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

MEMORANDUM DATE: September 27, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: FEDERAL DEPOSIT INSURANCE CORPORATION
KANSAS CITY, MISSOURI

Respondent

and Case No. DE-CA-04-0291

NATIONAL TREASURY EMPLOYEES UNION

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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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FEDERAL DEPOSIT INSURANCE CORPORATION KANSAS CITY, MISSOURI Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. DE-CA-04-0291

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 a ttached 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 **OCTOBER 31, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: September 27, 2005
Washington, DC

OALJ 05-50

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

FEDERAL DEPOSIT INSURANCE CORPORATION KANSAS CITY, MISSOURI Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. DE-CA-04-0291

Bruce E. Conant, Esquire
For the General Counsel

Saul Y. Schwartz, Esquire
For the Respondent

Diana L. Anderson, Esquire
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 or Authority), 5 C.F.R. Part 2423.

Based upon an unfair labor practice charge filed by the National Treasury Employees Union (NTEU or Charging Party), a complaint and notice of hearing was issued by the Acting Regional Director of the Denver Regional Office of the Authority. The complaint alleges that the Federal Deposit Insurance Corporation, Kansas City, Missouri (Respondent) violated section 7116(a)(1)(5) and (8) of the Statute when it failed and refused to furnish information requested under section 7114(b)(4) of the Statute and failed to inform the Charging Party that some of the requested information did

not exist. (G.C. Ex. 1(c)) The Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(d))

A hearing was held in Kansas City, Missouri on November 10, 2004, at which time all parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and 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

The Federal Deposit Insurance Corporation (Respondent or FDIC), Kansas City, Missouri is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(c) and 1(d)) The Kansas City Regional Office, Division of Supervision and Consumer Protection (DSC) is one of six DSC regions and is responsible for seven states: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. There are seventeen field offices, in ten territories, and one regional office. (Tr. 68-69)

The National Treasury Employees Union (NTEU or Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining. (G.C. Exs. 1(c) and 1(d)) There are approximately 435-450 bargaining unit employees in the Kansas City Region. (Tr. 68)

FDIC and NTEU negotiated a Compensation Agreement and a subsequent Memorandum of Understanding, which established the Corporate Success Awards (CSA) program. The purpose of the new CSA program was to recognize the top contributors within the FDIC. The CSA is based on individual contributions and on how an employee impacts productivity and results through doing his/her job in a manner beyond that normally expected from an employee in that position and grade or by making important contributions when performing assignments outside of his/her job description. (Jt. Ex. 2) According to the parties MOU dated March 13, 2003, "CSAs will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and FDIC Circular 2420.1." (Jt. Ex. 1) The parties agreed that a minimum of 33⅓% of bargaining unit employees would receive the awards, which provided a 3% pay adjustment in addition

to the 3.2% pay adjustment which went to all employees. In November 2003, the Commissioner determined that 33⅓% of bargaining unit employees would receive CSAs. (Tr. 34, 92-94)

Employees were nominated by their immediate supervisors using one or more of the following criteria: Business Results; Competency; Working Relationships; and Learning and Development. (Jt. Ex. 2) The procedures set forth in the MOU required that supervisors nominate employees using FDIC Form 2420/21 in January 2004[1], based on their individual contributions during 2003. These nominations were first reviewed by the regional supervisors, who determined which nominations would be forwarded for regional review. (Tr. 156) At the regional level, the remaining award nominations were reviewed by the five Assistant Regional Directors (ARD) for the Kansas City Region. These reviewers focused on the actual nominations, and then forwarded the nominations to the Deputy Regional Director. The ARD panel was later asked to meet again and review a handful of the nominations. (Tr. 163) They were also asked to rank the bottom ⅓ of the final nominations. (Tr. 164) There were about 150 total nominations. The ARD panel compared the four criteria to the nomination form and made comparisons across regional lines. (Tr. 168, 172) A total of 121 CSAs were distributed. The recipients of the CSAs were announced in March by the Respondent to all of its employees, via its internal newsletter. (Tr. 28, 121, 140)

On March 24, the Charging Party, by Chapter 274 President Robert Hoshaw, submitted grievances for eleven bargaining unit employees who did not receive a CSA. (Tr. 71) Nine of the grievances concerned employees in offices in the Minnesota territory; one was from the Omaha territory and one was from the regional office. (Tr. 60, 98-99) Attached to each grievance was an identical request for information relating to the individual grievant. The letters requested that the Respondent furnish eight categories of information and explained the need for each in order to process the associated grievances. By the hearing, only two types of requested information remained at issue in this matter: copies of CSA nomination forms for each CSA bargaining unit recipient in the Kansas City Region holding

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[1] All dates occur in 2004 unless otherwise stated.

the same positions as the grievants[2] (Item No. 1) and ranking documents generated at the nomination level, the first and second levels of review, and at the final approval stage (Items 2, 4, 5 and 6). The data requested by Item No. 3 (copies of all directives and/or guidelines provided to Kansas City Region supervisors or Regional managers concerning the CSA program, including the nomination process) was furnished to the Charging Party and was not a subject of this case. The data requested in Items 7 and 8 (copies of performance appraisals and of any disciplinary and/or non-CSA FDIC awards) was not included in the amended charge and was not a part of this complaint. (G.C. Exs. 1 (b) and 1(c); Tr. 44-47)

In each letter, the Charging Party asserted that the requested information was necessary in order for the union to determine and prove that the FDIC did not consistently apply the CSA criteria when each of the individual grievants was not given a CSA. Further, the information was necessary to determine and prove that each of the individual grievants was not treated fairly and equitably when he or she did not receive a CSA. The letters further explained ". . . the Union requires the documents requested in order to prove whether management gave appropriate direction to supervisors pursuant to the parties MOU and FDIC circular, whether supervisors articulated standards to bargaining unit employees which fairly and accurately reflected the CSA standards as relevant to their organizational units, whether any other awards granted to bargaining unit employees had any bearing or relationship to the grant of CSA awards, whether CSA recipients were ever counseled about either performance or conduct, and whether management consistently reviewed and determined who should receive the CSA awards."

The information requests specified that the information could be "sanitized" to remove names so long as they were coded to identify documents pertaining to the same individual. Jt. Ex. 8(a)-(k)(Jt. Ex. 8(i) contains a representative sample of the documents generated by the individual grievances, including the March 24 grievance and attached request for information, April 23 Step Two Grievance Response, May 3 appeal to Step Three, May 26 Step Three Grievance Response, June 7 appeal to Step Four, and

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[2] The requests, as drafted by NTEU's National Counsel, had a blank space for the position title of each grievant which the local Chapter President failed to complete prior to submission. Subsequent discussion confirmed that management representatives had understood the intent of the request and did not seek clarification. (Tr. 39-40, 111)

July 19 Invocation of Arbitration.) (Tr. 44-47, 66, 71, 74-76, 98-101)

On March 29, 2004, Margaret McCaleb, Human Resources Specialist, Labor/Employee Relations, sent identical responses to each of NTEU's requests for information, stating in part:

> After careful review, your request for this information is denied because you have failed to demonstrate a particularized need for the requested information.
>
> You have not demonstrated that the Grievant, or the Union on his behalf, would be unable to process the grievance without this information. You must provide more than a bare assertion that the information is or would be relevant or useful.
>
> Additionally, your request is overly broad and unduly burdensome within the meaning of 5 USC § 7114(b)(4).

(Jt. Ex. 9(a)-(k); Tr. 48, 73)

On March 31, Dianna L. Anderson, Assistant Counsel, NTEU, had a telephone conversation with David Swiss, Counsel, Corporate Affairs Section, Legal Division, and McCaleb, and clarified the Charging Party's need for the requested information. Anderson disagreed with the Respondent's position that region-wide CSA nomination forms were not necessary. Anderson asserted that even though supervisors initially nominated employees, the Division Director was responsible for ensuring the consistent application of the CSA criteria in a fair and equitable manner to all employees. Thus, in order to determine if the criteria were fairly and equitably applied by the decision makers, information beyond a single supervisor was necessary. In an effort to address the burdensome issue, Anderson suggested that NTEU would be willing to accept one out of every three CSA nomination forms, however, the FDIC did not accept this offer. (Jt. Ex. 5; Tr. 48-50, 105-106)

Swiss responded by letter to Anderson dated April 2, in which he points out that the parties' MOU sets out data to be provided by FDIC to NTEU for bargaining unit CSA recipients. He had been advised that this data had been provided as well as data in this same format for all bargaining unit employees and advised Anderson to contact NTEU headquarters for this information. Swiss stated that

the parties had already agreed to a method by which awards would be reviewed on a wide scope for comparison.[3] (Jt. Ex. 6; Tr. 50)

By letter dated April 7, to Swiss, Anderson clarified that her previous letter referenced a particular grievance, but was meant to include all of the information requests by Chapter 274. (Jt. Ex. 7; Tr. 50)

NTEU filed the original unfair labor practice (ULP) in this matter on April 5, and amended it on August 16. (G.C. Ex. 1(a) and (b); Tr. 52) Complaint and Notice of Hearing was issued on August 27. (G.C. Ex. 1(c))

In August, the Respondent, through Smith, sent Anderson a series of letters regarding the requests for information, in which he provided certain data to the Charging Party and set forth the Respondent's position with respect to portions of the data request. On August 20, Smith wrote:

> In response to the first category of information requested in these information requests, I am now providing to you a sanitized copy of each CSA nomination form for CSA award recipients in the same work groups as the Grievants. . . .
>
> In response to the third category of information requested in these information requests, I am now providing you with copies of the national guidance, including directives, provided to all employees, including supervisors and managers, related to the CSA program. . . .[4]

(Jt. Ex. 10)

On August 23, 2004, Smith wrote:

> I am now providing you . . . with 4 additional sanitized nomination forms for CSA recipients, on the basis that employees in the Grand Island field office work within the same territory as the Omaha Grievants. You have already received all of the sanitized nominations for CSA nomination forms for

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[3] The Respondent does not assert that the demographic information provided to NTEU on a national basis concerning CSA recipients precluded other information requests. (R. Brief, fn. 9, page 10)

[4] The complaint does not allege and the General Counsel does not assert any violation of the Statute with regard to the timeliness of the provided information.

CSA recipients in the Minneapolis Territory (which includes field offices in Minneapolis, Mankato and Rochester). None of the Grievants worked outside of these two territories.

. . . I am now providing you . . . with 8 electronic mail messages sent to all FDIC supervisors and managers as guidance related to the CSA program.

(Jt. Ex. 11)

On August 24, 2004, Smith wrote:

You have not demonstrated a particularized need for CSA nominations on a region-wide basis. After careful review, we have determined that NTEU has not demonstrated that the Grievants, or the Union on their behalf, would be unable to process the grievances without this information – at any step of the grievance procedure.

Rather, you have now been provided with the sanitized copies of CSA nomination forms for CSA award recipients in a manner equivalent to other FDIC regions (i.e., for the same work group or territory as the Grievant). Moreover, your region-wide request is overly broad and unduly burdensome within the meaning of 5 U.S.C. § 7114 (b)(4).

. . .

In response to the four and fifth categories of information requested, you were previously informed on March 29, 2004, that the Union's requests for this information was denied because the Union had failed to demonstrate a particularized need for the requested information, that the Union had not demonstrated the Grievants, or the Union on their behalf would be unable to process the grievances without this information and that the Union must provide more than a bare assertion that the information is or would be relevant or useful. As outlined in the November 7, 2003 Memorandum . . ., you will note that regional review panels evaluated the CSA nominations and assigned numerical rankings. We take the position that these regional rankings are a part of management's internal deliberative processes and are not releasable to NTEU under

> 5 U.S.C. §7114(b)(4)(C). Additionally, these rankings are protected by the deliberative process privilege (Exemption 5 of the Freedom of Information Act). To the extent that the second category of your information request seeks numerical rankings from first-line supervisors, as described in the November 7 memoranda, the same rationale would apply.

(Jt. Ex. 12)

> On August 25, 2004, Smith wrote:
>
> With regard to the sixth category of information requested, I am providing the only documentation generated by DSC in approving CSAs for Kansas City bargaining unit employees, relevant to your grievances. That documentation consists of a sanitized copy of each CSA nomination form for CSA recipients in the same work groups and territories as the Grievants, with the approving signature of the division director or designee. . . .

(Jt. Ex. 13)

The eleven grievances are still pending arbitration. In August, the Charging Party did receive certain data from the Respondent, which included the recommendations for awards from all the offices/territories where the grievances arose. (Tr. 60) The Charging Party did not receive data showing how supervisors ranked individual employees, or any higher level rankings. (Tr. 63) The Charging Party did not receive any comparative data regarding recommendations for awards at the regional level. (Tr. 65)

Issues

1. Whether the Charging Party articulated a particularized need for the information requested.
2. Whether the release of the information was prohibited by law.

3. Whether the Respondent illegally failed to disclose to the Charging Party that some of the information requested did not exist.

Positions of the Parties

General Counsel

The General Counsel asserts that the information requested by the Charging Party in connection with the eleven individual grievances concerning the CSAs met the Statutory requirements of section 7114(b)(4) and that the Respondent's failure to furnish this information was violative of the Statute. Further, the General Counsel asserts that the Charging Party articulated a particularized need for the region-wide nominations and for ranking information. *See, Federal Bureau of Prisons, Washington, D.C. and Federal Bureau of Prisons, South Central Region, Dallas, Texas and Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma*, 55 FLRA 1250 (2000) (Member Cabaniss dissenting) *(FBP Dallas)*.

In this case the Respondent had agreed to distribute the awards "in a fair and equitable manner" and had negotiated procedures to assure consistency at the Regional level. Similarly, the Respondent had implemented a procedure requiring that award nominations be reviewed at three levels of management. Although admitting that the nomination forms for CSA recipients in the grievants' work groups would have some value, the General Counsel argues that whatever unfairness may have occurred in the distribution of the awards happened during the higher-level reviews and in comparing employees with other nominees outside of their work groups. The General Counsel argues that the Respondent had an obligation to furnish the Charging Party with information concerning all comparators region-wide, not only those of the same locality. *See, U.S. Department of Justice, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Nigel, California and U.S. Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Tucson Sector, Tucson, Arizona*, 58 FLRA 656 (2003) (*INS Tucson*) (Authority rejected agency defense that only discipline issued in same organizational unit was necessary for grievance over removal action, finding region-wide disciplinary records necessary.)

With regard to the defense that the release of the information is prohibited by the Privacy Act under section 7114(b)(4)(C) of the Statute, and under Exemption 5 of the Freedom of Information Act (FOIA), the General Counsel argues that the information was requested in a sanitized and indexed form and the Privacy Act therefore does not prohibit its release. *See, Health Care Financing Administration and AFGE, Local 1923*, 56 FLRA 503, 506 (2000) *(HCFA)* (No unwarranted invasion of privacy where identifying information is redacted; accordingly, Privacy Act does not prohibit its release.) The General Counsel rejects the Respondent's argument that release of region-wide nomination forms would threaten the privacy interests of employees.

See, Department of Transportation, Federal Aviation Administration, New England Region, Windsor Locks, Connecticut, 51 FLRA 1054, 1063-1069 (1996) *(FAA Windsor Locks)* (release of sanitized performance award data not barred by Privacy Act.)

The General Counsel further asserts that the Respondent did not raise the defenses that these requested documents were part of management's deliberative process and not releaseable under section 7114(b)(4)(C) and/or FOIA Exemption 5 at the time the information was requested. These defenses were not raised until five months later and only after the Regional Director decided to issue the complaint. Accordingly, the Respondent should be precluded from raising them for the first time during litigation. "An agency is responsible for raising, at or near the time of the union's data requests, any countervailing anti-disclosure interests." *INS Tucson*, citing *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas*, 57 FLRA 808, 812 (2002) *(FCI Forrest City)* (Member Pope dissenting in part).

Even if these arguments are considered, however, they must be rejected because the information sought does not constitute guidance provided for managers relating to collective bargaining within the meaning of section 7114(b)(4)(C) of the Statute. *United States Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon*, 60 FLRA 413, 416 (2004). *(Portland District)*

Finally, FOIA Exemption 5 does not apply to this matter. *See, Department of the Treasury, Internal Revenue Service, Washington, D.C.*, 40 FLRA 1070, 1080-82 (1991). Since the documents at issue were not prepared in the formulation of policy on behalf of the agency, they are not prohibited from disclosure and should be released.

The General Counsel further asserts that the Respondent failed to disclose to the Charging Party that some of the information requested did not exist. At the hearing the Charging Party learned that the documents showing the numerical ranking of nominees were not actually generated during the first and second level management review of the CSA nominees. The evidence reflects that only the bottom third of the recipients were ranked and that this action was only taken after the final decision was made on which employees would receive an award. Failing to inform the Charging Party that much of the requested ranking data did not exist misled the Charging Party into believing that the CSA award review process at the Region complied with written guidance. The Charging Party had the right to know that

Respondent had not followed its own procedures and to know this important fact without having to pay the price of an arbitration to learn it. *See, FCI, Forrest City*. The Respondent is required to deal with the Charging Party in good faith concerning an information request including informing the Charging Party of what information it has requested does not exist and cannot be provided, regardless of the Charging Party's demonstrated need.

Counsel for the General Counsel requests that the Respondent be ordered to provide the Charging Party with copies of sanitized but indexed region-wide nomination forms and ranking documents.

Respondent

The Respondent asserts that the ranking documents developed in the process of evaluating nominees are personnel records covered by the Privacy Act and their disclosure to NTEU is prohibited by law under 5 U.S.C. 7114 (b)(4). The Authority has repeatedly held that where disclosure of information is prohibited by the Privacy Act (*i.e.*, disclosure would constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6) such disclosure is prohibited by law. *See, Social Security Administration, San Francisco Bay Area and AFGE, Local 3172*, 51 FLRA 58, 62-65 (1995).

The disclosure of the ranking documents would result in a clearly unwarranted invasion of the privacy interest of those employees named, as well as of those not named, because by omission it would be known that such employees were not even nominated for a CSA. The specific interest of NTEU to have the rankings of such employees does not outweigh the substantial privacy interest of the employees involved, as the Authority has so often ruled. The general public's knowledge of such rankings would not advise the public regarding the operations of the FDIC in fulfilling its statutory obligations and, therefore, the public's general interest does not outweigh the employees' substantial interest in privacy.

The documents involved in this request clearly fall within the meaning of a "record" under the Privacy Act and are within a "system of records" because the ranking sheets are identifiable by the individual names and are related to considerations for an award. In similar cases, the Authority has taken official notice that performance appraisals and other similar personnel documents are contained in a system of records. *U.S. Department of Transportation, Federal Aviation Administration, New York*

Tracon, Westbury, New York, 50 FLRA 338 (1995). Therefore, the production of the ranking sheets is prohibited by law.

Even if the ranking sheets were provided in a sanitized form with the names redacted, the privacy interest of the employees would not be sufficiently protected. The names of the supervisors would still be evident as well as the office location of the subject employees. Because the staff of a typical field office is relatively small and employees have a fairly intimate knowledge of the work assignments of colleagues, it would be very easy to identify a sanitized nomination form of a CSA award recipient to a specific employee and cross reference it to a coded ranking sheet. "Even where an employee's name is not identified on a requested document, if the identity of the employee is nonetheless apparent, then the employee's privacy interests are affected." *American Federation of Government Employees, Local 1858 and United States Department of the Army, Army Aviation and Missile Command Redstone Arsenal, Alabama*, 56 FLRA 1115, 1117-1118 (2001).

Even if disclosure of the ranking documents is not prohibited by law, the Respondent asserts that NTEU has not demonstrated a particularized need for the ranking documents. The information requests submitted by the Charging Party to the FDIC requested a broad scope of "all documents and/or nomination forms . . . used in forwarding and/or supporting nominations." NTEU never specifically requested ranking documents and, accordingly, never articulated - orally or in writing - any reasons why such documents were needed to process the CSA grievances at any step of the grievance procedure.

In this matter, the Charging Party has not provided any specific reasons why the ranking documents would be more than just interesting or have some relevance. "A union's mere assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data." *See, United States Equal Employment Opportunity Commission, Washington, D.C.*, 20 FLRA 357, 357-358 (1985). "A union is required to articulate some particularized need for the information sought." *United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. Federal Labor Relations Authority*, 988 F. 2d 1267, 1271 (D.C. Cir. 1993).

At hearing NTEU asserted that the uses for the ranking documents were to compare the contributions of the grievants to determine if they were treated fairly and equitably and/ or to determine if the reviewing officials fulfilled their responsibility to ensure consistent application of CSA

criteria. NTEU does not explain how the mere ranking (numbers and names) would be necessary to compare contributions of the grievant to others, to determine fair and equitable treatment or whether the reviewing officials fulfilled their responsibility. The testimony is clear that the reviewing officials seriously considered the nominations submitted by all of the territory field supervisors and the rankings by the field supervisors did not play any significant role. (Tr. 158, 160-166)

The Respondent asserts these same arguments apply to the Charging Party's failure to provide a particularized need with its request for region-wide CSA nomination forms. The FDIC provided NTEU a sanitized copy of each CSA nomination form for those CSA award recipients in the same work groups as each one of the grievants, which included those award recipients within the same territorial office structure as the grievant. The Respondent argues that this furnished information is more than adequate for NTEU to make a comparison of each CSA recipient within the same territorial office structure of each grievant. The Respondent argues that NTEU has adequate data to process each grievance and that it has failed to show how region-wide CSA nominations were needed for the processing of the grievances.

Finally, the Respondent denies that it failed to inform NTEU that any part of the requested information did not exist. A careful review of the transcript clearly shows that no evidence was presented by the General Counsel that any part of the information request submitted to the FDIC did not exist and that the FDIC failed to inform NTEU of any such non-existent material. Therefore, the General Counsel has not met the standard of proof under 5 C.F.R. 2423.32.

Analysis and Conclusion

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

1. The requested 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).

In its answer to the complaint, the Respondent denied that the data requested by the Charging Party was normally maintained. However, in August, the Respondent furnished certain portions of the requested data. Further, it did not set forth any arguments that the data was not normally maintained.

Accordingly, it is found that the data requested by the Charging Party on March 24 is normally maintained by the Respondent in the regular course of business.

2. The requested 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); *U.S. Department of Justice, Washington, DC and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 46 FLRA 1526 (1993).

In its answer to the complaint, the Respondent denied that the data requested by the Charging Party was reasonably available. However, in August, the Respondent furnished certain portions of the requested data. The record supports that the requested date is subject to the Agency's control. Further, although the Respondent told the Charging Party that it would be burdensome to furnish the requested information, it presented no evidence in support of this contention. The record indicates that the Respondent furnished CSA recommendations for approximately 20 employees and there are about 99 such recommendations still at issue. There is no specific evidence regarding how the furnishing of these remaining recommendations or the ranking information would be burdensome to the Respondent. And the Respondent presented no arguments on this issue in its brief. Therefore, it is found that the requested data was reasonably available.

3. The requested information did not constitute 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).

The Respondent does not present any evidence in support of its contention that the requested data related to collective bargaining.

Therefore, it is found that the requested data does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining. *Portland District,* 60 FLRA 413.

4. The Charging Party articulated a "particularized need" for the information in its March 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, 669-670 (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. *Id.* (footnote omitted). *See, also AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998) (*AFGE, Local 2343*); *United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA*, 988 F.2d 1267, 1270-71 (D.C. Cir. 1993). 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. The agency is responsible for establishing any countervailing anti-disclosure interests and, like the union, must do so in more than a conclusory way. *Id. See, also, HCFA*, 56 FLRA at 159. Such interests must be raised at or near the time of the union's request. *FCI, Forrest City*, 57 FLRA at 812.

In this matter the Charging Party clearly informed the Respondent that it needed the requested information for several reasons. The Charging Party asserted that it needed the nomination forms and ranking documents in order to process the eleven grievances regarding the CSA. The information sought was necessary to determine and to prove whether the FDIC was consistently applying the CSA criteria and whether the individual grievants were treated fairly and equitably. Further, it needed the region-wide comparative data in order to ensure that the CSA was processed in a "fair and equitable manner", as required by the parties' agreement. *See, HCFA,* 56 FLRA at 506-507. While the awards were, in fact, initiated at the local office level, they were reviewed by various levels of management at the regional level. Further, the Respondent's witnesses admit that comparisons were made of employee contributions across regional lines.

The Respondent's defense that only the recommendations from the same office/territory should be furnished ignores the actual manner in which the CSA recommendations were processed and the awards were ultimately determined. The Charging Party's request for the region-wide information is consistent with Authority decisions that have found that region-wide information on such things as disciplinary information should be furnished. *See, FBP Dallas,* 55 FLRA 1250, in which the Authority found that the union established a particularized need for data from both the region and the agency in order to evaluate and prepare for arbitration. *Cf. Department of Health and Human Services, Social Security Administration, New York Region, New York,* 52 FLRA 1133 (1997) (SSA), in which the Authority found that the stated reasons for the requested information, *i.e.*, for the purposes of "monitoring compliance" with the collective bargaining agreement and pursuing "possible grievances" and EEO complaints, were too general and conclusory to establish the necessity of the information requested.

Therefore, based on the record as a whole, I find that the Charging Party clearly articulated a particularized need for both the rating information and the region-wide recommendation forms.

5. Privacy Act Defense

The Respondent further asserts that furnishing the requested information is a violation of the Privacy Act. 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.

The evidence reflects that the Respondent did not raise its Privacy Act defense in its initial responses to the Charging Party's requests for information in March. Rather, it did not raise this defense until August, five months after the initial requests, immediately after the amended charge was filed and just prior to the issuing of the complaint in this matter.

In *INS Tucson*, 58 FLRA 656, the Authority found that the ALJ did not err in finding that the Respondent failed to timely raise anti-disclosure interests and thus could not rely on those interests. The Authority has held that an agency is responsible for raising, at or near the time of the union's data requests, any countervailing anti-disclosure interests. *See, FCI, Forrest City*, 57 FLRA 808 and *Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*) (agency must articulate non-disclosure interests in response to information request and not for the first time at the unfair labor practice hearing). In *INS Tucson*, the Authority rejected the agency's argument that its first opportunity to raise its anti-disclosure interests was in its answer to the complaint. The Authority found that the agency could have raised those interests at any time after receiving the data request. Instead, the agency waited more than three months before raising those interests in its response to the answer. In this matter, the Charging Party's data requests were made in March and the Respondent did not raise its anti-disclosure arguments (other than particularized need) until August, more than five months later. Under these circumstances, I find that the Respondent did not timely raise its anti-disclosure interests and therefore cannot rely on such defenses in this matter.

Even assuming that the Respondent timely raised its Privacy Act defense, I find that the Privacy Act does not prohibit the release of the requested information. In that regard, the Charging Party specifically requested that the information be furnished in a sanitized and indexed form. Therefore, the privacy concerns raised by the Respondent are

not legitimate. *See, HCFA*, 56 FLRA 503 and *FAA Windsor Locks*, 51 FLRA 1054.

6. FOIA Defense

In agreement with the General Counsel, the Respondent's defense that the requested information cannot be released pursuant to FOIA Exemption 5 must be rejected. As set forth above, the Respondent did not timely raise this defense and therefore cannot rely on it during litigation. Even assuming the defense was timely, the Respondent did not present evidence in support of such a defense, and the evidence failed to show that the requested information was exempt from disclosure under section 7114(b)(4)(C) of the Statute.

7. Failure to Inform the Charging Party that Requested Data Did Not Exist

The Authority has consistently held that, when information requested by a union from an agency does not exist, the agency is obligated under section 7114(b)(4) of the Statute to inform the union of that fact. *See, FCI,* 57 FLRA 808; *Social Security Administration, Dallas Region, Dallas, Texas*, 51 FLRA 1219, 1226 (1996); *United States Naval Supply Center, San Diego, California*, 26 FLRA 324, 326-27 (1987). Failure to inform a union of the nonexistence of requested information constitutes a violation of section 7116(a)(1), (5), and (8) of the Statute.

The General Counsel asserts that the Charging Party was not informed that all levels of the management review of the CSA nominations did not create a ranking document in accordance with the parties' agreement regarding the CSA program. (Jt. Ex. 1) The Respondent denies that any part of the requested information did not exist or that it failed to inform the Charging Party of the non-existence of any part of the information. The evidence reveals that the Respondent's first-line supervisors submitted their nominations with an e-mail that had them ranked. The ARDs ranked the bottom third of the final nominations. There is no evidence that the first and second levels of review created any ranking documents.

Under these circumstances, I find that the Respondent violated the Statute by failing to inform the Charging Party that certain items of the requested information relating to ranking documents did not exist.

In conclusion, the Charging Party 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. The Respondent has failed to establish a defense that would preclude disclosure. 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 the requested information and by failing to inform the Charging Party that certain items of the requested information relating to ranking documents did not exist. It is therefore recommended that the Authority adopt the following:

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 Federal Deposit Insurance Corporation, Kansas City, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Treasury Employees Union (NTEU), the employees' exclusive representative, with items 1, 2, 4, 5, and 6 of NTEU's data requests of March 24, 2004.

(b) Failing to notify NTEU that certain information requested under the Statute did not exist.

(c) 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) Upon request, furnish NTEU with information requested by NTEU on March 24, 2004, to include:

(1) A copy of Corporate Success Award (CSA) nomination forms (FDIC 2420/21) for each CSA bargaining unit recipient in the Kansas City Region who holds any of the following positions (corresponding to the named grievants): Risk Management Examiner, Examiner (Trust) or File Clerk.

(2) Copies of all documents and/or nomination forms prepared by supervisors, first-level reviewers,

second-level reviewers and/or the Regional Director reflecting the ranking or approval process for the CSA awards. Documents pertaining to particular individual employees may be sanitized to remove names and other identifiers so long as all documents pertaining to an individual are indexed by identifying each employee with a common number or letter.

(b) Post at its facilities in the Kansas City Region, where bargaining unit employees represented by the National Treasury Employees Union 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 Regional Director, 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, Denver 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, September 27, 2005.

_____

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 Federal Deposit Insurance Corporation, Kansas City, Missouri, 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 fail or refuse to furnish the National Treasury Employees Union (NTEU), the employees' exclusive representative, with items 1, 2, 4, 5, and 6 of NTEU's data requests of March 24, 2004.

WE WILL NOT fail to notify NTEU that certain information requested under the Statute does not exist.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, furnish NTEU with information requested by the NTEU on March 24, 2004, to include:

(1) A copy of Corporate Success Award (CSA) nomination forms (FDIC 2420/21) for each CSA bargaining unit recipient in the Kansas City Region who holds any of the following positions (corresponding to the named grievants): Risk Management Examiner, Examiner (Trust) or File Clerk.

(2) Copies of all documents and/or nomination forms prepared by supervisors, first-level reviewers, second-level reviewers and/or the Regional Director reflecting the ranking or approval process for the CSA awards. Documents pertaining to particular individual employees may be sanitized to remove names and other identifiers

so long as all documents pertaining to an individual are indexed by identifying each employee with a common number or letter.

_____

_

(Agency)

DATE: _____ BY:_____

(Signature) (Title)

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 any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-04-0291, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Bruce Conant, Esquire **7004 2510 0004 2351 0019**
Federal Labor Relations Authority
Denver Region
1244 Speer Blvd., Suite 100
Denver, CO 80204-3581

Saul Schwartz, Esquire **7004 2510 0004 2351 0026**
Federal Deposit Insurance Corporation
Legal Division
550 17th Street, NW, Room H-2106
Washington, DC 20429

Diana L. Anderson, Esquire **7004 2510 0004 2351 0033**
National Treasury Employees Union
475 17th Street, Suite 500
Denver, CO 80202

DATED: September 27, 2005
Washington, DC