a clearly unwarranted invasion of personal privacy[.]" the determination as to whether disclosure is prohibited is made by balancing the privacy interests that would be jeopardized and the public interest that would be served by such disclosure. *U.S. Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury, New York*, 50 FLRA 338, 342 (1995). In balancing these factors, the criteria used for FOIA requests are applicable in "all cases involving the FOIA, including those that have their genesis in a request pursuant to section 7114(b)(4) of the Statute." *Id.* at 344. Stated otherwise, "every requestor [including unions] must be treated the same for purposes of determining whether disclosure of requested information is consistent with the FOIA." *U.S. Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 599, 608 (1995)(375th Squadron). See also *National Treasury Employees Union and U.S. Department of the Treasury, U.S. Customs Service, Washington, DC*, 55 FLRA 1174, 1181 (1999).

Here, the Union specifically raised a Privacy Act issue. Its request stated that the Union would accept sanitized copies of those records "if and only if the production of an unsanitized copy [of certain requested performance appraisal records] is determined to be a violation of the Privacy Act." By its explicit terms, therefore, the request did not permit the Respondent to respond simply by furnishing the appraisal records in sanitized form. It required a determination as to whether the Privacy Act prohibited furnishing them in unsanitized form.⁽⁴⁾ By referring the determination to the FOIA/PA Unit, Respondent, consistent with *375th Squadron*, treated the Union the same way it would have treated any other requestor.

C. Respondent's Furnishing of the Data Was Not Shown to Have Been Untimely

An agency's obligation under section 7114(b)(4) of the Statute to furnish information includes the duty to furnish it in a timely manner in order to effectuate the purposes and policies of the Statute. *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022, 1026 (1992). The timeliness of an agency's compliance depends on the circumstances. *Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania*, 11 FLRA 639, 642 (1983).

Here, the Respondent responded to the Union promptly, indicating that its data request was being forwarded for determination of the applicability of FOIA and the Privacy Act. For the reasons set forth above, this response was not, in itself, improper. Moreover, the Respondent did not ignore, but continued to respond to, the Union's further inquiries about the status of the request.

The General Counsel contends that the delay of over four months in providing the documents subject to FOIA/PA review constituted a failure to comply with the Statute's timeliness requirement, arguing that Respondent's treatment of the Union's request as a FOIA request delayed the production of the documents. However, I read the Authority's statement in *375th Squadron* that every requestor must be treated the same to mean that, at least absent special circumstances, an agency may properly handle a union's request for information that requires a FOIA determination in the same order of priority that it handles FOIA requests from others. While the delay of a little over four months might seem excessive to any requestor, including the Union, there is no evidence that the FOIA determination made here was pursued with any less diligence than was the practice with respect to FOIA requests from other requestors.⁽⁵⁾

In a different case, where predictable harm to a union's ability to perform its duties as exclusive representative would result from such a delay, it might be argued that its request was entitled to priority handling. At least, the relative urgency of a union's need may be a proper factor to consider in determining whether an agency's compliance was timely. *See, for example, Department of Defense Dependents Schools, Washington, DC and Department of Defense Dependents Schools, Germany Region*, 19 FLRA 790, 791 (1985), *remanded as to other matters sub nom. North Germany Area Council, Overseas Education Association v. FLRA*, 805 F.2d 1044 (D.C. Cir. 1986), *decision on remand*, 28 FLRA 202 (1987). Here, however, nothing in the Union's request or in its subsequent inquiries gave the Respondent reasonable cause to request that the FOIA/PA Unit give this matter any special or expedited consideration. In these circumstances, the General Counsel has not shown that the Respondent acted in a dilatory manner or that it was untimely in the performance of its obligation under section 7114(b)(4).

For all of the above reasons, I recommend that the Authority issue the following Order:

ORDER

The complaint in Case No. DA-CA-90591, is dismissed.

Issued, Washington, DC, July 31, 2000.

JESSE ETELSON

Administrative Law Judge

1. The General Counsel states in its brief that this waiver was offered on May 10, 2000, the date of the hearing. Although that date appears in the top margin of a faxed copy of the letter informing Nero-Walker of the waiver, I am unable to determine whether the faxed copy was the original notification of the waiver or a later retransmittal of the undated letter.
2. I have included this stipulation among my findings of fact although it addresses what is more analogous to a legal question than a factual question. In any case, it is a proposition to which the parties have agreed for the purposes of this case.
3. It appears that an "x" had been typed in the space provided to indicate that the partial denial was based also on 5 U.S.C. § 552a(j)(2), but this "x" was inked over with what I take to be the intention of deleting it.
4. Respondent argues that the Union's additional request for all data "of any kind and nature whatsoever," that was used in rating the debt collection agents whose performance appraisal records the Union requested also required Privacy Act analysis as to the necessity of redacting any protected information. This seems eminently reasonable.
5. While, pursuant to FOIA, at 5 U.S.C. § 552(a)(6)(A), an agency is normally required to determine within 20 business days whether to comply with a request, it is common knowledge that agencies often, and with impunity, exceed that time limit. Nor does the General Counsel argue that the 20-day period be adopted as the Authority's standard for timeliness.