74 FLRA No. 56

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARING OPERATIONS
BALTIMORE, MARYLAND
(Agency)

and

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL
AND TECHNICAL ENGINEERS
(Union)

0-AR-6012

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DECISION

March 26, 2026

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members
(Member Wagner concurring)

I. Statement of the Case

The Agency informed the Union that it was no longer allowing the Union to access Agency files containing personally identifiable information (PII) for representational purposes, on the ground that such access conflicted with Agency policy and the Privacy Act.[1] The Union grieved, arguing that access to these files is necessary, in certain circumstances, to effectively represent the employees in the bargaining unit. Arbitrator Laurence M. Evans issued an award finding that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally terminating the Union's access, and directed the Agency to return to the status quo ante. Alternatively, the Arbitrator found that, even if the status quo ante conflicted with the Privacy Act, the Agency nonetheless failed to satisfy its bargaining obligations under the Statute. Thus, in the event the status quo ante remedy was found to be unlawful, the Arbitrator directed impact-and-implementation bargaining as an alternative remedy.

On exceptions, the Agency argues that the Arbitrator erred in finding the Privacy Act permits Union officials to access protected information on the basis of their statutory representational duties. Because the Agency fails to demonstrate the award is contrary to the Privacy Act in this regard, we deny this exception. The Agency also challenges the status quo ante remedy, arguing that it requires unlawful disclosures. Because the scope of Union access to protected information under the status quo ante remedy is inconsistent with the Privacy Act, we grant this exception and set aside this remedy. The Agency also challenges the Arbitrator's alternative remedy on nonfact and exceeded-authority grounds. For the reasons that follow, we dismiss the nonfact exception, deny the exceeded-authority exception, and uphold the portion of the award directing the parties to engage in impact-and-implementation bargaining.

II. Background and Arbitrator's Award

The Union represents administrative law judges (ALJs) who resolve claims concerning Social Security benefits. To adjudicate these claims, ALJs must access claimant files containing PII and cite relevant claimant PII in their decisions. Union representatives – who are themselves ALJs – previously accessed claimant records to prepare for certain representational meetings and grievances.

Following one such meeting, the Agency informed the Union that its practice of accessing claimant records for representational purposes violated the Agency's privacy policy, and that continued Union access of records could result in discipline. The Union responded that the parties had a twenty-year-long past practice whereby the Union exercised unsupervised access to claimant records whenever necessary; that such access was necessary for effective representation of ALJs; and that the Agency could not unilaterally terminate the past practice. Claiming that continued access would be unlawful, the Agency declined the Union's request to reinstitute access to claimant files. The Union grieved, and the matter proceeded to arbitration.

The parties did not agree on the issues, and the Arbitrator framed the issues, as relevant here, as: whether the Privacy Act or the Statute "governs the outcome of the Union's . . . national grievance," and, "if the Privacy Act prevails, . . . did the Agency nonetheless violate 5 U.S.C. [§] 7116(a)(1) [and] (5) by unilaterally terminating[,] without notice to the Union[,] the parties' past practice permitting Union representatives access to claimants' disability case files . . . in certain appropriate circumstances under the Statute?"[2]

The Privacy Act prohibits disclosure of any covered records to any person or agency unless disclosure

[1] 5 U.S.C. § 552a.

[2] Award at 8-9 (internal quotation marks omitted).

is permitted by one of its enumerated exceptions.[3] As relevant here, the Privacy Act permits disclosure "to those officers and employees of the agency which maintains the record who have a need for the record *in the performance of their duties*."[4] At arbitration, the Agency contended that this exception (need-to-know exception) applies "only when the employee is performing official Agency duties, which . . . do[es] not include union representational duties."[5] The Agency disagreed with the Union's assertion that a past practice existed and, alternatively, argued that any such practice was unlawful and unenforceable. Thus, the Agency claimed that it had the right to terminate the Union's access because it was unlawful to permit the Union the "unfettered ability to access highly sensitive and Federally protected claims files . . . [for] representational work."[6]

The Arbitrator disagreed, finding that the parties had a lawful past practice that permitted the Union unrestricted access to claimant files whenever it was necessary for representational purposes. In reaching this conclusion, the Arbitrator found that the Privacy Act's need-to-know exception did not define the term "duties," but that the Statute and the parties' collective-bargaining agreement permit representatives on official time to engage in the types of representational activities for which the Union had traditionally accessed claimant files.[7] Based on this statutory and contractual authority, the Arbitrator found that the work Union representatives perform on official time could constitute official duties for purposes of the need-to-know exception.[8] Further, the Arbitrator reasoned that § 7114(b)(4) of the Statute provides unions the right to access information necessary to adequately represent bargaining-unit employees.[9] As relevant here, § 7114(b)(4) requires agencies – "to the extent not prohibited by law" – to furnish unions with information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[10]

Due to the sensitive nature of the ALJs' work, the Arbitrator found that the bargaining-unit employees would be "significantly harmed and prejudiced by the failure of its Union representatives to access" relevant sensitive information.[11] The Arbitrator credited the Union's assertion that, in certain circumstances, Union officials would be entirely precluded from providing adequate representation if they were unable to review relevant claimant records. As an example, he observed that when an employee is accused of misconduct during a hearing concerning Social Security benefits, the Union representative "could not even be present when the [bargaining-unit] ALJ defends himself [or] herself by citing and referring to PII that could be exculpatory from the claimant's file."[12] He also noted the "apparent hypocrisy" in the contrast between the Agency's concession that it "frequently uses a disability claimant's sensitive PII when . . . dealing with the Union" and its position that the need-to-know exception does not permit disclosure of any PII to Union officials.[13]

Based on the ubiquity of PII in the ALJs' work product, the Arbitrator found that the Privacy Act's need-to-know exception included Union access to claimant files when necessary for representational purposes. Thus, the Arbitrator found the Agency violated the Statute when it unilaterally terminated the past practice of permitting the Union to access claimant files. As a remedy, the Arbitrator directed the Agency to return to the status quo ante regarding Union access.

However, acknowledging the complicated interplay of the Privacy Act and the Statute in this case, the Arbitrator made an alternative finding. Noting that an appellate authority might find the parties' past practice unlawful under the Privacy Act, the Arbitrator found that the Agency nonetheless committed an unfair labor practice "by failing to give notice to the Union of the change and[,] thus[,] den[ying] the Union an opportunity to bargain with the Agency over the impact and implementation . . . of the Agency's unilateral decision to terminate the past practice."[14] In the event a "higher authority set aside" the status quo ante remedy, the Arbitrator directed, as an alternative remedy, that the Agency bargain over the impact and implementation of its decision to terminate the Union's access to claimant files.[15]

The Agency filed exceptions on February 21, 2025, and the Union filed an opposition on March 24, 2025.

[3] 5 U.S.C. § 552a(b).
[4] *Id.* § 552a(b)(1) (emphasis added).
[5] Award at 17-18 (summarizing Agency arguments).
[6] *Id.* at 18.
[7] *Id.* at 24-25; *see also* 5 U.S.C. § 7131(a)-(d) (providing that union officials will be granted official time "during the time the employee otherwise would be in a duty status" to represent the union "in any amount the agency and the [union] involved agree to be reasonable, necessary, and in the public interest").
[8] Award at 25-26.
[9] *Id.* at 24-27 (citing 5 U.S.C. § 7114(b)(4)).
[10] 5 U.S.C. § 7114(b)(4)(B).
[11] Award at 23.
[12] *Id.*
[13] *Id.* at 21 & n.19.
[14] *Id.* at 22.
[15] *Id.* at 30.

III. Preliminary Matters

A. Because the Agency cured the procedural deficiency in the service of its exceptions, we deny the Union's request to dismiss the Agency's exceptions.

The Union argues that the Authority should dismiss the Agency's exceptions because "the Agency failed to serve its exceptions on the Union via an authorized means."[16] The Authority's Regulations permit service by email "only when the receiving party has agreed to be served by email."[17] The Union claims that although it did not consent to email service in this case, the Agency served its exceptions on the Union by email.[18]

The Authority issued an order directing the Agency to properly serve the Union and to file with the Authority a statement of service demonstrating that it cured this procedural deficiency.[19] Thereafter, the Agency timely filed a statement of service with the Authority indicating that it served the exceptions on the Union by mail.[20] When a deficiency in service of otherwise timely filed exceptions has been cured after the expiration of the original filing period for exceptions, the Authority views such service to be procedurally sufficient unless the opposing party establishes that it was prejudiced by such service.[21] The Union timely filed its opposition, and there is no evidence that it was prejudiced by the Agency's procedural deficiency. Thus, there is no basis for dismissing the Agency's exceptions.[22]

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's arguments.

The Agency argues that the Arbitrator's alternative finding and remedy are premised on a nonfact.[23] According to the Agency, it did not deprive the Union of an opportunity to bargain over the change to its access policy, because "[t]he Union did not demand to bargain" over the impact and implementation of the change.[24] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[25] In its grievance and post-hearing brief, the Union argued that the Agency failed to provide notice of a change to the past practice and an opportunity to bargain over the change.[26] Thus, the Agency could have argued at arbitration that the Union never demanded bargaining. It did not do so. Accordingly, we do not consider this argument.[27]

C. The Union's cross-exception is untimely.

In its opposition, the Union raises a "cross-exception," arguing that the Arbitrator erred as a matter of law when he denied part of the Union's requested relief.[28] However, the Authority only considers exceptions that are contained within an opposition if the cross-excepting party files them within the time limit for filing exceptions[29] – thirty days from the date of service of the award.[30] The Arbitrator served his award on January 22, 2025, and the Union filed the opposition brief containing its cross-exception on March 24, 2025.[31] Because this is more than thirty days after the award, this cross-exception is untimely, and we do not consider it.[32]

IV. Analysis and Conclusions

A. The Agency does not demonstrate that representational duties cannot constitute "duties" for the purposes of the Privacy Act's need-to-know exception.

The Agency argues that the award conflicts with the Privacy Act because none of the Privacy Act's exceptions permitting disclosure of protected records

[16] Opp'n Br. at 1.
[17] 5 C.F.R. § 2429.27(b)(6).
[18] Opp'n Br. at 1 ("[T]he Agency's certificate of service fails to contain a representation that the Union consented to service via email.").
[19] Show-Cause Order at 3.
[20] Agency's Resp. to Show-Cause Order at 1-3.
[21] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 492, 493 (2009).
[22] *See id.* (not dismissing for untimely service where opposing party was not prejudiced); *NAGE, Loc. R1-109*, 61 FLRA 593, 595 (2006) (declining to dismiss where opposing party "was not harmed by the delay in service").
[23] Exceptions Br. at 27.
[24] *Id.* at 28.
[25] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. Dep't of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 47-48 (2022) (citations omitted).
[26] Exceptions, Ex. 4, Grievance at 7 ("As to past practices, the Agency cannot change those without first providing notice and an opportunity to bargain (which has not occurred)."); Opp'n, Ex. 8, Union Closing Br. at 55 (alleging the Agency repudiated the parties' agreement by failing to provide "notice and [an] opportunity to bargain changes in past practice").
[27] *See NLRB Union*, 74 FLRA 230, 232-33 (2025) (dismissing nonfact exception where excepting party did not raise a factual argument in support of its position at arbitration, but could have done so).
[28] Opp'n Br. at 36.
[29] *U.S. Dep't of the Treasury, IRS, Agency-Wide Shared Servs., Florence, Ky.*, 63 FLRA 574, 577 n.5 (2009) (*Treasury*) (citing *U.S. Dep't of Transp., FAA*, 55 FLRA 797, 797 n.1 (1999)).
[30] 5 C.F.R. § 2425.2(b).
[31] Award at 31; Opp'n Br. at 41.
[32] *See Treasury*, 63 FLRA at 577 n.5 (dismissing untimely cross-exception in opposition brief).

apply to the Union's representational activities.[33] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[34] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[35] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[36]

The Privacy Act prohibits disclosure of protected information unless a specific statutory exception applies.[37] One of those exceptions – the need-to-know exception – permits disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties."[38] As relevant here, § 7114(b)(4) of the Statute requires agencies to provide information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[39] To demonstrate necessity under § 7114(b)(4), the union must establish a "particularized need" by articulating, with specificity, the purpose of the requested information, and how use of the information relates to the union's representational responsibilities under the Statute.[40]

The Agency contends that the Arbitrator erred in finding that the Privacy Act's need-to-know exception permits disclosure of PII to Union officials because, according to the Agency, "a union's representational activities . . . do not constitute employee 'duties' under the Privacy Act."[41] Reasoning that the Privacy Act neither defines "duties" nor expressly excludes Union activities,[42] the Arbitrator interpreted the need-to-know exception to include Union officials' representational "duties" under the Statute.[43] Thus, he concluded that Union representatives engaged in representational activities authorized by the Statute could "access, use[,] and refer to a claimant's PII, if necessary . . . [to] perform[] their representational . . . duties."[44]

As the Arbitrator found, the record reflects that the Union representatives at issue must often access certain PII to perform their representational responsibilities under the Statute due to the ALJs' extensive reliance on PII to process Social Security claims and the Agency's use of PII in communications with the Union.[45] For example, when the Agency investigates an ALJ for alleged misconduct during a hearing, the Agency often provides the Union representatives with the names and Social Security numbers of affected claimants in advance of a disciplinary meeting.[46] During such a meeting, the Agency's questions and the ALJs' defenses often require reference to relevant

[33] Exceptions Br. at 10-12.
[34] *AFGE, Loc. 3972*, 74 FLRA 252, 254 (2025) (citing *AFGE, Loc. 506*, 74 FLRA 201, 202 (2025)).
[35] *Id.*
[36] *Id.*
[37] 5 U.S.C. § 552a.
[38] *Id.* § 552a(b)(1).
[39] *Id.* § 7114(b)(4)(B); *see also U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 672 (2012) (*BOP*) (upholding judge's finding that union demonstrated requested information about disciplinary investigation was "necessary" within the meaning of § 7114(b)(4) by articulating how the information would enable the union to assess the agency's treatment of the employee under investigation and the appropriateness of any penalties); *FAA, New England Region, Burlington, Mass.*, 35 FLRA 645, 651-52 (1990) (*FAA*) (finding the Statute requires agencies to provide information necessary to effectively represent employees at investigatory examinations "when a union's request satisfies the requirements of [§] 7114(b)(4)").
[40] *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 430 (2019) (*Dep't of VA*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015)); *see, e.g., IRS, Aus. Dist. Off., Aus., Tex.*, 51 FLRA 1166, 1178 (1996) (Chair Segal concurring) ("The [u]nion has explained why it needs the information" about the penalties levied against similarly situated employees: "to ascertain whether there was disparate treatment of an employee"; "to determine the appropriateness of the proposed penalty"; and "to represent an employee against whom an adverse action was proposed."). As appropriate under the circumstances of a § 7114(b)(4) information request, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interest, or inform the union that the information requested does not exist or is not maintained by the agency. *Dep't of VA*, 71 FLRA at 430 n.31 (citing *FAA*, 55 FLRA 254, 260 (1999)). The agency must explain its anti-disclosure interest in more than a conclusory way and must raise these interests at or near the time of the request. *Id.* (citing *SSA*, 64 FLRA 293, 295-96 (2009)).
[41] Exceptions Br. at 13.
[42] Award at 24-25.
[43] *Id.* at 25-26 (citing 5 U.S.C. § 7114(b)(2)).
[44] *Id.* at 28.
[45] *Id.* at 23.
[46] *See* Opp'n, Ex. 16, *Weingarten* Notices at 3, 5, 7, 8 (identifying the subject of disciplinary meeting by listing claimants' names and Social Security numbers and reminding bargaining-unit employees of their right to have a Union representative present to discuss claimants' cases).

details in the claimants' case file.[47] Before the events precipitating this dispute, Union representatives often reviewed relevant details from claimants' case files or hearing transcripts to assist the employees in developing and articulating their defenses.[48] The Arbitrator found that excluding representational duties from the need-to-know exception would mean that "the Union representative could not even be present when the [bargaining-unit] ALJ defends himself [or] herself by citing and referring to PII that could be exculpatory from the claimant's file."[49] Based on the subject matter of the ALJs' work and the Agency's use of PII in disciplinary investigations, the Arbitrator rejected the Agency's interpretation of the Privacy Act, finding that "ALJ[s] would . . . be denied effective representation . . . in clear violation of the Statute."[50]

At arbitration, the Agency did not dispute the Union's claim that the Agency "frequently uses a disability claimant's sensitive PII when . . . dealing with the Union,"[51] such as providing the Union with meeting agendas that include claimants' names and Social Security numbers.[52] The Agency asserted that the need-to-know exception permits Agency employees to disclose protected information to Union officials when disclosure "is necessary for Agency business."[53] Thus, under the Agency's interpretation of the Privacy Act, the need-to-know exception permits the Agency to access and disclose PII to comply with its own obligations under the Statute, but it does not permit the Union to review relevant PII for the same purpose. The Agency did not provide, and we are not aware of, any Authority or federal court precedent supporting such a distinction or mandating this interpretation of the Privacy Act.

As noted above, the Statute provides Union officials the right to represent bargaining-unit employees on official time, and to receive information "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[54] Although the Agency disagrees with the Arbitrator that the need-to-know exception encompasses these statutory representational "duties,"[55] it provides no compelling support for its preferred interpretation.[56] Moreover, the Agency's practice of disclosing protected information to Union representatives for representational purposes tacitly applies the Arbitrator's interpretation.[57] Thus, because the Privacy Act does not expressly exclude representational duties authorized by the Statute from the need-to-know exception, and the Agency cites no contrary precedent,[58] the Agency fails to establish that the Arbitrator's interpretation of "duties" to include representational

[47] *See* Award at 23 ("[U]nder the Agency's interpretation . . . the [bargaining-unit] ALJs could not even discuss what [they] know[] about the claimant's allegations against the[m] . . . [with their Union representative] because to reveal what that ALJ knows about the case would be disclosing privileged PII to someone without a need to know.").
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 21.
[52] *Id.* at 4 (noting Union's argument that it is often impossible for the Union to represent employees without accessing PII "because the Agency made the decision to use the [claimant's Social Security number] as the case identifier"); *see also* Opp'n Br. at 5 (arguing that "[t]he Union also provided uncontroverted evidence of the use of PII, with the Agency's knowledge, in the context of grievances, bias complaints, bargaining, and threats to [ALJs]").
[53] Exceptions Br. at 26-27; *see also* Exceptions, Ex. 7, Agency's Post-Hr'g Br. at 26 (arguing that "matters such as sending directives, *Weingarten* interview notices[,] . . . ALJ recusals, requests for information in connection with Labor[-]Management Committee meetings, [and] . . . coverage of hearings for other ALJs . . . are all areas where there is an Agency business need for the access and use of Agency records and information covered by the Privacy Act").
[54] 5 U.S.C. §§ 7114(b)(4)(B), 7131(d)(1).
[55] Exceptions Br. at 12.
[56] *See, e.g., id.* at 14 n.1 (citing decisions in which the Authority found that "the performance of union representational duties [did] not constitute the performance of official agency duties," but in contexts that meaningfully differ from the Privacy Act's need-to-know exception, such as management's right to assign work, or determine the technology used in performing work, under 5 U.S.C. § 7106).
[57] *See* Award at 20 (noting Agency's concession that there "are circumstances where the Union may have or receive PII that will be transmitted during grievance and arbitration proceedings"); *see also AFGE, Loc. 1164*, 66 FLRA 74, 77 (2011) (holding that the need-to-know exception focuses on the needs of the employee "who *received the disclosure*, rather than on the needs of the official who made the disclosure" (emphasis added)).
[58] In *U.S. DOD v. FLRA*, the U.S. Supreme Court held that the Statute does not alter the requirements for Freedom of Information Act (FOIA) requests under the Privacy Act. 510 U.S. 487, 498-99 (1994). As the Court's reasoning concerned the impact of the Statute on the FOIA exception to the Privacy Act, *id.*, rather than the need-to-know exception at issue in this case, we find this holding inapplicable. *See id.* at 504 (Concurring Opinion of Justice Souter) ("I join the Court's opinion with the understanding that it does not ultimately resolve the relationship between the [Statute] and all of the Privacy Act['s . . .] exceptions . . . and that any more general language in the opinion is limited . . . to the relationship between the . . . Statute and the [FOIA] exception to the Privacy Act.").

activities is contrary to the Privacy Act.[59] Accordingly, we deny this exception.[60]

B. The Statute defines the scope of the Agency's disclosure obligations, and the status quo ante remedy is contrary to the Privacy Act.

The Agency also argues that the status quo ante remedy is contrary to law because allowing the Union access to protected information for representational purposes "would require that the Agency acquiesce [to,] and even participate in[,] innumerable violations of the Privacy Act."[61] As discussed above, the Agency has not demonstrated that the need-to-know exception excludes Union duties. However, because the need-to-know exception allows PII access only to agency officers or employees "who have a need for the [PII] in the performance of their duties,"[62] we believe that the scope of union access to such information for representational purposes must be defined by reference to the Statute's definition of what is necessary for unions to perform their representational duties – specifically, information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."[63]

Under the status quo ante, the Union did not access protected information after articulating a "particularized need" for it in an information request[64] – as the Statute requires for information requests under § 7114(b)(4).[65] Instead, Union representatives had unrestricted access to claimant case files, permitting the Union to exercise unreviewable discretion in determining what information was necessary for a particular representational purpose.[66] In filtering out unnecessary information, in at least some situations, Union representatives almost certainly reviewed PII that was unnecessary for conducting either their Agency or Union duties – a practice that does not conform to the Privacy Act's prohibition on unauthorized disclosures of protected information.[67]

Thus, although the Agency does not establish that the Privacy Act prohibits *all* disclosures to Union representatives, we find that the past practice of unrestricted Union access to claimant records, without an information request articulating a "particularized need," does not satisfy the need-to-know exception to the Privacy Act – the only exception to the Privacy Act at issue here. As such, the past practice permits unlawful disclosures.[68] Because the status quo ante remedy directs the Agency to return to such a practice, we set it aside as contrary to the Privacy Act.[69]

However, the Authority has held that agencies must provide notice and bargain over the impact and implementation of a change to a term or condition of employment even when the agency is correcting an unlawful practice[70] – although, in those circumstances, the agency may bargain after executing the change.[71] In his alternative finding, the Arbitrator found that the Agency failed to satisfy this statutory obligation and, thus, he directed the Agency to engage in post-implementation

[59] 5 U.S.C. § 552a(b)(1).
[60] *See SSA, Region IX*, 65 FLRA 860, 864 (2011) (Member Beck dissenting) (denying contrary-to-regulation exception where agency failed to demonstrate that "official travel" could not include "official (Union) travel"); *U.S. Dep't of the Army Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 408 (2010) (denying contrary-to-law exception where excepting party offered no support for its contention).
[61] Exceptions Br. at 8.
[62] 5 U.S.C. § 552a(b)(1).
[63] *Id.* § 7114(b)(4)(B); *see also BOP*, 66 FLRA at 672 (upholding judge's finding that union demonstrated requested information about disciplinary investigation was "necessary" within the meaning of § 7114(b)(4) by articulating how the information would enable the union to assess the agency's treatment of the employee under investigation and the appropriateness of any penalties); *FAA*, 35 FLRA at 651-52 (finding the Statute requires agencies to provide information necessary to effectively represent employees at investigatory examinations "when a union's request satisfies the requirements of [§] 7114(b)(4)").
[64] *See* Award at 2 ("There is no serious dispute between the parties that for approximately [twenty] years[,] Union representatives have been allowed on contractual and statutory 'official time' to access a disability claimant's case file in order to access, analyze, use[,] and refer to relevant PII when it is necessary for the Union . . . to carry out certain . . . representational activities.").
[65] *Dep't of VA*, 71 FLRA at 430 ("[I]n order to demonstrate that requested information is 'necessary' within the meaning of § 7114(b)(4), the union must establish a 'particularized need' by articulating, with specificity, why it needs the requested information, and how its use of the information relates to the union's representational responsibilities under the Statute.").
[66] *See* Award at 2.
[67] *See* 5 U.S.C. § 552a(b) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person" unless permitted by an enumerated exception.).
[68] *See id.*
[69] *See U.S. DOD, U.S. Marine Corps, MAGTFTC/MCAGCC/MCCS, Twentynine Palms, Cal.*, 74 FLRA 46, 50-51 (2024) (setting aside unlawful portion of remedy where excepting party established that particular remedy was contrary to law without demonstrating arbitral finding of underlying statutory violation was deficient); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 73 FLRA 762, 764 (2023) (setting aside unlawful remedy but leaving underlying arbitral finding of contract violation undisturbed).
[70] *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 723 (2012) (*USDA*); *U.S. INS, Wash. D.C.*, 55 FLRA 69, 73 n.8 (1999) (*INS*) (Member Wasserman dissenting on other grounds).
[71] *AFGE, Loc. 1367*, 63 FLRA 655, 657 (2009) (*Loc. 1367*).

bargaining.[72] In setting aside the status quo ante, we do not vacate the Arbitrator's alternative finding and remedy.[73] We discuss the Agency's challenges to the alternative remedy below.

C. The Agency does not otherwise demonstrate that the award is contrary to law.

The Agency argues that the award conflicts with "other federal laws [that] extend[] to certain types of information in Agency records."[74] By explanation, the Agency cites broad swaths of various federal laws, arguing that these laws "generally do not authorize use and disclosure for union representational purposes."[75] It also notes that the Agency has regulatory obligations to maintain certain information-security procedures.[76]

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c).[77] Although the Agency cites various laws and regulatory obligations, it does not quote or identify any specific provisions that support its claim that these laws "generally do not authorize use and disclosure for union representational purposes."[78] In other words, the Agency's conclusory statement that the award conflicts with various laws and regulations does not explain *how* the award conflicts with these laws and regulations. In these circumstances, we find the Agency has failed to support its contrary-to-law and contrary-to-regulation arguments, and we deny them under § 2425.6(e)(1) of the Authority's Regulations.[79]

Additionally, citing its Privacy Act arguments, the Agency contends that the award violates "the provisions of the Social Security Act prohibiting employees from disclosing Agency records in violation of federal law and Agency regulations."[80] The Agency also cites an Agency regulation that proscribes "dislos[ing] information when a law specifically prohibits it."[81] As the cited provisions of both the Social Security Act and Agency regulations prohibit disclosures that violate *other* federal laws, the Agency's arguments concerning these authorities are premised on its Privacy Act arguments. But, for the reasons discussed above, the Agency does not demonstrate that disclosing records to Union representatives – when necessary for collective bargaining under the Statute – conflicts with the Privacy Act. Thus, the Agency similarly does not demonstrate that the Arbitrator's interpretation of the need-to-know exception conflicts with either of these authorities.[82]

D. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority in finding that, even if the Union's access under the status quo ante conflicted with the Privacy Act, the Agency failed to satisfy its bargaining obligations under the Statute.[83] According to the Agency, "the issue of [impact-and-implementation] bargaining was not raised by the Union in its grievance and was not before the [A]rbitrator."[84] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.[85]

[72] Award at 30 ("I find that the Agency violated [§] 7116(a)(1) & (5) of the Statute when it terminated an unlawful past practice without giving notice to the Union and without giving the Union an opportunity to bargain over the [impact and implementation] of the unlawful practice's termination."); *id.* ("The Agency, upon demand, shall bargain with the Union over the [impact and implementation] of its decision to terminate the unlawful practice at issue in this matter.").

[73] *See Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1527-28, 1532 (1994) (upholding judge's finding that, although the agency could change an unlawful practice without prior bargaining, the agency nonetheless violated the Statute by failing to engage in post-implementation bargaining).

[74] Exceptions Br. at 21.

[75] *Id.* (claiming that Agency records are covered by the Internal Revenue Code, the Fair Credit Reporting Act, the Right to Financial Privacy Act, and a section of Title 42 concerning "drug and alcohol records").

[76] *Id.* at 22 (claiming that, pursuant to the Federal Information Security Modernization Act, the Agency must comply with policies and procedures established by the National Institute of Standards and Technology and the Office of Management and Budget).

[77] 5 C.F.R. § 2425.6(e)(1).

[78] Exceptions Br. at 21.

[79] *See AFGE, Loc. 4010, Council of Prison Locs. #33*, 73 FLRA 873, 873-74 (2024) (denying contrary-to-regulation exception where excepting party "ma[de] certain claims, and cite[d] and quote[d] various regulations, . . . [but did] not explain how its claims relate to the regulations, or how the [a]rbitrator's award conflicts with the terms of any of those regulations"); *USDA, U.S. Forest Serv., L. Enf't & Investigations, Region 8*, 68 FLRA 90, 93 (2014) (denying exception where excepting party asserted award was contrary to a cited statute and cited regulation, but "never explain[ed] how the award conflict[ed] with either" the statute or the regulation); *AFGE, Loc. 922*, 67 FLRA 458, 459 (2014) (denying contrary-to-law exception where excepting party quoted and cited statutes but "ma[de] no argument as to how the award [was] deficient under" those statutes).

[80] Exceptions Br. at 12 (citing 42 U.S.C. § 1306(a)).

[81] *Id.* at 11 (citing 20 C.F.R. § 401.125).

[82] *See U.S. DHS, CBP*, 73 FLRA 799, 802-03 (2024) (Chairman Grundmann concurring) (denying exceptions based on previously rejected arguments).

[83] Exceptions Br. at 30.

[84] *Id.*

[85] *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (citing *AFGE, Nat'l VA Council No. 53*, 67 FLRA 415, 415-16 (2014)).

When parties do not stipulate the issues for resolution, the Authority accords the arbitrator's formulation of the issue to be decided the same substantial deference that the Authority accords an arbitrator's interpretation and application of a collective-bargaining agreement.[86] When the Authority defers to an arbitrator's formulation of the issue for resolution, the Authority will not find that the arbitrator exceeded his or her authority when the award is confined to the issues as the arbitrator framed them.[87]

The parties did not stipulate the issue submitted to arbitration, and the Arbitrator framed the relevant issue as whether the Agency "unilaterally terminat[ed]" a past practice of granting the Union access to claimant files "without notice to the Union."[88] By framing the issue this way, the Arbitrator focused the dispute on the Agency's notice-and-bargaining obligations. As discussed above, the Authority has held that an agency may implement a change to correct an unlawful practice without first bargaining over the change.[89] But, in that circumstance, the agency is obligated to provide notice of the change and an opportunity to bargain after implementation.[90] Consistent with the framed issue, the Arbitrator found that, even if the past practice conflicted with the Privacy Act, the Agency nonetheless had a post-implementation bargaining obligation that it failed to satisfy when it terminated the practice without providing the Union with the requisite notice and opportunity to bargain.[91] As the Arbitrator's conclusion that the Agency was obligated to engage in impact-and-implementation bargaining is directly responsive to the issues as the Arbitrator framed them, the Agency fails to establish that the Arbitrator exceeded his authority. Thus, we deny its exception challenging the Arbitrator's alternative remedy directing the parties to engage in impact-and-implementation bargaining.[92]

V. Decision

We grant the Agency's Privacy Act exception in part, dismiss or deny its remaining exceptions, and set aside the status quo ante remedy.

[86] *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 434 (2010) (*IRS*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002) (Member Pope dissenting in part on other grounds)).
[87] *Id.* (citing *AFGE, Loc. 1547*, 59 FLRA 149, 150-51 (2003)).
[88] Award at 8-9.
[89] *USDA*, 66 FLRA at 723; *INS*, 55 FLRA at 73 n.8.
[90] *Loc. 1367*, 63 FLRA at 657.
[91] Award at 28.
[92] *See NTEU*, 73 FLRA 431, 433-34 (2023) (denying exceeded-authority exception where arbitrator framed issue as whether agency failed to provide midterm-bargaining opportunity and then directed the parties to engage in impact-and-implementation bargaining because "the precise nature of the [a]gency's bargaining obligation . . . flows from, and is directly responsive to, the issue she framed"); *IRS*, 64 FLRA at 435 (denying exceeded-authority exception where findings were directly responsive to the issues the arbitrator framed). The Agency also argues the Arbitrator exceeded his authority because "the [a]ward requires that the [A]gency allow or even participate in violations of the Privacy Act, the Social Security Act, and its privacy regulations." Exceptions Br. at 29. To the extent this argument is premised on the Agency's contrary-to-law arguments, which we denied in Section IV.A and IV.B, we also deny this exception. *See U.S. Dep't of Educ.*, 72 FLRA 203, 205 n.30 (2021) (Chairman DuBester concurring) (denying exceptions that were "premised on the same arguments as contrary-to-law exceptions that [the Authority] ha[d] already denied"). And to the extent this argument specifically challenges the Union's "unfettered access" to PII under the status quo ante, Exceptions Br. at 29, we find it unnecessary to address this argument because we have already set aside the status quo ante remedy as contrary to the Privacy Act. *See U.S. Dep't of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 808 n.6 (2012) (finding it unnecessary to address additional exceptions challenging portion of award that was set aside (citing *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011))).

Member Wagner, concurring:

I agree with the decision in all respects. I write separately to emphasize that this case involves only the Privacy Act's need-to-know exception. Nothing in the decision prohibits the Union from accessing personally identifiable information if a different Privacy Act exception applies – even if the Union has not articulated a "particularized need"[1] for that information under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute.[2] In this regard, the entitlement to information under § 7114(b)(4) is a statutory floor, not a ceiling; agencies are not prohibited from giving unions access to more information than what § 7114(b)(4) requires them to give.[3] Thus, if another exception to the Privacy Act applies, the mere fact that the Union has not established particularized need does not automatically mean that the Union cannot access the information.[4]

[1] *See, e.g.*, *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 430 (2019) (*VAMC Decatur*).

[2] 5 U.S.C. § 7114(b)(4).

[3] *NTEU*, 22 FLRA 131, 134 (1986) ("The language and the legislative history of [§ 7114(b)(4)] do not indicate that Congress intended to prohibit an agency from providing a union with information other than that which is . . . necessary."); *see also NTEU*, 68 FLRA 334, 337 (2015) (finding bargaining proposal that would require the agency to provide information for which the union had not established particularized need was not contrary to § 7114(b)(4)).

[4] *See, e.g.*, *VAMC Decatur*, 71 FLRA at 431-32 (finding Freedom of Information Act exception to Privacy Act permitted disclosure); *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 328-29 (2016) (finding "routine-use" exception to Privacy Act permitted disclosure).