



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

December 1, 2006

Michael J. Snider, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208

Re: FLSA Information Request Pursuant to 7114(b) of the Statute

Dear Mr. Snider:

This is in response to your letter dated November 1, 2006, in which you informed the Agency that Council 228 filed a grievance on behalf of all bargaining unit employees (BUEs). In this grievance, the Union alleges that the Agency violated the Fair Labor Standards Act (FLSA), the collective bargaining agreement and all other relevant and applicable law, rule and regulation when it allegedly: 1) Failed to properly classify BUEs as FLSA non-exempt; 2) Failed to pay proper compensation for overtime worked to BUEs; 3) Improperly offered BUEs compensatory time in lieu of overtime; and 4) Failed to pay suffered and permitted overtime to employees. In your letter you also requested that the Agency provide information pursuant to § 7114(b) in response to thirteen (13) separate requests.

I. The Request for Information

The Union has requested: 1) A list of all BUE's represented by the Union since 11/1/03, including first and last name, position title, Agency position number, job series, grade and step, FLSA exempt or non-exempt status, email address, business phone and business address; 2) A copy of each employees position description; 3) A copy of one SF-50 for each employee since 11/1/03; 4) A copy of all information relied upon to classify each employee as exempt from the FLSA, who is or was "exempt from the FLSA at anytime since 11/1/03 BUE; 5) A copy of any FLSA work sheets for each employee since 11/1/03; 6) The names of individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination; 7) A copy of any Agency FLSA consistency reviews since 2000; 8) A list of all overtime worked by each BUE since 11/1/03, by employee, grade and office location; 9) A list of all comp time worked by each BUE since 11/1/03; 10) A list of all credit hours worked by each BUE since 11/1/03; 11) A copy of all sign in/outs sheets maintained for any BUE since 11/1/03; 12) A copy of all scan in/out records maintained for any SBA office since 11/1/03; and 13) Identification of the precise exemption (i.e., Professional, administrative, executive) relied upon to exempt each "exempt" employee from FLSA.

Specifically, in your information request, you state:

The Union needs the requested information to prove the underlying facts and contentions in its Grievance. In particular, the union needs the information to show that the Agency improperly exempted many bargaining unit employees under the FLSA, underpaid or failed to pay proper overtime to those employees, and illegally offered comp time in lieu of overtime. The position descriptions are needed to show critical, essential and grade controlling duties of the positions, to show job duties of positions, to show the job duties have not changed and to show that the Grievants are and were improperly exempted. The Union needs a list of the individuals who denied the overtime to call them as witnesses and a list of employees to call them as witnesses. The SF-50's will show that the Grievants are improperly exempted and the Agency's exemption pattern was arbitrary, capricious and/or violative of the Agreement. Finally, the Union needs the rosters, overtime rosters and printouts of overtime worked to show damages to the Grievants. The requested information will further enable the Union to fulfill its representational duties to represent employees under the statute.

II. Applicable Law

Pursuant to 5 USC § 7114(b)(4), the Agency is required only to “[f]urnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is normally maintained by the Agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided from management officials or supervisors, relating to collective bargaining...” 5 USC § 7114(b)(4). (emphasis added).

The Federal Labor Relations Authority (FLRA or Authority) has found that information is *normally maintained* by an Agency, within the meaning of section 7114(b) (4) of the Statute, if the Agency possesses and maintains the information. Dept. of Health and Human Services, SSA, Baltimore, Maryland, 37 FLRA 1277 (1990). Also, the Authority has also found that information is “reasonably available” under section 7114(b) (4) when it is *accessible or attainable*. Dept. of Health and Human Services, Social Security Administration, 36 FLRA 943(1990).

To demonstrate that the information is necessary, a Union must 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. AFGE Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir 1998); IRS, Wash., D.C., and IRS, Kansas City Serv. Ctr., Kansas City, Mo., 50 F.L.R.A. 661, 669 (1995). The Authority requires unions to articulate particularized need to ensure that in cases like this, the employer has sufficient information about exactly why the union needs the information in order to weigh the Union's interest against any countervailing interest the employer might have in privacy and non-disclosure. AFGE 2343 v. FLRA, 144 F.3d 85, 330 U.S. App. D.C. 136 (1998).

An Agency is not required to provide data which is available through extreme or excessive means. HHS, SSA, 36 FLRA at 950. Moreover, the Statute does not require an Agency to create information or documents if they do not already exist or if the information is not maintained by the Agency. Section 7114(b) (4).

III. Agency Response

The Agency is denying the Union's request:

1. The information the Union is seeking is not normally maintained by the Agency and some of it does not even exist. Specifically, the Agency stopped maintaining sign in/out sheets back in April 2003, when the Union and the Agency entered into an MOU (Regarding Article 28, Performance Appraisal System) eliminating sign in/sign out sheets wherever they existed. Also, no information exists regarding Agency FLSA consistency reviews or information relied upon to classify each employee as "exempt" from the FLSA or FLSA worksheets or scan in/out records or identifiers for the precise exemption relied upon to exempt each "exempt employee from the FLSA.

2. The information the Union requests is not reasonably available. For the Agency to comply with this overbroad request, would be onerous and require extreme or excessive means to accomplish. It would be costly in terms of employee work hours and budget for the Agency to review over 2,500 Official Personal Folders including SF-50's, and position descriptions, as well as overtime, credit and comp time hours worked for 1,400 BUE's in over 70 District Offices and Servicing Centers throughout the country. The Agency's primary mission would be affected by compliance with such a request.

3. The Union has not demonstrated a particularized need for each separate piece of information requested. In fact, the Union has provided nothing more than general and conclusory assertions in the request. Merely stating "The Union needs the requested information to prove the underlying facts and contentions in its Grievance" and "The requested information will further enable the Union to fulfill its representational duties to represent employees under the statute" does not establish a particularized need. The Union cannot overcome the insufficiency of conclusory assertions by making several such assertions in the same request. Dep't of Health and Human Services, Soc. Sec. Admin., New York Region, New York, N.Y., 52 FLRA 1133, 1148 (1997).

Moreover, the Union has not requested information to determine whether a contract violation has occurred. Rather, the Union requested information to "prove the underlying facts and contentions in the grievance." Indeed, neither the Union grievance, nor the information request even cite to any contract provision. Thus, the Union has submitted an overly broad information request in the hope of possibly developing a case against the Agency. It is clear that the Union's request is nothing more than a fishing expedition. This is evident from the request on its face and because when the Union filed its FLSA Overtime Grievance on November 1, 2006, it had no evidence of an FLSA violation. On the same day that it submitted its grievance, it also submitted its information request. Furthermore, the fact that the Union emailed an FLSA

survey to SBA bargaining unit employees on November 27, 2006, and posted another email on SBA Gateway on November 30, 2006 regarding the survey, almost three weeks after filing the grievance clearly establishes that the Union's information request is nothing more than a fishing expedition. In fact, the Union states in its survey that "we're gathering information from all SBA employees which we will use to determine whether or not employees have been classified correctly by the SBA, according to the Fair Labor Standards Act" and "Our survey is designed to tell us whether SBA employees in your series should be classified as exempt, or reclassified to non-exempt, and therefore eligible to collect overtime pay." The Union's actions are contrary to, § 7114(b)(4) of the Statute, which is not the equivalent of discovery under the Federal Rules of Civil Procedure. The Union, in essence, is attempting to require the Agency to prove that it has not violated any laws or contract provisions and that is not the purpose of § 7114(b)(4). For example, a Union could merely allege that an Agency has violated the EEO laws and simultaneously request thousands of items that deal with any kind of personnel action (e.g. promotion, award, appraisal, detail, transfer, reassignment, leave approval/denial, training, acting designation etc.) that could have been taken over a period of an extended time period (e.g. 3-6 years) for all unit employees.

In addition, there is no particularized need for the time period of the request. The request is overbroad (covering between a three and six year period depending on the request) and not specific (Agency wide in some requests) and it is not limited to bargaining unit employees (bargaining and non-bargaining employees in some requests) or a group of BUE's in a particular division, office or region. The Authority has previously found that the mere existence of information spanning several years is insufficient to establish the necessity for information spanning those same years. *See, e.g., Customs Serv., 53 FLRA at 799 (1997)* (no need established for data covering a four-year period); *United States Dep't of Labor, Washington, D.C., 51 FLRA 462 (1995)* (DOL) (union failed to establish particularized need for information covering a five-year period). The Authority also has recognized, in such cases, that while *some* of a union's requested information may be necessary in order for representational purposes, a union seeking to establish a particularized need must show that *all* of the requested information is necessary. *See, e.g., DOL, 41 FLRA at 476. See also United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark., 57 FLRA 808, 814 (2002)*. The Union has failed to do this.

4. The Agency also has countervailing anti-disclosure interests. The private law firm, as the Union's agent, is requesting information that pertains to individual employees' work history and pay history. Employees have an interest in keeping these types of records confidential, whether or not the Agency maintains them under the Privacy Act. Indeed, an employee has a reasonable expectation that their work, time and attendance and pay records will be maintained in a confidential manner and used only for the purposes for which they are maintained. The Union's mere conclusory assertions of violations of law and contract, and the attempt to use the Statute as a civil action discovery tool do not outweigh these significant employee interests.

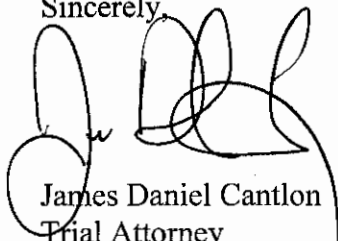
5. The requested information also is not disclosable because disclosure is contrary to law; *i.e.* the Privacy Act. The Privacy Act regulates the disclosure of any information contained in an Agency record within a system of records, (as those terms are defined in the Privacy Act)

that is retrieved by reference to an individual's name or some other personal identifier. 5 USC § 552a(4)(5). With certain enumerated exceptions, the Privacy Act prohibits the disclosure of personal information about federal employees without their consent. FAA, New York TRACON, Westbury, NY and National Air Traffic Controllers Association, 50 FLRA 338 (1995).

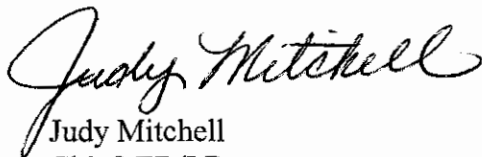
Exemption 6 of the Privacy Act provides that information contained in "personnel files" may be withheld if disclosure of the information would result in a clearly unwarranted invasion of personal privacy. 5 USC § 552(b)(6). The Union requests a copy of an employee's SF-50, which contains information in an Agency record within a system of records which is retrieved by reference to an individual's name or personal identifier such as a social security number. In addition, the SF-50's contains the name of the employee, his or her social security number, their date of birth and any adverse personnel action that may have been taken against them. For these reasons, the disclosure of this information would be an unwarranted invasion of personal privacy and implicate employee privacy interests.

For each of the above independent reasons, the Agency is denying your information request because the elements of § 7114(b)(4) of the Statute have not been met for each type of requested information.

Sincerely,



James Daniel Cantlon
Trial Attorney
Office of General Counsel



Judy Mitchell
Chief, ER/LR
Office of Human Capital Management