MICHAEL WOLF

ARBITRATOR/MEDIATOR

4532 43RD STREET, N.W.
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December 7, 2007

James Cantlon, Esq.
U.S. Small Business Administration
409 3rd Street, SW
Suite 5300
Washington, DC 20416

Michael J. Snider, Esq.
Snider & Associates, LLC
104 Church Lane
Suite 201
Baltimore, MD 21208

RE: FMCS Case 07-52363

Dear Messrs. Cantlon and Snider:

Enclosed please find my decisions on the pending discovery dispute and the Union's motion for reconsideration/bifurcation. I am also enclosing an invoice for the time I have worked on this case since my last invoice, including the preparation of these decisions. Prompt payment of the invoice would be appreciated.

Sincerely yours,

Michael Wolf

Enc.

ARBITRATOR MICHAEL WOLF
4532 43rd Street, N.W.
Washington, DC 20016

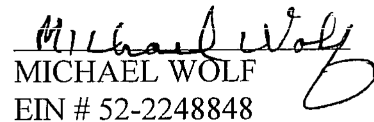
INVOICE

FMCS Case 07-52363
U.S. Small Business Administration-AFGE, Council 228

Travel Days	0
Hearing Days	0
Study Days	4
Total Days	4

TOTAL FEES ($900 X 4)	**$ 3,600.00**
Expenses	0
TOTAL FEES AND EXPENSES	**$ 3,600.00**
AMOUNT PAYABLE BY THE EMPLOYER	**$ 1,800.00**
AMOUNT PAYABLE BY THE UNION	**$ 1,800.00**

DATE: 12/7/07



MICHAEL WOLF
EIN # 52-2248848

FEDERAL MEDIATION AND CONCILIATION SERVICE
CASE # 07-52363-a
GRIEVANT: Class

IN THE MATTER OF THE ARBITRATION

between

U.S. SMALL BUSINESS ADMINISTRATION,
Employer.

and

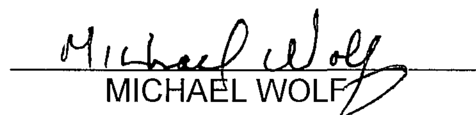
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 228,
Union,

Arbitrator: Michael Wolf

Employer Advocate: James Cantlon, Esq.

Union Advocate: Michael Snider, Esq.

DATE: 12/7/07



MICHAEL WOLF

ISSUE

Currently before me are discovery disputes arising out of requests for information filed by both the Union and the Agency. In a letter dated October 4, 2007, I advised the parties that they should first brief the dispute over the Union's request for: (1) time and attendance records, (2) travel vouchers and (3) credit card expenditures. Those briefs were received October 19, 2007. The issue to be decided is whether the three categories of documents are discoverable under 5 U.S.C. §7114(b) or whether they are protected from disclosure under the Privacy Act and Freedom of Information Act.

BACKGROUND

The Union filed this grievance on November 1, 2006, alleging that the Small Business Association ("SBA" or "Agency") failed to comply with the Fair Labor Standards Act ("FLSA") with respect to employees represented by the Union. The Union also filed a request for information ("RFI") on November 1, 2006. The Agency refused to comply fully with the information request, leading to the Union's filing of an unfair labor practice charge over the Agency's non-compliance with the RFI. On August 7, 2007, the Regional Director of the Federal Labor Relations Authority ("FLRA") notified the Union of his refusal to issue a complaint on the charge. The Regional Director concluded that the Union had failed to satisfy its burden under 5 U.S.C. §7114(b)(4) of showing a "particularized need" for much of the information and, in addition, that the information is not "reasonably available." On October 31, 2007, the FLRA General Counsel denied the Union's appeal from the Regional Director's decision.

In addition to the November 1, 2006 RFI, the Union filed several other requests for information. In a preliminary award dated July 19, 2007, I concluded that all but one

of the Union's RFIs were identical to or sufficiently similar to the November 1, 2006 request that I was barred, pursuant to 5 U.S.C. §7116(d), from considering the merits of the dispute between the Agency and Union with respect to those requests. However, I also concluded that a request from the Union dated May 11, 2007 was neither legally nor factually the same as the other requests and that I had jurisdiction to resolve the parties' dispute over that request.

The May 11, 2007 request sought the following information:

1. All time and Attendance records for all Bargaining Unit Employees from November 1, 2003 to the present.

2. All travel vouchers and other travel documents maintained related to travel by Bargaining unit employees from November 1, 2003 to the present.

3. Records for all Government Owned Vehicles used by Bargaining Unit Employees form [sic] November 1, 2003, to the present, including vehicle logs, gas receipts, and credit card usage.

4. Copies of all manuals, guidelines, and handbooks used by Loan Specialists Grievants 1165-09, Grievants 1165-11, Grievants 1165-12, and Grievants 1165-13.

5. Copies of all agency correspondence between SBA and OPM and SBA and GSA relating to overtime, comp time, and credit hours policy, and relating to FLSA status of positions encumbered by bargaining unit employees.

6. Call records for all government cell phones used by Bargaining unit employees in the course of their duty since November 1, 2003.

On July 31, 2007 the Agency produced to the Union a list of bargaining unit employees and a telephone directory. It further advised in an August 7, 2007, letter that position descriptions for these employees and the documents covered by request #6, above, would be produced. In its August 7, 2007 letter, the Agency also stated that

> [a]s to the Union's May 11, 2007 request, time and attendance records and travel vouchers and credit card expenditures are covered by the Privacy Act. However, if the Union obtains a release from an employee allowing the disclosure of that information to the Union, the Agency will provide that employee's information.... Absent a release by a particular employee, however, the Agency is prohibited under the Privacy Act from disclosing time and attendance, travel voucher and credit card information.

That same letter noted that the SBA does not maintain vehicle logs and cell phone records segregated by bargaining unit employees, but that

> [a]s part of an agreement resolving the information issues, the Agency proposes to provide [this information], even though they contain information concerning non-unit employees and even though they are not required to be disclosed under section 7114(b)(4).

Finally, the Agency stated that it could not locate any documents covered by request #5 in the May 11, 2007 RFI.

In my letter of October 4, 2007, I directed the parties to submit briefs with respect to the Agency's assertion that requests 1, 2 and 3 in the Union's May 11, 2007, RFI cannot be produced because of the Privacy Act. This preliminary award addresses that issue.

THE UNION'S POSITION

The Union's position can be summarized as follows:

1. The documents in dispute are all covered by 5 U.S.C. §7114(b).
2. The Union has identified a particularized need for these documents.
3. The Privacy Act does not preclude production of the information, since individual employees are entitled to the information and the Union has requested the information "on behalf of the individuals to whom the records pertain." U.Br. at 5.
4. The documents requested are also producible pursuant to the "routine use" exception to the Privacy Act. The "routine use" in this case is the disclosure of the

records in an adjudicatory proceeding. This "routine use" has been published by the Agency in the Federal Register with respect to its payroll files and travel files. The records are necessary "to determine [the] exact number of over-tour hours worked by each grievant." U.Br. at 7.

5. The documents requested are also producible pursuant to FOIA. In particular, the courts have ruled that time and attendance records and travel vouchers are subject to disclosure under FOIA. As a result, "the Agency cannot preclude through the Privacy Act those documents that are allowed pursuant to the Freedom of Information Act." U.Br. at 9.

THE AGENCY'S POSITION

The Agency's position can be summarized as follows:

1. Records protected by the Privacy Act, 5 U.S.C. §552a, are exempt from disclosure under FOIA unless the Union can identify a public interest that outweighs the privacy interests of employees. The Union's interest in collective bargaining and in processing grievances is not a public interest within the meaning of FOIA. "Therefore, the Union has no more right to the requested Privacy Act information than any other individual or entity. The Union's status as the exclusive representative in the flsa grievance and the Statute are irrelevant under the balancing test in FOIA exemption 6." Ag.Br. at 4-5.

2. The Agency's time and attendance records and travel vouchers are contained within a system of records covered by the Privacy Act. The mere fact that the Union is the employees' bargaining representative does not alone authorize the Union to review these records. Under the Privacy Act, there must be clear consent by each employee to

permit the Union's access to these records. Absent such consent, the Agency is required to maintain the confidentiality of the records.

3. The records sought by the Union do not fall within the "routine use" exception to the Privacy Act. While there is a "routine use" for records in litigation, it is not clear that the Arbitrator qualifies as a "court, or adjudicative body, or a dispute resolution body" within the meaning of the routine use published in the Federal Register. Moreover, that routine use only arises if the Agency has determined that the records are "relevant and necessary to the litigation." The Agency has not made that determination in this case. The Agency also has not determined that disclosure of the records in arbitration would be "compatible with the purpose for which the records were collected," as is required under the routine use exception. Finally, the routine use exception for documents used in litigation, as published in the Federal Register, does not list unions among the intended recipients of such documents.

4. The documents are not "reasonably available" within the meaning of 5 U.S.C. §7114(b)(4). It is not possible to sanitize each file to delete personal data for all bargaining unit employees for a period of 3½ years. Nor are the documents "reasonably segregable with[in] the meaning of FOIA." Ag.Br. at 9. Efforts to review and sanitize such a large amount of records dispersed around the country would be onerous and costly and would hamper the Agency's ability to carry out its primary mission.

5. The Union has also failed to show a "particularized need" for the information, as required by 5 U.S.C. §7114(b)(4). The Union's arguments have articulated only "generalized and generic" uses for the record. The FLRA has already determined that

these arguments were insufficient to establish "particularized need;" the same conclusion should be reached by this Arbitrator.

6. If the Arbitrator determines that disclosure of the requested information is required and not in violation of the Privacy Act, then he should issue that decision in the form of a "final order" so that it can be appealed immediately to the FLRA.

FINDINGS AND CONCLUSIONS

The Union's May 11, 2007 RFI was made pursuant to 5 U.S.C. §7114(b)(4), which provides:

> **(b)** The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
>
> * * * *
>
> **(4)** in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> **(A)** which is normally maintained by the agency in the regular course of business;
>
> **(B)** which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining....

Under this law, release of the requested information is permitted if the records are: (1) "normally maintained ... in the regular course of business," (2) "reasonably available," (3) "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining," and (4) "not prohibited [from release] by law."

The Agency has not disputed that the records in question are maintained in the regular course of business. It has disputed the Union's ability to satisfy the other three pre-conditions for release of information under Section 7114(b)(4). I will therefore address each of those criteria, although not in the same order as listed above.

A. Are The Documents Requested by the Union Necessary for Purposes of Collective Bargaining?

The Union's collective bargaining obligations and rights extend to the investigation and resolution of grievances. For this reason, the Union is entitled to receive information necessary for the processing and litigation of grievances. However, to establish "necessity," the Union must prove more than that the information is useful or relevant to a grievance. Department of the Air Force v. FLRA, 104 F.3d 1396 (D.C. Cir. 1997); NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992). It must instead "establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute." Internal Revenue Service and NTEU, 50 FLRA 661, 669 (1995). This burden cannot be satisfied by conclusory statements. The Union must provide sufficient specificity to "permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the statute." Department of Justice and AFGE, Local 0922, 57 FLRA 808, 812 (2002).

The District of Columbia Circuit has opined that a union may meet its burden where it has a "grievable complaint covering the information" being sought. NLRB v. FLRA, 952 F.2d at 552. Indeed, the Court has held that

> There may well be cases where the connection between the information a union seeks and grievance is so clear that the union's need is self-evident.

AFGE, Local 2343 v. FLRA, 144 F.3d 85, 89 (D.C. Cir. 1998). On the other hand, that Circuit has also held that the existence of a grievance, standing alone, does not automatically establish a particularized need. AFGE, Local 2343 v. FLRA, 144 F.3d 85

(D.C. Cir. 1998). When a union's need is not "self-evident," it must provide sufficient detail to inform the employing agency "about exactly why the union needs the information," giving the agency an opportunity "to weigh the competing interest in a meaningful way." Id. In such cases, a union's bald statement that the information is needed to prepare for arbitration is not adequate. The Court noted that its standard is identical to the FLRA's. See generally Department of Justice and AFGE, Local 0922, 57 FLRA 808 (2002).

In the instant case, the Union provided the following statement of need for the requested information:

> The Union believes that the Agency has violated the Fair Labor Standards Act, the Collective Bargaining Agreement, and other rules, law and regulations in regard to the Grievants. The Union needs the requested information to prove the underlying facts and contentions in its Grievance.
>
> In particular, the Union needs the information requested in paragraphs 2, 3, and 6 to show that Bargaining Unit Employees worked for the Agency's benefit beyond their regular tour of duty. The Union needs the information in paragraph 1 to show that overtour work was not compensated by credit hours or comp time. The Union needs the information requested in Paragraph 4 to demonstrate that Bargaining Unit Employees are implicitly or explicitly expected by the Agency to work over their regular tour of duty. The Union needs the information requested in Paragraph 5 to demonstrate that the agency acted willfully and in reckless disregard of the statute and regulations in question by misclassifying Bargaining Unit Employees under the FLSA.

This articulation of the Union's need is sketchy, at best. It veers quite close to the type of conclusory statement that both the FLRA and D.C. Circuit warn against. In order to assess the adequacy of this statement of need, I must consider the categories of requested documents separately. I will take them up in reverse order.

1. Need for Credit Card Expenditures

Credit card records are found in the Union's request #3 in its May 11, 2007 RFI: "Records for all Government Owned Vehicles used by Bargaining Unite Employees form November 1, 2003, to the present, including vehicle logs, gas receipts, and credit card usage." As stated above, the only "need" identified by the Union is that this information would help "prove the underlying facts and contentions in its Grievance" and will "show that Bargaining Unit Employees worked for the Agency's benefit beyond their regular tour of duty." This is indeed a conclusory statement without sufficient detail to show how the credit card records would aid in that objective; there is no statement of the uses to which the records would be put or the nexus between the information contained in credit card receipts and the objective of proving an FLSA violation. Since the relevance and need for these records is not self-evident, I conclude that the Union has failed to prove its entitlement to production under Section 7114(b)(4).

2. Need for Travel Vouchers and Related Documents

Request #2 in the RFI sought: "All travel vouchers and other travel documents maintained related to travel by Bargaining Unit Employees from November 1, 2003 to the present." The Union's statement of need is the same as that for credit card records. In other words, it is conclusory. Although travel vouchers may show that an employee has traveled overnight for government-related purposes and the payment of per diem for such travel, the Union has not articulated how this information is necessary to establish its objective of proving an FLSA violation. The nexus between the information in such records and the burden of proving a prima facie case is not self-evident. While I might be able to intuit certain uses that could be made of these documents, the

responsibility of identifying such uses rests with the Union. It has not done so, rendering this request beyond the scope of Section 7114(b)(4).

3. Need for Time and Attendance Records

The Union's request #1 sought: "All Time and Attendance records for all Bargaining Unit Employees from November 1, 2003 to the present." I had requested that the parties submit to me the "time and attendance record[s] ... that are in dispute." The Union did not respond to my request. The Agency submitted four different documents: (a) Form CD-440, which is a time and attendance worksheet that is completed by hand and which shows, inter alia, hours worked, leave taken, etc. for each pay period, (b) "STAR Time and Attendance Report," which is generated electronically and shows hours worked, leave taken and leave balances for each pay period, (c) OPM Form 71, "Request for Leave or Approved Absence," which records employees' requests for various types of leave (including FMLA) and a supervisor's signature with approval or disapproval, and (d) SBA Form 454, which is entitled "Request to Work Overtime" and which records an employee's request to work overtime and a supervisor's signature indicating approval.

The Union has articulated the following statement of need for all time and attendance ("T&A") records: "The Union needs the information in paragraph 1 to show that overtour work was not compensated by credit hours or comp time." As to the Form 71, "Request for Leave," the Union has made no effort to show how this document is necessary to prove its FLSA case. It does not show hours actually worked or the compensation paid for hours worked. Accordingly, I conclude that the Union has not satisfied its burden of showing why the Request for Leave forms need to be produced.

The other three time and attendance records, however, stand on a very different footing than the other records in the RFI.

The Union's claim in this case can be summarized quite simply: bargaining unit employees have worked overtime, but have not been paid at an appropriate rate for that overtime. Time and attendance records for bargaining unit employees lie at the heart of this grievance. In a sense, they are the subject of the grievance and can prove or disprove the Union's case. The three records (Form 454, Form CD-440 and STAR reports), when taken together, show how many overtime hours an employee has requested and how many hours in each pay period were worked "overtour." If the Agency's records show that a non-exempt bargaining unit employee requested and/or worked "overtour" hours, but was not paid at an appropriate rate for those hours, then the Union will have proved a prima facie case for that employee.

While the Union can present a prima facie case through the testimony of individual employees who describe their work hours, proof of a violation is much more credible and probative if established through the Employer's own records. Without these records, the Union would find it virtually impossible to reconstruct an accurate summary of work hours for all relevant employees over the period of time covered by their FLSA claim. This fact makes the T&A records more than merely useful or relevant. They provide evidence of undisputed probity and are therefore essential to the Union's burden of proof, since they eliminate any questions about the veracity of employee recollections about their work hours over an extended period of time.

I conclude that the two T&A reports and the Request for Overtime forms, to the extent they show hours worked by non-exempt bargaining unit employees, are

themselves the subject of this FLSA grievance. See NLRB v. FLRA, 952 F.2d at 552. Even though the Union's statement of need is conclusory, the nexus between these records and the grievance is self-evident and the Union's need for these records is self-evident. See AFGE, Local 2343 v. FLRA, 144 F.3d at 89. The Agency cannot seriously have any uncertainty as to the Union's need for the work hours contained in these documents or their centrality to the grievance. Accordingly, I conclude that these records, to the extent they show hours worked and overtime hours requested by non-exempt employees, satisfy the "necessity" requirement under Section 7114(b)(4).

This same conclusion will apply to any employees who, as a result of this proceeding, are ultimately found to have been incorrectly classified as exempt under the FLSA. Those employees should be treated the same as any other non-exempt employee. However, in another preliminary award I am issuing this same date, I have concluded that the litigation over the exempt employees should be bifurcated into two separate phases: liability and remedy. The liability phase will focus exclusively on the question whether the subject employees have been properly deemed exempt under the FLSA. The remedy phase would follow, but only for those employees who I conclude were wrongfully classified as exempt.

Because of this ruling on bifurcation, it is premature to consider the production of the three T&A/Overtime records for employees who are currently deemed exempt by the Agency. To the extent I conclude that some employees have been properly categorized as exempt, there would be no Agency liability vis a vis those employees and no need for those employees to participate in the remedial phase of this proceeding. In that event, those employees would have no need to prove the amount of

overtime worked and would have no need for the T&A/Overtime records. For this reason, there currently is no "particularized need" for these records vis a vis the exempt employees. If and when I determine that some (or all) of the exempt employees should have been classified as non-exempt, then those employees would be entitled to seek a remedy. At that point, the T&A/Overtime records would be necessary for the presentation of the Union's case, for the reasons stated above.

Therefore, in view of my ruling on the bifurcation motion, the Union's request for T&A/Overtime records is premature with respect to bargaining unit employees who are currently deemed by the SBA to be exempt from the FLSA overtime provisions. The Union's need for those records can be re-visited after I make my ruling on the merits of the Union's liability argument with regard to those employees and prior to the commencement of the remedial phase of the hearing.

B. Is Release of the Requested Information Without Redaction Prohibited by Law?

The Agency contends that, absent employee consent, the Privacy Act and FOIA bar release of unsanitized T&A records. The Union responds that neither statute precludes disclosure and, to the contrary, that they require disclosure. The Union identifies three arguments in support of its position: (1) as the exclusive representative of bargaining unit employees, its written request for the records is alone sufficient to trigger production, (2) the records are subject to disclosure under the "routine use" exception to the Privacy Act, and (3) the documents are "permissibly available" via the Freedom of Information Act.

Initially, the Union states that it submitted a written request for the documents on behalf of the bargaining unit employees and that its representation of these employees

is alone sufficient to require production of the records. The Union cites no authority for this proposition. I conclude that this argument has effectively been rejected by the Supreme Court in U.S. Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994). See also Department of the Air Force and NFFE, Local 153, 51 FLRA 1144 (1996)(employee's "designation of the union as her representative does not constitute consent to disclosure under the Privacy Act.")

Second, the Union points to the "routine use" exception under the Privacy Act:

> (b) Conditions of disclosure
>
> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--
>
> * * * *
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.... [5 U.S.C. §552a(b)(3).]

Subsection (a)(7) defines a "routine use" as follows:

> the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.... [Id. at §552a(a)(7).]

Subsection (e)(4)(D) requires agencies to publish their routine uses in the Federal Register.

Among the routine uses published by the SBA is the following applicable to its payroll and travel files:

> THESE RECORDS MAY BE USED, DISCLOSED OR REFERRED:
>
> * * * *
>
> In a proceeding before a court, or adjudicative body, or a dispute resolution body before which the agency is authorized to appear or before which any of the following is a party to litigation or has an interest in

> litigation, provided, however, that the agency determines that the use of such records is relevant and necessary to the litigation, and that, in each case, the agency determines that disclosure of the records to a court or other adjudicative body is a use of the information contained in the records that is compatible with the purpose for which the records were collected:
>
> (1) The agency, or any component thereof;
>
> (2) Any employee of the agency in his or her official capacity;
>
> (3) Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee; or
>
> (4) The United States Government, where the agency determines that litigation is likely to affect the agency or any of its components.

This is the only routine use that the Union has cited as a basis for release of the records included in its May 11, 2007 RFI.

The Agency argues that this routine use does not authorize release of the documents. It initially questions whether this arbitration qualifies as an adjudicatory forum for purposes of this routine use exception. However, it cites no authority for its professed doubt. This arbitration is being conducted pursuant to the procedures for selection of arbitrators under the rules of the Federal Mediation and Conciliation Service. I conclude that this arbitration qualifies as a proceeding before an "adjudicatory" or "dispute resolution" body for purposes of this exception. The question then becomes whether the Union's RFI satisfies the requirement of the exception.

The Union cites several cases in support of its contention that the documents identified in its May 11, 2007 RFI meet the requirements of a "routine use" under the Privacy Act and under the above definition published in the Federal Register. However, most of the cases cited in the Union's brief do not address the "routine use" exception at all. For example, the Union has an extended quote at page 6 of its brief that it attributes

to the Circuit Court decision Department of Justice v. FLRA, 991 F.2d 285 (D.C. Cir. 1993). In fact, the quote is not found in the Court's opinion and is instead an extract from a completely unrelated arbitration award. Moreover, the Department of Justice case does not involve the Privacy Act, let alone the routine use exception to that Act. In Shannon v. General Elec. Co., 812 F. Supp. 308 (N.D.N.Y. 1993), which is also cited by the Union, the court denied a motion for summary judgment involving the routine use exception because the motion was premature; the court did not decide the merits of the routine use dispute.

The other cases cited by the Union that discuss this exception refer to routine uses adopted by other agencies that are completely different in content from the routine use at issue in the instant case. In Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989), the court permitted two agencies to share investigative files pursuant to a published "routine use" relating to those types of files. The instant case does not involve an investigative use exception. In Farmers Home Administration Finance Office and AFGE, Local 3354, 23 FLRA 788 (1986), the FLRA directed the disclosure of employee names and addresses pursuant to an OPM "routine use" that explicitly permitted the disclosure of information to "officials of labor organizations ... when relevant and necessary to their duties of exclusive representation." The SBA has not published an analogous "routine use."

Routine uses put employees on notice how and when certain records may be disclosed on a routine basis; in this manner, the employing agency may protect itself from liability under the Privacy Act. See U.S. Postal Service v. NALC, 9 F.3d 138, 141 (D.C. Cir. 1993). In litigation, the courts may defer to an agency's reasonable

interpretation of its own routine use; if the agency has not provided such interpretation, then the courts must interpret the language published in the Federal Register in light of the purpose for which the use has been adopted. See U.S. Postal Service v. NALC, 9 F.3d at 147 (Williams, J., concurring). A review of the case law under the routine use exception reveals that the courts strictly construe routine uses as published and will not expand upon them. See, e.g., Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987); Doe v. Naval Air Station, 768 F.2d 1229 (11th Cir. 1985); Local 2047, AFGE v. Defense General Supply Center, 423 F. Supp. 481 (E.D. Va. 1976). See also Swenson v. U.S. Postal Service, 890 F.2d 1075 (9th Cir. 1989).

The only routine use relied upon by the Union, as quoted above, has an explicitly narrow focus. Although it is hardly a model of linguistic clarity, its intent and scope are easily discernible. They apply whenever the agency or one of its employees[1] appears in a "proceeding before a court, or adjudicative body, or a dispute resolution body" or when any other federal agency is a party to such proceeding in which the SBA may be affected. If these pre-conditions are met, then the Agency may disclose payroll and travel files to "a court or other adjudicative body" if the files are "relevant and necessary to the litigation" and if disclosure is "compatible with the purposes for which the records were collected." The determination as to whether these conditions have been met is to be made by the Agency.

This routine use limits disclosure to a court or other adjudicative body. It does not authorize unilateral disclosure by the Agency to a union or to an opponent in

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[1] Employees sued in their individual capacity are covered by this routine use only if the Department of Justice agrees to represent the employee in the litigation.

litigation. A court or other adjudicative body may direct release of such records to other parties in litigation, but that is a determination to be made by the neutral adjudicator pursuant to the general rules governing information subject to the Privacy Act. The SBA's routine use, on the other hand, must be strictly construed to bar the Agency's <u>unilateral</u> release of records to a union without approval of a neutral adjudicator. Accordingly, I cannot construe the above-quoted routine use as authorizing the Agency's unilateral release of the requested records to the Union. The routine use exception to the Privacy Act therefore does not apply to this case.

The fact that the documents in question do not fall within the scope of a routine use does not end the analysis. It instead means that I can direct release of the requested information only if doing so satisfies the general disclosure rules under the Privacy Act. One of the other exceptions to the Act's general rule of non-disclosure states that information may be released without an employee's consent if it is "required under section 552 of this title [i.e., FOIA]." 5 U.S.C. §552a(b)(2). FOIA provides, in turn, for the release of government records unless subject to a statutory exemption. One such exemption states that documents may be withheld if the "disclosure ... would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The SBA argues that disclosure of the records requested by the Union on May 11, 2007 would violate its employees' privacy interests.

The Supreme Court has instructed that a determination as to the applicability of this FOIA exception must balance: employees' privacy interests against the public's interest. <u>Department of Defense v. FLRA</u>, 510 U.S. 487 (1994). As to the latter, the Court cautioned that a union's collective bargaining interests are not synonymous with

the public's interests. Moreover, since any member of the public is entitled to request information pursuant to FOIA, the "purposes for which the request for information is made" is irrelevant to a determination of the propriety of disclosure. Id. at 496. The Court concluded that the public interest for purposes of FOIA is "information that sheds light on any agency's performance of its statutory duties." Id. The public has a right to understand "the operations or activities of the government." Id. at 496, quoting Department of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 775 (1989).

Under this balancing test, the SBA is required first to establish the existence of a legitimate privacy interest on the part of its employees in the documents requested by the Union. If such an interest is identified, then the burden shifts to the Union to show that the public's interest (not its own parochial interest) outweighs the privacy concerns. In DOD v. FLRA, the Court concluded that the employees' privacy interest in non-disclosure of their home addresses significantly outweighed the public's interest in such information. The Agency has also cited several decisions affirming the significant privacy interest that employees have in such records as their performance appraisals and disciplinary actions. See, e.g., Warren v. Social Security Administration, 2000 WL 1209383 (W.D.NY 2000); Social Security Administration and AFGE, Local 3172, 51 FLRA 58 (1995). However, neither the Agency nor the Union has cited any precedent involving disclosure of time and attendance records in the absence of a published

routine use.[2] I am therefore unaware of any FLRA or judicial precedent that directly controls the outcome of the current discovery dispute.

The Union here is interested in records that show how many hours each bargaining unit employee has worked and an indication of the type of pay status accorded to those work hours. Rather than addressing the Union's RFI in the abstract, it is preferable to review the actual forms in question. As indicated above, there are three records in issue (i.e., for which a particular need exists).

1. Form 454: Request for Overtime

This form contains such information as an employee's name, grade, projected overtime hours, projected compensatory time, signatures (supervisor and employee) and description of the work to be performed. The Agency has not addressed this specific form and has not explained how or why the information on the form implicates the privacy interests of employees. The Agency cites no precedent holding this type of information to be protected under the Privacy Act/FIOA. Nor can I find any privacy interest in this information.

Information relating to the number of hours worked in each pay period is not information that employees could reasonably expect to be private. They are working for a public agency at taxpayer expense and should expect that the public has an interest in how their taxes are spent. The basic information of hours worked is not inherently

[2] Cf. U.S. Postal Service v. NALC, 9 F.3d 138 (D.C. Cir. 1993). In that case, the union sought, inter alia, employee payroll and benefit records. The Court affirmed an Arbitrator's award directing disclosure of this information based on the fact that a routine use published by the Postal Service explicitly covered the release of such documents to labor organizations. As discussed above, there is no comparable routine use cited by the Union in the instant case. The Court did not indicate how the litigation would have turned out in the absence of the published routine use.

personal; it is certainly not personal in the same sense as home addresses or disciplinary information.

The Form 454 merely records an employee's request to work overtime or compensatory time and, where appropriate, supervisory approval. This is purely factual information. It relates solely to an employee's public work at public expense. I find that release of this information does not compromise either personal information about the employee or inhibit the evaluation process critical to supervisors. I therefore find neither the Privacy Act nor Exemption 6 of FOIA requires these records to be sanitized prior to release.

2. STAR Time and Attendance Report

The primary purpose of the STAR report is to record hours worked and leave taken. For the reasons stated above, there is no discernible basis for according this information a privacy protection. The Agency has not articulated any argument for keeping employee work hours exempt under FOIA. Public release of such information is not a clearly unwarranted invasion of an employee's personal privacy.

However, the STAR report also contains several fields of information that implicate personal information. First, and foremost, is a block that calls for a social security number. In an age of identity theft, it cannot seriously be disputed that disclosure of all or even part of a social security number is an unwarranted invasion of an employee's privacy. Nor has the Union articulated how such information is necessary to prove its FLSA claim.

The STAR report also records, in addition to hours worked, an employee's annual leave, sick leave and "other" leave; it records the amount of such leave used in a

pay period and the balance available to an employee. An argument can be made that these numbers reveal private information, although I note that the Agency has not made this argument with any specificity. For example, an employee may have used a large amount of sick leave because of an illness he/she does not wish to disclose. While the form does not require the disclosure of an illness or injury, some employees might prefer that other people not know that an extended absence was recorded as sick leave. The mere recitation of hours of sick leave used or accumulated cannot be grouped with social security numbers or performance appraisals as serious invasions of privacy. Nevertheless, disclosure of this sort of information is likely to make many employees uncomfortable; it is the sort of information that some employees would resist disclosing to the public at large.

Weighed against these privacy concerns is the public's interest in having access to the information contained in the STAR reports. An immediate reaction might be that the public probably has little interest in seeing an individual employee's T&A report. However, the public may well have an interest in the information that could be derived from the cumulative information in all of an Agency's T&A reports, especially an Agency that is alleged to have failed to pay its employees proper compensation. One may ask: Would the public have an interest in seeing the results of a record analysis showing that the SBA has improperly excluded a large percentage of its work force from the compensation requirements of the FLSA, as the Union alleges? Would the STAR reports aid the public in understanding how much overtime has been worked by agency employees and the type of pay given to employees for that overtime?

In raising these questions, I am not suggesting that there is merit to the Union's allegations in its grievance. That determination must await the presentation of evidence at the hearing. However, the very questions that the Union raises about the way the SBA pays its employees is not merely a parochial interest. The public has an interest in knowing whether an agency's employees are completing their duties within the normal work week and, if not, whether they are paid an overtime rate for the hours beyond the normal work week. That information reflects on the agency's productivity, as well as its compliance with public law. If an agency has large numbers of employees engaged in large amounts of overtime work, those numbers may suggest to some people that the workforce is of insufficient size. If the public were to believe that a particular agency's employees were overworked and underpaid, then some might conclude that employees are likely to suffer from low morale and insufficient incentive to perform well. Other members of the public might believe that this information reflects a workforce of insufficient skill and motivation. Whatever one might read into this information, it is still information that is likely to be of interest to the public when it considers the workings of its government.

Justice Thomas in the DOD case put it colloquially: the public has an interest in knowing what its government is up to. That interest is not merely in knowing the results of an agency's work, but also how much work and money goes into achieving those results. The public has an interest in knowing how efficiently the results are achieved by an agency's workforce. The STAR reports, when analyzed cumulatively, can provide such information. In the scheme of things, such information may not rank high in voters'

concerns when they consider their electoral choices, but many people would find the STAR reports informative and useful in understanding how the SBA operates.

In sum, I conclude that employees have a privacy interest in some of the information in the STAR reports, but that there also is a public interest in most (but not all) of the information contained in those records. The outcome of the pending dispute with respect to the STAR reports is therefore dependant upon a balancing of those two interests. I conclude that, with respect to social security information and sick leave utilization, the employees' interests far outweigh the public's interest. The public has no legitimate need for social security numbers or records reflecting employees' illnesses or injuries. Absent employee consent, release of the STAR reports with social security numbers (whether whole or partial) and with sick leave data would constitute an unwarranted invasion of privacy that has no countervailing public interest. Moreover, the Union has not articulated any "necessity" in obtaining this information in the context of this grievance. Conversely, I conclude that public employees have no legitimate interest in maintaining the privacy of the hours they have worked on the public payroll and have only a minimal interest in information recording their utilization of annual leave or undefined "other" leave, as set forth in the STAR reports. Whatever privacy interests employees may have in these two categories of leave, they are outweighed by the public's interest in that same information.

The STAR reports are therefore not protected by the Privacy Act or FOIA Exemption 6 if social security and sick leave information is redacted. Once that information is removed, the reports can be released to the Union (subject to reasonable availability). Alternatively, if the Union were to obtain employee consent for release of

the STAR reports, then redaction of the reports as to those employees would be unnecessary prior to release.

3. T&A Worksheets

The T&A worksheet includes some of the same information provided in the STAR report pertaining to hours worked and leave taken. It also contains a block for a social security number and has fields for hours used and accumulated for each pay period in sick leave, AWOL, LWOP and "susp" status.

For the reasons stated above, employees have a privacy interest in social security numbers. Employees are also likely to have privacy interests in the disclosure of sick leave, AWOL, LWOP and time in a suspended status. I conclude that employees' privacy interests in these matters outweigh whatever interest the public might have. Moreover, the Union has made no showing that this information is necessary for the processing of its grievance.

In addition to the foregoing, the T&A worksheets contain fields of information that are abbreviated and/or not legible in the copies provided to me. Neither party has addressed those fields, and I am unable to assess the extent to which they implicate private or public interests. The information in those fields cannot be released until greater information is provided.

In sum, the T&A worksheets include information that must be redacted (social security information, sick leave, and hours in AWOL, LWOP or suspended status). I conclude that these records cannot be released in an unsanitized version without the consent of each employee. Once the information has been redacted, neither the Privacy Act nor FOIA would bar release of these records (although final release would

still need to await further clarification of the several fields in the form that are unclear or illegible).

C. Are the T&A/Overtime Records Reasonably Available?

Records are not "reasonably available" if they can be produced "only through extreme or excessive means." Social Security Administration and AFGE, Local 3302, 36 FLRA 943 (1990). The Fifth Circuit has suggested that this standard is too onerous. Department of Justice v. FLRA, 991 F.2d 285 (5th Cir. 1993). However, that Court noted that, under any standard, records would not be available if production would require an agency "to remove several employees from their regularly assigned duties for several weeks to search for, collect, collate, and redact thousands of pages of documents in various locations around the world." Id. at 291.

The Agency here argues that the T&A records are not reasonably available because they are dispersed across the country and because the task of obtaining, reviewing and sanitizing those documents for a 3½ year period would a "substantial effort requiring significant time and resources." Ag.Br. at 11-12. It rests this argument on an affidavit submitted by Richard Brechbiel, Chief Human Capital Officer for the SBA, which addresses both exempt and non-exempt employees. His affidavit avers, inter alia, the following:

a) The Agency employs approximately 155 timekeepers.

b) Each employee prepares and signs a T&A worksheet for submission to his/her supervisor. The supervisor then transmits the worksheet to the appropriate timekeeper.

c) The timekeepers create electronic T&A reports for each employee; after these reports are signed, they are transmitted to the National Finance Center, where they are stored electronically for 26 pay periods.

d) Timekeepers retain T&A files in hard copy for three years.

e) Neither the electronic nor hard copy versions of T&A records can be sanitized electronically by SBA timekeepers. To the extent that any information in a report needs to be redacted, it would have to be done manually.

f) It would take approximately 45 hours for each timekeeper to "identify, photocopy and ship T&A files" to the Office of Human Capital Management. This cost would be approximately $154,000.

g) Once the records are assembled the process of redacting all personal information would require the hiring of 40 contractors/employees; those persons would have to spend approximately four months to sanitize the records. This work would require the rental of additional office space and equipment.

h) The total cost to the Agency to perform the redactions would be in excess of $1 million.

The affidavit addresses only the T&A worksheets and the electronic T&A report; it does not address the Request for Overtime forms.

The Agency's argument that the T&A records are not "reasonably available" depends to a great extend on the contention that the documents would have to be sanitized in order to avoid violations of the Privacy Act and FOIA. The bulk of the time and cost of producing the requested records is the product of the redaction process. To the extent redactions are not required, then the time and expense of producing the

documents would be greatly reduced. The Union has indicated that it is willing to accept either sanitized or unsanitized versions of the requested records.

With respect to the Requests for Overtime, the Agency has advanced no argument against the availability of these documents. It has not indicated that it would be onerous to assemble and produce these records for non-exempt employees.[3] Since these documents do not need to be redacted, there is no evidence that the cost of production would be excessive or so difficult and time consuming as to make them functionally unavailable. Accordingly, I find that these documents, as they relate to non-exempt bargaining unit employees, are both necessary to the Union and reasonably available.[4]

The T&A worksheets lay at the other end of the spectrum of availability. The Affidavit from Richard Brechbiel, Chief Human Capital Officer for the Agency, asserts that the process of assembling and redacting these records would be a very arduous task, requiring many hours of work and considerable expense. However, Brechbiel's affidavit is premised on the need to sanitize and produce records for exempt, as well as non-exempt, employees. In light of my ruling on the bifurcation motion, there is no current need to produce these records for exempt employees. That production will be postponed until after I rule on the Union's claim that the exempt employees have been improperly classified.

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[3] As a result of my ruling on the motion to bifurcate, the Agency need not produce these documents for exempt employees at this time. See discussion infra.

[4] I note that the FLRA did not address these particular documents when it rejected the Union's ULP.

Brechbiel's affidavit does not segregate the time and expense of producing T&A worksheets for non-exempt employees (who appear to be far fewer in number than the exempt employees). Accordingly, I am holding in abeyance a decision on the production of these records for non-exempt employees until Brechbiel submits a new affidavit addressing the effort needed to produce and sanitize the T&A worksheets for just non-exempt employees; I will also wait until the Union has an opportunity to respond to the new affidavit. Brechbiel's affidavit should be submitted within 30 days of the date of this preliminary award. The Union will have 14 days thereafter to respond to the affidavit.

The STAR reports also need to be sanitized, but with fewer redactions than the T&A worksheets. Only the fields for social security numbers and sick leave would need to be redacted. The Agency contends, through Brechbiel's affidavit, that its employees are unable to perform these redactions by computer and therefore must engage in a document-by-document analysis by hand. It again contends that this process would be so expensive and require so much labor as to render the STAR reports functionally unavailable. In two respects, the Brechbiel affidavit does not satisfactorily resolve the question of the availability of the STAR reports.

First, the STAR reports are computer generated and maintained by the National Finance Center (NFC). While it may be that SBA employees are unable to redact the information by computer, the Agency has not indicated whether it can request the NFC to generate copies of these documents or compilations of the data in the documents with the two problematic fields (i.e., social security and sick leave) deleted. In this respect, I note that the NFC website has links for the production of various reports

requested by authorized users. The SBA is a "customer" of the NFC and presumably can request compilations of data on its employees. Until the Agency advises me whether the NFC can provide the kinds of data sought by the Union or sanitized STAR reports, I cannot determine whether these reports are reasonably available. The Agency is therefore directed to consult with the NFC and to provide to me and the Union a statement within 30 days of this preliminary award with representations about the capabilities of the NFC to generate redacted STAR reports or summaries of those reports. The Union will have 14 days thereafter in which to respond to the Agency's representations.

Second, Brechbiel's affidavit, insofar as it addresses the STAR reports, lumps all bargaining unit employees together – both exempt and non-exempt employees. For the reasons stated above, there is no need to produce the records for exempt employees at this time. Brechbiel's new affidavit, as directed above, should separately address the process for sanitizing and producing the STAR reports for non-exempt bargaining unit employees in the event that the NFC is unable to produce the sanitized records by computer processes.

D. Should This Award Be Designated a "Final Order"?

The Agency requests that I issue this decision as a "final order" so that it can then appeal the decision to the FLRA. My labeling this decision a "final order," even if I were so inclined, would make no difference to its essential character. This decision is not intended as a final order and cannot be misconstrued as one. I have no difficulty with the Agency seeking appellate redress from those aspect of this preliminary award with which it disagrees. However, if the Agency wishes to obtain judicial or FLRA relief

from provisions of this decision, it can make whatever legal arguments are available to it without enlisting my aid in an artifice.

* * * *

Finally, I note that, in a letter to the Union dated September 17, 2007, the Agency stated, inter alia:

> The Agency again offers to provide the following in response to the May 11, 2007, request, (which the Agency is not legally or contractually obligated to furnish), in return for the union furnishing the information requested by the Agency:
>
> 1. Time and attendance records, travel vouchers and credit card expenditures for unit employees that have submitted a signed release to the Agency allowing the disclosure of the above information to the Union for the period November 1, 2003 thru May 17, 2007....

The Agency thereby has suggested that it will not produce documents that it is legally obligated to disclose unless the Union reciprocates by producing records requested by the Agency. In fact, if the Union were to obtain a "signed release" from bargaining unit employees, then that action would remove the Privacy Act concerns that the Agency has raised. In that event, the Agency would be legally obligated under 5 U.S.C. §7114(b)(4) to release that information, as long as it is necessary and reasonably available. There is no quid pro quo in this legal obligation. The statute does not authorize the Agency to withhold information relating to employees who have given written consent to release of that information for the additional reason that it wishes to force the Union to produce other information.

I raise this point so it is clear that, in the event that the Union obtains written waivers from employees for release of the requested documents, the Agency should

produce the records for those employees forthwith, unless it can make a plausible argument why doing so would be too expensive or burdensome. [5]

Preliminary Award on Pending Discovery Issues

Upon consideration of the parties' arguments with respect to the Union's RFI dated May 11, 2007, the following summarizes my ruling:

1. The Request for Overtime forms for non-exempt bargaining unit employees should be released to the Union without any redactions.

2. The Agency will submit within 30 days of this preliminary award a new affidavit by Richard Brechbiel and an accompanying brief, which together address:

a. Whether the STAR reports for non-exempt bargaining unit employees can be produced by the NFC in expurgated form (i.e., without the social security and sick leave data) and, if so, the effort and expense required to do so.

b. If the NFC cannot redact the STAR reports for non-exempt employees by computer, representations as to the amount of time and the cost involved in the Agency's redaction of these reports by hand.

c. With respect to the T&A worksheets, an explanation of all fields and abbreviations in the form (accompanied by a legible copy of the form) and

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[5] If 10 employees, for example, were to provide written consent, the Agency would be hard-pressed to contend that time and attendance records were not reasonably available; it is unlikely that retrieval of the records for so few employees would entail much effort. Moreover, if those employees wished to pursue their FLSA claims and if the time and attendance records, when correlated with payroll records, were to show a failure to pay proper compensation for work performed, then those records would be necessary evidence in support of their claims. In this hypothetical scenario, it is difficult to understand how the Agency could refuse to produce the records. They could not refuse to produce them simply because the Agency wished to extract information from the Union.

representations as to the amount of time and the cost involved in the Agency's redaction of these reports for non-exempt employees by hand.

3. The records for exempt employees do not need to be produced at this time. If any of those employees are subsequently found to have been improperly classified as exempt, then the Union can renew its request for records on behalf of those employees.