

## CHAPTER 8

### ACCESS TO AGENCY INFORMATION

A common saying in today's world is "INFORMATION IS POWER." Our society thrives on information. In business, as well as many personal transactions, the person who has acquired the most possible information on a subject will always get the best deal. Businesses gather information on their competitors to know how to win in the market or even take over the competitor; banks gather information on a loan applicant to determine whether he/she is a good credit risk; and smart car buyers study the new car price guides before they negotiate a deal with the car salesman.

The saying "INFORMATION IS POWER" also applies to your negotiations and grievances with your Agency. The most important step to a successful negotiation or grievance is to gather all the necessary and relevant information. By obtaining all the documents and information that exist pertaining to your issue, you will often prove that the agency has indeed violated the contract or discriminated in its promotion, evaluation or discipline practices. Complete disclosure of information can also help you narrow the issues to be grieved and even help evaluate the strength of the case to determine whether to file a grievance.

Usually, the information necessary to prove your position in a grievance or in negotiations is in the exclusive possession of management. However, there are some powerful tools available to force the Agency to supply the information to you. The Agency's obligation to supply information to NTEU is governed by three federal statutes:

- (1) Title VII of the Civil Service Reform Act (CSRA)--gives the union access to information relevant and necessary to carry out its duties as exclusive representative;
- (2) the Freedom of Information Act (FOIA), gives members of the public access to a great deal of information concerning the operations of the government; and
- (3) the Privacy Act gives individuals access to information about themselves collected and maintained by the government, but also may act to bar disclosure under the other two statutes.

Additionally, all the contracts negotiated by NTEU with federal agencies include provisions which expand the access rights of the respective units' employees. Refer to your unit's labor agreement in order to determine your specific contractual entitlements to agency information. Each of these statutory and contractual rights to access to information held by the agency has specific powers and limitations. Each has specific exemptions or defenses which allow the Agency to refuse to disclose requested information. Therefore, knowing which statute to use and how to draft your request in order to avoid the exemptions and defenses will often force the agency to turn over the very information needed to win the grievance or negotiations.

## I. THE CIVIL SERVICE REFORM ACT

The Civil Service Reform Act imposes a very specific and broad statutory obligation on agency management to supply NTEU the information that it requests. Under the CSRA, unions have a special status as the representative of bargaining unit employees. This special status requires that unions be furnished the information they need to adequately and fairly police and enforce their collective bargaining agreement and to perform their other representational duties. NTEU's right under the CSRA is therefore completely independent of any other statutory right to the information. Thus, the agency must provide the union information requested pursuant to the CSRA even if the union could request the information under FOIA, ATF and NTEU, 7 FLRA No. 102 (1982), or an employee has asserted his own right to information, such as in an MSPB proceeding, IRS, Western Region and NTEU, 9 FLRA No. 57 (1982), or even if the union could get the information from a source other than the agency. Department of the Navy and IFPTE, Local 16, 38 FLRA No. 1 (1990).

Section 7114(b)(4) of the CSRA states:

- (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 cases of an agency, to furnish to the exclusive 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; and
  - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

### A. TYPE OF INFORMATION AVAILABLE UNDER CSRA

1. "Data"

A request by the union pursuant to Section 7114(b)(4) applies to "data". While there is no definition of data in the Statute, the information requested is not limited only to documents, but can also be in the form of answers to specific questions. VA and AFGE, Local 3314, 28 FLRA 260 (1989). The duty to furnish requested "data" may even require the Agency to create a new document if the Agency possesses the information needed to create the document. This issue will usually arise where the union has requested "lists" of specific information.

For example, in AFLC and AFGE, Local 1857, 37 FLRA 987 (1990), the Union requested a list of Temporary Duty Assignments for all employees over a period of time. Although, no such list existed, the list could be created by checking each employee's individual records for TDY assignments. Also, the name of a witness was held to be "data" disclosable to the union. Department of Navy, 9-CA-90307 (decision of ALJ Chaitovits, June 14, 1990.)

The union's access to "data" under 7114(b)(4) is thus broader than access the Freedom Of Information Act, which provides access to "agency records", since FOIA does not obligate the agency to create documents which do not exist. (As discussed later in this Chapter, Section 7114(b)(4) requires that the requested information be "relevant and necessary" to the Union's representation function, which is not required under the FOIA).

2. Normally maintained

Data requested under 7114(b)(4) must be turned over to the union if it is "normally maintained" by the agency. Data is normally maintained if the agency actually possesses the data and maintains possession in the regular course of business.

Investigative reports and exhibits relevant to an investigation conducted by another agency, such as the Office of the Inspector General on behalf of an agency, which can be released to the agency upon request are considered data within the control of the Agency and normally maintained within the meaning of section 7114(b)(4). U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 51 FLRA 1467, 1472 (1996) (INS I), reconsideration denied, 52 FLRA 1323 (1997), (INS II).

Where an individual management official maintains information for his or her own personal use it may be obtainable as “data” under the Statute. In SSA and AFGE, 37 FLRA 1277 (1990), the FLRA held that handwritten “memory joggers” written and maintained by a supervisor at the instruction of his supervisor were “normally maintained” for purposes of 7114(b)(4).

Generally, if an agency admits that it has actual possession of the requested data but tries to argue that the data is not “normally maintained” it will not prevail. For example, where the Agency specifically compiled a report in response to a grievance, it was deemed normally maintained. Department of Veterans Affairs, VA Regional Office, Waco, TX and AFGE, Local 2571, 90 FLRR 1-4075 (1990). However, if the agency claims that it does not possess the requested data the burden will be upon the Union to prove that assertion false.

Also, the Statute does not require that the requested information be completely maintained in one location. Internal Revenue Service, Western Region, 9 FLRA 480 (1982); see also, Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, MD and NWSEO, MEBA, 38 FLRA 120 (1990). Nor does the Statute require that a union request information from the local document custodian. Department of the Treasury, U.S. Customs Service and NTEU, 83 FLRR 1-4059 (1983). Finally, the information need not be in one document or in the form requested by the union, so long as the agency actually possesses the information. See, AFLC, 37 FLRA 987 (1990).

3. Reasonably available

The CSRA obligates the agency to provide only data which is reasonably available. As discussed above, the CSRA is not limited to documents which already exist, but instead may actually require the agency to create documents from data it maintains in other forms. Two issues, burdensomeness and costs, usually arise when an agency asserts that requested information is not reasonably available.

a. Burdensomeness of compliance

To date, the FLRA has been very restrictive in allowing agencies to avoid providing information by claiming that the burden is too great. Agencies must show that providing the information requires “extreme or excessive means.” Whether extreme or excessive means are required is determined on a case-by-case basis. The

following cases show how difficult it is for agencies to meet the "extreme or excessive" means test:

- a request requiring the agency to produce 1,500 pages of material was not burdensome. NTEU and HHS, HCFA, 21 FLRA No. 60 (1986).
- a request requiring the agency to write new computer program to extract the requested information from data base, was not burdensome. AFLC and AFGE, 28 FLRA No. 44 (1987).
- a request requiring the agency to review copies of 20,000 travel vouchers, taking one employee up to three weeks to complete, while "somewhat onerous" was not so extreme or excessive as to justify refusal to comply. HHS, SSA and AFGE, Local 3302, 36 FLRA No. 89 (1990).
- a request requiring 150 employee hours to compile the information was not burdensome. AFLC and AFGE, Local 1857, 37 FLRA No. 82 (1990).
- a request for two weeks of tapes documenting an air traffic controller's performance was not unduly burdensome. Federal Aviation Administration, Washington, DC and FAA, MDH-ATCT, Southern Illinois Airport, Murphysboro, IL. And NATCA, 92 FLRR 1-4013 (1992).

b. Costs

Unlike under the FOIA, an agency must bear the costs associated with supplying the information requested under 7114(b)(4). U.S. Forces, Korea and NFFE, 15 FLRA No. 79 (1984). But the costs of supplying the information may be make the requested information not reasonably available, subject to the "extreme or excessive" test. See, AFLC and AFGE, Local 1857, supra, (cost of \$1,500 or more to comply held not burdensome to the agency.)

Information spanning four years, retrieval of which would cost approximately \$19,000, was not reasonably available. The union sought information concerning the grade and step of each employee before and after demotion, which showed each employee's age, sex race, and national origin to ascertain if a

pattern and practice of discrimination had occurred. U.S. Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana and NTEU, Chapter 168, 53 FLRA NO. 67 ((1997).

Where information is accessible under both 7114(b)(4) and FOIA, the information should be requested under 7114(b)(4). The agency cannot require the union to request information under FOIA in an attempt to collect the costs of providing the information.

4. Necessary

The agency must provide all requested information which is "necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining". 7114(b)(4)(B)(emphasis added). This means that an agency must furnish information that is necessary for the union to carry out "the full range of union responsibilities in both the negotiation and the administration of a labor agreement". AFGE, Local 1345 v. FLRA, 793 F.2d 1360 (D.C. Cir. 1986), order dismissing complaint vacated 25 FLRA 1060 (1987); See also Federal Aviation Administration and NATCA, Tampa, Birmingham, Roanoke, Salt Lake city, ZJX, MIA ORF, ZDU Locals, 55 FLRA 254 (1999). These responsibilities include investigating and prosecuting grievances, negotiating term contracts and mid-term issues, and enforcing negotiated agreements, among other things.

Requested information must not only be relevant but "necessary" to the union's performance of its representational functions. For requested information to be necessary, a union must demonstrate a "particularized need" for the information.

Showing a particularized need requires more than a demonstration of mere usefulness or conclusory, bare assertions that information is needed. The request must articulate with specificity: (1) why the information is needed; (2) the uses to which the union will put the information; and, (3) the connection between these uses and the union's representational responsibilities. Unions do not, however, have to reveal strategies or grievants' identities in making this showing. IRS, Kansas City, 50 FLRA 661.

Where a union seeks information spanning a long period of time and or for a broad geographical region, it must articulate reasons for the *scope* of the request. INS, 51 FLRA 1467. In other words, the union must explain why

it needs the information for the identified time frame and geographic areas covered by the request. U.S. Border Patrol, Tucson Sector, Tucson, Arizona, 52 FLRA 1231, 1239 (1997).

Once the particularized need is shown, it will be weighed against an agency's reasons for not wanting to disclose the information. Like the union's responsibility to establish a particularized need for the information, agencies must articulate their anti-disclosure interests with specificity. Conclusory statements will not suffice. IRS, Kansas City.

Under this new standard, when drafting an information request, it is important that chapters specify why they want the information. Chapters should explain that the requested information is related to a contemplated or pending grievance or negotiation subject, and explain why it is needed for the grievance or bargaining. Simply stating that it is needed for the union to perform its representational responsibilities is not sufficient.

a). Grievance related requests

Under 7114(b)(4), an agency is obligated to provide information which will assist the union in evaluating and processing a grievance. See, AFGE v. FLRA, 793 F.2d 1360, 1363 (D.C. Cir. 1986). This obligation also includes furnishing information which will allow the union to determine whether to even file a grievance. See, Department of Army and AFGE, Local 1770, 34 FLRA No. 79 (1990), Veterans Administration and NFFE, Local 589, 32 FLRA 133 (1988). Asserting that a matter is not grievable is not an excuse for refusing to provide the information. Department of the Army, 34 FLRA No. 79 (1990).

b). Bargaining related requests

A union has the right to information needed for negotiations. GSA and AFGE Council 236, 19 FLRA 418 (1985). Agencies must provide information unions need to decide whether to invoke to bargaining as well as to assist unions in formulating their bargaining positions and drafting actual proposals.

c). Examples of "necessary" information

- 1) list of every employee by name, sex, race, title, position was necessary to determine whether agency discriminated in promotion practices. Veterans Administrative and NFFE, Local 589, 32 FLRA No. 19 (1988).
- 2) information concerning discipline of management officials and supervisors was necessary to establish whether a bargaining unit employee was disciplined more severely than supervisory employees for similar misconduct. DODDS and OEA, 28 FLRA 202 (1982).
- 3) copy of promotion file including qualifications of selectee was necessary to determine if selection was open to challenge. U.S. Department of Defense and NAGE, 31 FLRA No. 55 (1988).
- 4) performance appraisal documents of selectee were necessary to determine whether selection process was fair and in accordance with established procedures. Internal Revenue Service, Omaha District and NTEU, 25 FLRA 181 (1987).
- 5) promotion file for a non-bargaining unit position was necessary to determine whether to file grievance over evaluation and ranking of bargaining unit employee. Agency may not refuse to furnish information solely on the grounds that it involves a non-bargaining unit position. Department of the Army, Fort Bragg and AFGE, Local 1770, 34 FLRA No. 79 (1990). Mere assertion of non-grievability by agency will not defeat union's right to information to determine whether to file a grievance.
- 6) copy of questions used by interview panel in a merit promotion was necessary for grievance over rating by the panel. Department of Defense Maxwell AFB and AFGE, Local 997, 36 FLRA No. 13 (1990).
- 7) performance appraisals of all employees in journeyman position were necessary to determine whether potential grievant was treated disparately with respect to his

performance appraisal. Department of Justice INS and AFGE, 37 FLRA No. 110 (1990)

- 8) list of names of all bargaining unit employees who received awards or outstanding ratings was necessary to monitor agency's compliance with performance appraisal and awards system. Department of Commerce, National Weather Service, 38 FLRA No. 16 (1990).
- 9) documentation concerning disciplinary action taken against specifically named supervisor who allegedly used physical force against a bargaining unit employee was necessary for grievance by that employee requesting as remedy that supervisor be disciplined. [NOTE: information ordered disclosed even though agency alleged non-grievability and that the remedy was beyond power of arbitrator to grant.] Air Force, Scott AFB and NAGE, Local R7-23, 38 FLRA No. 42 (1990).
- 10) data concerning all employees in an IRS Region disciplined for specific rule of conduct violation was necessary where contract covering nationwide unit required consistency of penalty for same or similar offense. IRS, and NTEU, OALJ 90-109 (decision of Judge Samuel Chaitovitz, September 25, 1990). See also, IRS Western Region, 9 FLRA 480 (1982).
- 11) a copy of a safety study was necessary to determine whether to file a grievance alleging toxic chemicals in the shop were causing serious medical problems to employees. Department of Air Force and AFGE, Local 1592, 90 FLRA-4065 (decision of ALJ Eli Nash, February 26, 1990).
- 12) crediting plans were necessary for union to process grievances over merit promotion selections. Department of the Army, Fort Bragg and AFGE, Local 1770, 26 FLRA 407 (1987). See also, NTEU and Customs Service, [arbitrator Abrams (October 3, 1990)] NTEU A-1294 and A-1295.

- 13) leases between GSA and private landlords for all district posts of duty necessary to determine whether to file grievance over health and safety issues. IRS, Chicago and NTEU, Chapter 10, 5-CA-70055 (decision of ALJ Arrigo,1987)
  - 14) investigatory and disciplinary policy documents to show how investigations should be conducted and how cases are referred to an agency's investigatory arm. U.S. Department of Justice Federal Bureau of Prisons, Federal Correctional Institution Forrest City, AR and AFGE, Local 0922, 57 FLRA No. 179, 102 FLRR 1-1087, (2002).
  - 15) a performance appraisal for a single employee was necessary where the grievant and the other employee were the only two individuals to perform the same duties in the same position. Internal Revenue Service, Washington, DC and Internal Revenue, Kansas City Service Center, Kansas City, MO and NTEU and NTEU, Chapter 66, 50 FLRA 661, 95 FLRR 1-1072.
- d). Examples where information not "necessary"
- 1) data regarding agency expenses for office furniture did not bear directly on bargainable issues and was therefore not necessary to the parties' negotiations. SSA, and DHA, 19 FLRA No. 47 (1985).
  - 2) copy of investigation report, interview notes and documents in investigatory file concerning an active internal affairs investigations were not necessary for the union to obtain in order to carry out its representational responsibility at investigatory interview. The union could carry out its responsibility to assist the employee during the interview without access to this information. But the union was entitled to the information after discipline against the employee had been proposed, FAA and NAATS, 35 FLRA No. 73 (1990).

3) a bare assertion by the union that the requested information is necessary does not require the agency to supply it. AAES and AFGE, Local 1345, 17 FLRA No. 92 (1985) [NOTE: a request which lacks specificity can be clarified to correct any defects.]

4) Unsanitized suspension records dating back five years requested to ensure consistency in disciplinary actions were not necessary. There was no showing why five years of records were necessary and why unsanitized records were necessary. (See related discussion regarding Privacy Act implications of unsanitized records, below.) DOL, Washington, D.C., 51 FLRA No.41.

5). Other agency defenses to 7114(b)(4) requests

Even if the information requested is normally maintained, reasonably available and necessary for the union to discharge its representational function, it can nonetheless be withheld by the Agency if:

(1) the data requested constitutes guidance, advice, counsel or training provided by management officials or supervisors, relating to collective bargaining; or

(2) the disclosure of the requested data would be otherwise prohibited by law (i.e. violate some specific statutory prohibition against disclosure).

Both of these provisions have been narrowly construed by the FLRA and have rarely been used successfully by an agency to prevent disclosure.

a) Guidance relating to collective bargaining:

This exemption from disclosure was designed to protect agency bargaining and litigation strategies from disclosure. The restriction applies only to information which contains guidance, advice, counsel, or training for management officials relating “specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or a ULP charge

should be handled; and (4) other labor-management interactions which have an impact on the union's status..." NLRB v. FLRA, 92 FLRR 1-8001 (1992).

- memoranda written by Labor Relations Officer concerning general position for the agency to take with the union was held as protected advice. Department of Commerce, 30 FLRA 127 (1987).

- memoranda written by specific employee's supervisor concerning the employee's request for part-time employment (including supervisor's discussion of decision to deny the request) was not guidance, advice concerning collective bargaining. NLRB and NLRBU, 38 FLRA No. 48(1990).

- memoranda containing factual descriptions rather than advice are not guidance concerning collective bargaining, Department of Commerce, 30 FLRA 127 (1987).

b) disclosure otherwise prohibited by law.

"clearly unwarranted" invasions of personal privacy

Generally, this exception to disclosure is raised by agencies when unions request data covered by the Privacy Act, such as disciplinary records, performance appraisals and employee home addresses. As discussed below, the Privacy Act generally prohibits the release of personal information of this nature without the consent of the record's subject.

In deciding whether information covered by the Privacy Act must be provided, the FLRA will first require agencies to show:

- 1) the requested information is contained in systems of records under the Privacy Act;
- 2) disclosure would implicate the privacy interests of employees; and,
- 3) the nature and significance of those interests.

Then, the requesting union must:

- 1) identify the public's interest (as opposed to the union's interest) in disclosure; and
- 2) how disclosure will serve the public interest.

Stated another way, the union must explain how the disclosure of the information would shed light on the agency's performance of its statutory duties or otherwise let the public know what their government is up to.

The FLRA will then "balance" the privacy interest at stake against the public's interest to determine if disclosure will result in a clearly unwarranted invasion of the privacy of the record(s) subjects. If not, it must be disclosed. FAA, Westbury, 50 FLRA 338.

Examples of information barred from disclosure under the balancing test are:

- unsanitized disciplinary records may be barred from disclosure, DOL, Washington, D.C., 51 FLRA No. 41 (1995);
- unsanitized performance appraisals, FAA, Little Rock, 51 FLRA No.24 (1995);
- employee performance ratings requested prior to a RIF are barred by the Privacy Act, Army and Air Force Exchange Service, Waco Distribution Center, Waco, TX and AFGE, Local 4042, 53 FLRA 749 (1997);
- the names of employees investigated but not disciplined for patient abuse, VA Medical Center, Dallas, TX and AFGE Local 2437, 51 FLRA 945 (1996).

To avoid privacy objections to information requests, ask for the records (e.g., performance appraisals) with the employee's names sanitized. If you are asking for more than one set of records, ask that an identifying number or letter be assigned for each employee and that records be correlated to that identifying number or letter. (See HCFA and AFGE Local 1923, 56 FLRA 503 (2000), applications and rating and ranking materials for external

applicants not barred from disclosure when requested in sanitized form.)

If the agency raises privacy objections to a request, don't overlook questioning whether any significant employee privacy interests are even implicated. For example, if you are requesting access to case files worked by other employees, it is unlikely other employee privacy interests are at stake.

Other FOIA that exemptions may also bar release of information:

The identity of a confidential source and information provided to an agency by a criminal law enforcement authority in the course of a criminal investigation was exempt from disclosure under Exemption 7 of the FOIA, barring the release of records compiled for law enforcement purposes (with certain limitations). Warren AFB and AFGE Local 2354, 44 FLRA 452 (1992).

But materials related to a decision to remove an employee were not barred from disclosure under Exemption 5, the so-called "deliberative process" exemption, because it only applies to deliberations over the formation of agency policy, not individual personnel actions. IRS, Chicago and NTEU Ch. 10, 40 FLRA 1070 (1991).

B. WRITING A 7114(b)(4) REQUEST

1. The letter should be:
  - a. typewritten;
  - b. dated;
  - c. specific (failure to be specific may result in rejection. See, U.S. Air Force v. AFGE, 6 FLRA No. 24 (1981));
    - (i) the letter should concisely but completely explain why the information is needed and how it will be used to perform the representational responsibilities;
    - (ii) if the requests spans a long period of time and or a wide geographic area, the letter should provide reasons for the scope of the request;
    - (iii) the letter should request that management respond by a specific date and invite the responder to directly contact the requestor with any questions or concerns;
    - (iv) the letter should request specific reasons and statutory and or

- regulatory citation(s) justifying a denial of any part or all of the request; and
  - (v) the letter should request the name and title of the official denying any portion of the request.
  - d. signed by the author and include the requestor's address and telephone number.
2. Retain a copy of the request and response letters.

### C. CHALLENGING DENIALS OF INFORMATION REQUESTS

1. An improper denial of a union's request for information is an unfair labor practice (ULP), since such conduct violates 5 U.S.C. Section 7116(a)(1)(5) and (8).
2. Untimely responses also violate the Statute. For example, a delay of nine months in furnishing information was untimely and violated the statute. Department of the Treasury, U.S. Customs Service, Southwest Region, Houston, TX and NTEU, 43 FLRA 1362 (1992). A timely response to an information request is required even if the requested information is not releasable. DHHS, SSA and AFGE Local 3369, 52 FLRA 1133 (1997)
3. If the agency refuses to provide requested information, follow up to clarify the basis for the denial if it is unclear. If the agency claims that you have not stated a "particularized need" for the information, ask what more the agency needs to know and provide that information. Be sure to take notes of the discussion and record the date it occurred. The FLRA expects both unions and agencies to try to work out their differences over disclosing requested information, before formalizing the dispute. IRS, Kansas City, 50 FLRA 661.
4. Contact your National Field Representative for advice if your information request has been denied. The union may file a ULP, or a grievance, or a motion to compel production of the data to an arbitrator. See, IRS, Indianapolis District and NTEU Chapter 49, (Arb. Goldman, 1987) NTEU A-774. Discuss the method of enforcement with your field representative before filing a grievance.

### II. FREEDOM OF INFORMATION ACT (FOIA)

The Freedom Of Information Act (FOIA), 5 U.S.C. 552 et seq., is a statute which generally allows citizens access to government records. The FOIA assumes that the government

and the information held by the government belong to the citizens. Requests for information under FOIA are quite different from information requests under the CSRA discussed above. Knowing the basic distinctions and when to use each may be the difference in whether you receive the information.

A. STATUS OF THE REQUESTOR

Under the FOIA "any person" (i.e. an individual or organization) may make a request. This is different from a CSRA request which is only available for unions to request information from the agency where the union represents the employees. If a union chooses to request information under FOIA it stands in the shoes of a member of the general public when it makes such a request. It has no greater right to the records under FOIA than an average member of the public. ATF and NTEU, 18 FLRA No. 74 (1985); Constangy, Brooks and Smith v. NLRB, 851 F.2d 839 (6th Cir. 1988). The fact that the union may have a crucial "need" for the information is not relevant. Under the FOIA, the identity of the requestor is irrelevant to the determination of whether the information will be provided. [NOTE: if the information needed is "necessary" for the union to carry out its representational responsibilities the request should be a 7114(b)(4) request rather than a FOIA request.]

B. TYPE OF INFORMATION AVAILABLE

The FOIA applies to "records" in the control of administrative agencies of the executive branch of the federal government. The range of records available to the general public through FOIA is quite extensive, although the FOIA allows agencies to refuse to provide nine categories of records. [See below for further discussion of the exemptions.] But since the FOIA is primarily a "disclosure" statute, an agency's exemption authority is limited. The burden is upon the agency to prove that one of nine exemptions actually applies to the request. See, Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), cert. denied sub nom, Irons v. Parker, 434 U.S. 965 (1977). If only a part of a requested record is exempt, and that part can be deleted, the rest of the record must be provided to the requestor. EPA v. Mink, 410 U.S. 73, 91 (1973).

C. EXAMPLES OF INFORMATION RECEIVED UNDER FOIA

Occasionally, NTEU may want information that it cannot obtain through a Section 7114(b)(4) request, because it is not needed to perform collective bargaining functions. Therefore, NTEU has resorted to a FOIA request. The following are examples of information NTEU has obtained through the FOIA.

- Information about discipline of high level Agency officials, with personal identifiers redacted
- PMRS evaluations of supervisors (sanitized)
- memoranda on disciplinary proceedings within the IRS. See, Chamberlain v. Kurtz, 589 F. 2d 827 (5th Cir. 1979), cert. denied 444 U.S. 842 (1980)

#### D. EXEMPTIONS UNDER FOIA

Only a few of the FOIA exemptions will be relevant to a FOIA request which NTEU would make:

Exemption 2: exempts from FOIA disclosure matters "related solely to the internal personnel rules and practices of an agency"

- applies to minor or trivial matters of little or no public interest. See, Department of Air Force v. Rose, 425 U.S. 352 (1976), holding that case summaries of ethics violations could not be withhold under exemption 2.
- may apply where disclosure of substantive internal matters would allow circumvention of a statute or agency regulation. See, NTEU v. Customs Service, 802 F.2d 525 (D.C. Cir. 1986).

Exemption 5: "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency"

- under this exemption fall certain internal government communications -chiefly deliberative memos, advisory opinions and recommendations prepared to help in decision making. Wolfe v. HHS, 839 F.2d 768 (D.C. Cir. 1988)(en banc.) However, if an agency, in making a final decision, chooses expressly to adopt or incorporate by reference a pre-decisional recommendation, that document loses its protection under Exemption 5. NLRB v. Sears Roebuck, Inc. 421 U.S. 132, 161 (1975). Even if a document is pre-decisional, the exemption applies only to the "opinion" portion of the document, and not to the factual, investigative aspects of the document. Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854 (1980).

- As noted earlier, unlike FOIA the CSRA does not have a "deliberative process" exemption to disclosure. Data otherwise available under the CSRS can only be withheld if it constitutes guidance, advice or training for collective bargaining. See, NLRB and NLRBU, 38 FLRA No. 48 (1990).

Exemption 6; personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.

- This exemption requires a balancing test between the right to privacy and the public's interest in the release of the material. Further, the public interest must be viewed in light of the purpose of FOIA which is exposure of the workings of the government to public scrutiny. Reporters Committee, 109 S.Ct. 1468, (1989); U.S. Dept. of Defense v. FLRA, 94 FLRR 1-8002 (1994).

Exemption 7: records or information compiled for law enforcement purposes, but only to the extent that the production of the information would: interfere with enforcement proceedings; deprive a person of a fair trial; disclose the identify of a confidential source of information who furnished the information on a confidential basis; disclose law enforcement techniques that could lead to circumvention of the law; or endanger the safety of any individual.

#### E. FEE WAIVER

The FOIA allows the agency to assess fees for costs of retrieving and copying requested documents. The Act also provides that fees may be waived where two basic requirements have been met.

1. the disclosure of the requested information must be in the public interest; and
2. disclosure of the information "is not primarily in the commercial interest of the requestor."

To establish the request promotes the public interest, the following criteria should be addressed in the request with something more than conclusory statements:

- the requested information must specifically concern identifiable "operations or activities of the government."

- the disclosable portions of the requested information must be meaningfully informative about those operations or activities. Larson v. CIA, 843 F.2d 1481, 1482 (D.C. Cir. 1988). Thus, requests for information already in the public domain would likely not meet the test. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9th Cir. 1987).
- the disclosure must contribute to the understanding of the public at large, as opposed to a narrow segment of interested persons. NTEU v. Griffin, 811 F.2d 648 (court rejected NTEU's suggestion that its size insures that any benefit to it amounts to a public benefit.)
- the requestor (e.g., NTEU) must show an expertise in the subject area of the request and an ability and intention to disseminate the information to the general public. Larson v. CIA, 843 F.2d at 1483 (D.C. Cir. 1988)(inability to widely disseminate information is a sufficient basis for denying fee waiver request.)

After addressing the "public interest" standard, a fee waiver request must establish why the request is not primarily in the requestor's commercial interest (because the public should not foot the bill unless it will be the primary beneficiary of the disclosure). Burris v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981). Non-profit status alone is not enough to make disclosure primarily in the public interest. Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987). In other words, if NTEU is the requestor, the request must explain why the public will benefit more from the disclosure of the information than NTEU, as an institution, will benefit. The agency may not refuse to waive fees simply because the request is burdensome. Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979).

#### F. CHALLENGING A DENIAL

An agency denial must provide the reasons for the denial, notice of your right to appeal the denial, and the name and position of the person responsible for the denial. 5 U.S.C. 552(a)(6)(A)(I) and (a)(6)(C). If the FOIA request is denied or not responded to, you should do the following:

1. Send an appeal letter to the person or office specified in the agency's reply. If instructions are not provided, send your appeal to the head of the agency.
2. In the appeal letter, identify what you are appealing. Develop as strong a case as possible supporting your right to know. If possible, cite relevant court decisions supporting your right to the information.

3. Include with your appeal a copy of the rejection letter and your original request.
4. File your appeal in compliance with subject agency's established time limits. If you have not received a reply within twenty (20) days of filing your appeal, contact your field representative for information on your right to appeal to the courts.

### III. PRIVACY ACT

The Privacy Act of 1974 was enacted to give citizens more control over the type of information collected by the federal government about them and the manner in which that information was used. The Act's central provision is Section 552a(d)(1), which provides that each agency maintaining a system of records must:

upon request by an individual to gain access to this record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him...

No reason for the request need be given or should be sought. FTC v. Shaffner, 626 F.2d 32 (7th Cir. July 14, 1980).

#### A. PROTECTIONS

The Privacy Act achieves its objective through the following protections:

1. Agencies must publicly report the existence of all systems of records maintained on individuals.
2. Information contained in these record systems must be accurate, complete, relevant, and up-to-date.
3. Procedures through which individuals can inspect records and correct inaccuracies about themselves in federal files must be established by agencies.
4. Information gathered about an individual for one purpose cannot be used for another purpose without that individual's consent.
5. Agencies must maintain an accurate accounting of the disclosure of records and, with certain exceptions, make those disclosures available to the subject of the record.

6. Agencies must collect information to the greatest extent practicable directly from the subject individual in most situations. For example, a court awarded damages for mental distress resulting from an improper, secret investigation that violated this requirement, found at section 552 a(e)(2). The agency did not interview the employee until three years after beginning the investigation, when it began speaking to a number of third parties. Johnson v. IRS, 700 F.2d 971 (1983).
7. Records about an individual cannot be disclosed to others without that individual's written consent, with certain exceptions.
8. Violations of the Act can be enforced in federal court or through the negotiated grievance procedure.

B. TYPE OF INFORMATION AVAILABLE

1. The Privacy Act applies only to personal records maintained by agencies of the executive branch of the federal government. Through the Act, an individual can obtain access to personal records concerning him or herself.
2. Agencies are required to release records to the requestor in a form which is comprehensible. For example, all computer codes and unintelligible notes must be translated into understandable language.

C. FEES

Under the Privacy Act, agencies are permitted to charge a fee to cover the actual cost of copying records. However, an agency cannot charge for locating or preparing the records for inspection.

D. EXEMPTIONS

Certain systems of agency records can be exempted from disclosure. Each agency is required to publish annually in the Federal Register the existence and characteristics of all records systems, including those which have been exempted from access.

E. WRITING A REQUEST

1. The letter should be:
  - a. typewritten;
  - b. dated;
  - c. complete;
  - d. concise;

- e. specific;
  - f. signed by the author;
  - g. addressed to the head of the agency which maintains the requested records or a designated official;
  - h. clearly identified as a PRIVACY ACT RECORDS REQUEST and identify the records you want;
2. The letter should:
- a. describe as accurately and specifically as possible the record(s) you want;
  - b. clearly establish your identity. For example, you might consider having your signature notarized or including your SSN if it will facilitate record retrieval;
  - c. include your address;
  - d. request that the agency inform you of the processing costs before they fill your request. Alternatively, you may want to consider informing the agency to process your request, if the cost will not exceed a certain amount;
  - e. request the identification of the specific exemption(s) under which records related to each part of the request are being denied;
  - f. request the name and title of the official denying any portion of the request;
  - g. request that the agency inform you of the procedures for appealing a denial.

#### F. CHALLENGING A DENIAL

The Privacy Act does not contain standard procedures for appealing denials. Therefore, you should determine and use the procedure developed by the particular agency to whom the request was originally sent. If such instructions are not provided, send a letter of appeal to the head of the subject agency. Your letter should include a copy of both the rejection letter and your original request. A denial can always be challenged through the negotiated grievance procedure.

#### IV. RELATIONSHIP OF SECTION 7114 TO PRIVACY ACT AND FOIA

As one can see, these three statutes are interrelated. Often information could be requested under both section 7114 and the FOIA, but the Privacy Act may limit the type of information available under either law. Of the three statutes, the most valuable to the NTEU chapter representative is section 7114(b)(4) because the vast majority of information the representative needs will be relevant and necessary to a grievance, potential grievance or collective bargaining. Therefore, the first consideration should be to seek information under section 7114.

## V. MEMBERSHIP AND ACCESS TO INFORMATION

The aggressive use of information access rights, coupled with publicizing the information obtained, can boost membership. Frequently, the information that is uncovered through a thorough and persistent use of your access to information rights will provide "the winning hand" in both grievances and mid-contract negotiations.

Request Filed Under  
5 U.S.C. 7114(b)(4)

Monte Mall  
Chief, Inspectional Services  
Department of the Treasury  
1234 Backwater Street  
Reno, Arkansas 50001

Mr. Mall:

In accordance with 5 U.S.C. 7114(b)(4) and Article \_\_\_\_, Sections \_\_\_\_ and \_\_\_\_, of the NTEU Agency Agreement, I request to be given the following information:

1. (At this point, identify the data, documents or records that you believe are maintained by the agency and which are necessary to investigate a potential grievance, prepare or process a grievance at any stage, including arbitration, or conduct negotiations. All requests should identify a specific and well defined issue.)

I need this information because...(specify why it is necessary, eg., performance appraisals of each employee in group to determine if management consistently applied the elements and standards for a job).

I request that this data be furnished to me no later than five (5) days after you receive this letter.

If this request is denied, in whole or in part, please inform me, in writing, of the name, position title, and grade of the official making that decision and the specific statutory, regulatory, or contractual citation(s) on which that decision is based.

If you have any questions or concerns about this request, please contact me directly at \_\_\_\_\_.

Sincerely,

Keith Parker  
President  
NTEU Chapter 550

cc: National Field Representative  
4/90

Joyce V. Patten  
FOIA Disclosure Officer  
Department of Health and Human Services  
5678 Main Street  
Washington, D.C. 80000

Re: FOIA Request

Dear Ms. Patten:

Pursuant to my rights under the freedom of Information Act, 5 U.S.C. Section 552, as amended, I hereby request a copy of the following information:

(At this point, include a clear description of the information being requested.)

If all or any part of my request is denied, please list the specific exemption(s) which are being claimed to withhold information. In addition, should you determine that some portions of the requested material are exempt, I shall expect, as the Act provides, that you will provide me with the remaining non-exempt portions.

I request a waiver of fees because (cite arguments in support of fee waiver. See discussion in text, above, for the specific criteria that must be addressed.) If you rule otherwise, and if the fees will exceed \$ \_\_\_, please inform me of the charges before you fill my request.

Furthermore, as provided by the Act, I shall expect to receive a reply within ten (10) working days after your receipt of the subject FOIA request.

Sincerely,

Joshua Rush  
Address  
Telephone Number

cc: National Field Representative  
4/90

Mark Breesly  
Office of FOIA Appeals  
Public Health Service  
Department of Health and Human Services  
2700 North Pennsylvania Avenue  
Washington, D.C. 27111

Re: FOIA Appeal

Dear Mr. Breesly:

This letter is to notify your office of an appeal, pursuant to subsection (a)(6) of the Freedom of Information Act, 5 U.S.C. Section 352 (as amended.)

By letter dated   (date)  , I sent the attached information request to (Name of Official), (Attachment A.) Yet, as of this date, I have not received a response.

Since I have allowed more than a reasonable amount of time for compliance without any unusual circumstances being claimed, I am treating (Name of Official) failure to respond as a denial.

I trust that upon examination of my request, you will conclude that my request is not exempt under the amended Act. However, should you choose instead to continue to withhold the requested information, I ask that you provide me with an index of such information, together with the justification for each item of information which is withheld. Should a determination be made that some portions are exempt, please provide the remaining non-exempt portions.

A waiver of fees based on service in the public interest is requested because (cite arguments in support of fee waiver. See discussion in text, above, for the specific criteria that must be addressed.)

Finally, as provided by the Act, I will expect to receive a reply to this administrative appeal within twenty (20) working days.

Sincerely,

Joshua Rush  
Address  
Telephone Number

cc: National Field Representative  
4/90

Roscoe Tanner  
Privacy Act Officer  
Federal Communications Commission  
Washington, D.C. 26130

Re: Privacy Act Request

Dear Mr. Tanner:

Under the provisions of the Privacy Act of 1974, I hereby request a copy of (or: access to)... (describe as accurately and specifically as possible the record or records you want and provide all of the relevant information you have concerning them.)

If there are any charges for copying these records, please inform me before you fill the request if the fee will exceed \$ \_\_\_\_.

If my request is denied, in whole or in part, please cite the specific exemptions which you conclude justify your refusal. Also, please advise me of your agency's appeal procedure.

In order to expedite your processing of my request, I have included... (include and identify some document of identification or state that your signature has been notarized) which should assist you process expeditiously any request.

I look forward to your prompt response.

Sincerely,

Susan S. James  
Address  
Telephone Number

cc: National Field Representative

4/90

Dorothy Z. Bornack  
Commissioner  
Federal Communications Commission  
400 Arapahoe Drive  
Washington, D.C. 20000

Re: Privacy Act Appeal

Dear Ms. Bornack:

On (date), I received a letter from (Name of Official) of your Commission denying my request for access to... (describe information requested.) Enclosed is a copy of the denial and a copy of my original request. By this letter I am appealing the denial.

Since Congress intended the information sought under the Privacy Act of 1974 to be released unless it could be withheld under both this Act and the Freedom of Information Act, I hereby request that you also refer to the FOIA in consideration of this appeal.

I look forward to your prompt response to the letter.

Sincerely,

Susan S. James  
Address  
Telephone Number

cc: National Field Representative

4/90