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# Introduction

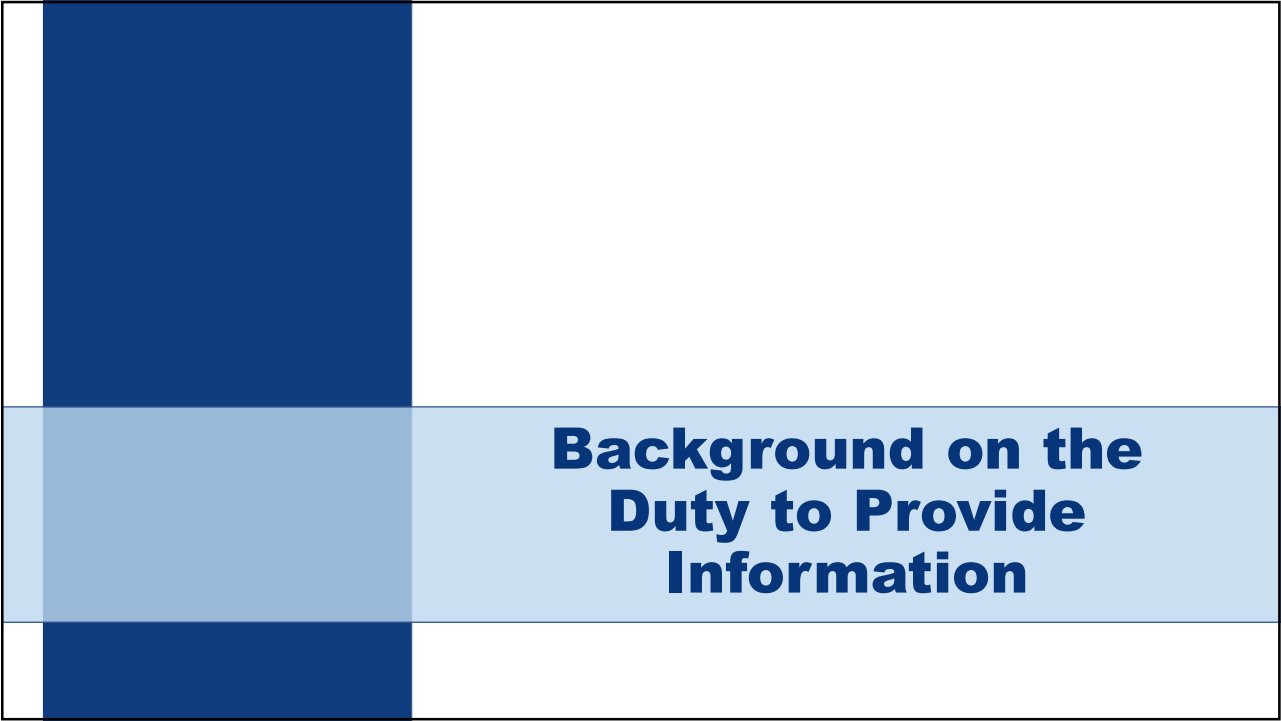
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- ## Outline
- Background on the duty to provide information
  - How do unions demonstrate a particularized need?
  - What must management do after receiving a request?
  - Countervailing management interests:
    - When is information normally maintained?
    - When is information necessary for collective bargaining?
    - When is information prohibited by law or otherwise inappropriate for disclosure?

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**Statutory Requirement to Provide Information**

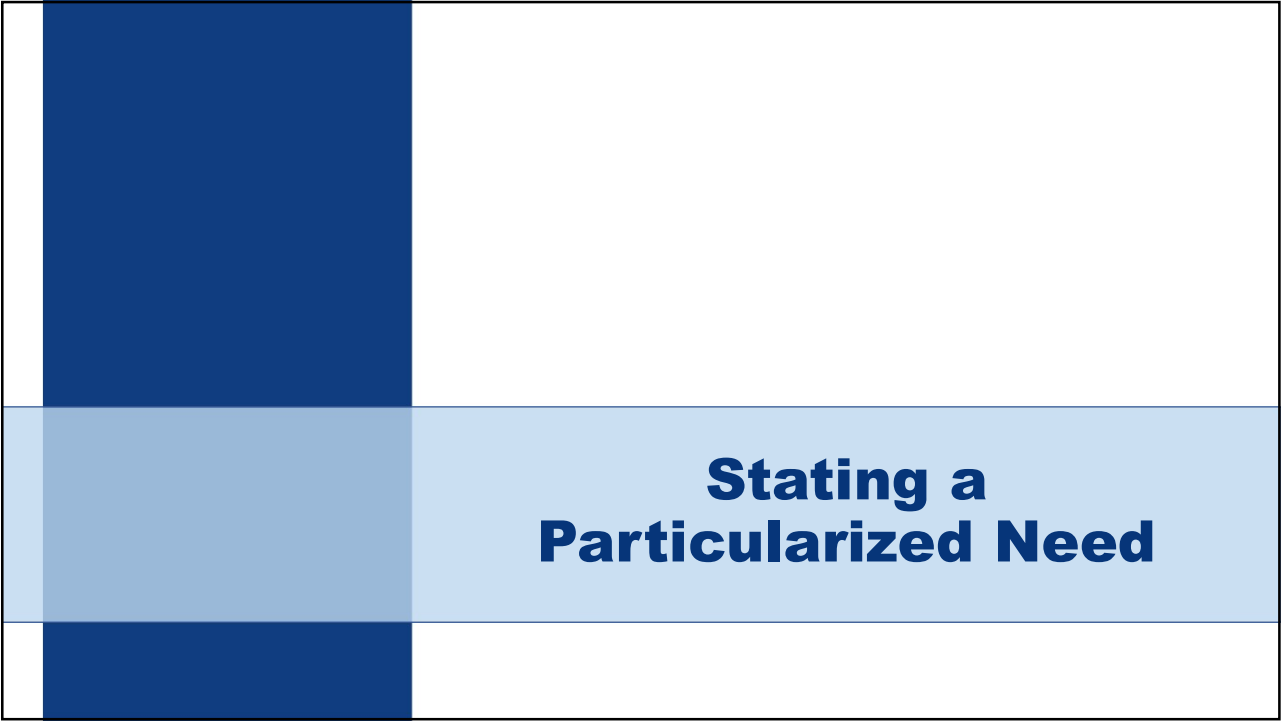
- Section 7114(b)(5) of the Statute provides: in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –
  - (A) which is normally maintained by the agency in the regular course of business;
  - (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
  - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.
- Violations are ULPs under 5 U.S.C. §§ 7116(a)(1), (5), and (8).

### Additional Background

- Information requests are like the “interactive process” in ADA cases.
  - Unions must detail why they need the information;
  - Management must work with union to get clarity or describe what is and is not available – cannot “just say no.”
  - The parties must allow each other the opportunity to respond and amend their original submissions to find a workable solution.
- The right to request information is the union’s, which means:
  - The union may expand, alter, or limit the right in a CBA.
  - Employees have no right to request, but the union may violate DFR if they unfairly pick and choose when to request on employees’ behalf.

### Common examples

- After an employee is disciplined, union asks for investigative records, disciplines issued to similarly-situated employees, evidence related to the discipline like security footage.
- After an employee notices an issue with pay, union asks for scheduling information and payroll records to investigate accuracy.
- Before parties begin negotiating new collective bargaining agreement, union asks for a wide range of information including payroll, scheduling, workplace policies, etc. to prepare bargaining proposals.



	<b>What is a particularized need?</b>
	<ul style="list-style-type: none"><li>• A union’s request for information states a particularized need 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.” <i>IRS Wash. D.C.</i>, 50 F.L.R.A. 661, 669 (1995).</li><li>• “The union’s articulation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information.” <i>Id.</i></li><li>• However, the particularized need statement need not describe “the exact nature of the alleged irregularities” or the “specific law or regulation that was alleged to have been misapplied,” as that would ask “the Union to describe the potential contents of documents it has not seen.” <i>Health Care Fin. Admin.</i>, 56 F.L.R.A. 156, 162 (2000).</li></ul>

## What is a particularized need?

- In *FCI Ray Brook, New York*, 68 F.L.R.A. 492 (2015), after management decided to institute a modified lockdown in response to several prison gang fights, the guards' union requested (1) rules or policies relied on to make the decision and (2) all other documents substantiating the decision.
- The union stated the information was necessary "to determine if management's actions were appropriate within the context of the requirement to lower the inherent risks of the correctional environment in accordance with the (CBA)."
- Management responded that the request did not sufficiently describe how the request related to the union's representational responsibilities.

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## What is a particularized need?

- *FCI Ray Brook, cont'd.* - The F.L.R.A. held that the statement was sufficiently specific. The union referenced a specific provision in the parties' collective bargaining agreement and explained that the information would help the union determine whether the agency violated that provision.
- The union was not required to state exactly how any of the information would show that the agency did not maintain its duty to lower the risks, because that would require the union to know what the documents said before receiving them.
- The F.L.R.A. emphasized that unions must be able to obtain information "to determine how to support and pursue a [possible] grievance" so that "arbitration can function properly," i.e., so that unions don't unknowingly file frivolous grievances.

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- On the other hand, in *Fed. Bur. of Prisons, Marion, Ill.*, 52 F.L.R.A. 1195 (1997), the F.L.R.A. found that a prison guard union’s request did not state a particularized need.
- Management released a known violent prisoner into the prison population and he immediately instigated a fight. One bargaining unit officer was charged and assigned to home duty on allegations of abusing an inmate while attempting to break up the fight.
- The union filed a grievance, alleging that releasing the inmate threatened the health and safety of the bargaining unit.
- The union then sent the agency an information request for the investigative report which led to the charges against the officer.

What is a particularized need?

- *Marion Prison, cont’d.* - The union said it needed the information to prepare for the arbitration of the grievance relating to the health and safety of the entire staff. The agency refused to provide it, arguing that the union had not demonstrated a particularized need.
- The F.L.R.A. held that the statement was not sufficiently specific. It was not immediately clear why management’s investigation of the officer related to the grievance. Without further description, the agency had no way of knowing how the union would use the information to represent the bargaining unit.

	<b>Management's Response</b>

	<b>Management's Response to a Request</b>
	<ul style="list-style-type: none"><li>• If an employing office is unwilling to provide the information, it must inform the union, along with the reason why, at the time of the request. <i>F.A.A.</i>, 55 F.L.R.A. 254, 260 (1999).</li><li>• The employing office's reason for rejecting the request – the insufficiency of the union's request or the office's own "countervailing interest" – must be detailed enough for the union to understand the reasoning and, where appropriate, amend its request to satisfy the office's concerns. <i>IRS, Kansas City, MO.</i>, 50 F.L.R.A. 661, 670-671 (1995).</li><li>• Failing to respond or just saying no may result in a ULP and an order to produce the information if the union established a particularized need. <i>Id.</i></li></ul>

## Management's Response to a Request

- In *L.O.C. and IFPTE, Local 75*, 63 F.L.R.A. 515 (2009), the Library announced that it intended to eliminate some bargaining unit positions.\* The union asked for “all studies and other materials used by the Agency to reach its decision to eliminate the positions of the affected employees.”
- The Library responded that the union did not establish a particularized need for the information.
- The union elaborated that the information was necessary to determine if the RIFs followed CBA requirements to prioritize reductions by attrition. The Library again denied the request.

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- *Library, cont'd.* – The union filed a grievance over the refusal. At arbitration, the Library argued, for the first time, that the documents were “confidential . . . Guidance, advice, and counsel for management officials relating to collective bargaining.”
- The arbitrator and F.L.R.A. rejected this countervailing interest because the Library did not raise it to the union at the time of the request.
- The Library argued that it was not required to raise that because the union did not establish its need for the information.
- Arbitrator and F.L.R.A. found that the union established a particularized need, so the Library acted at its peril by not presenting its countervailing interest.

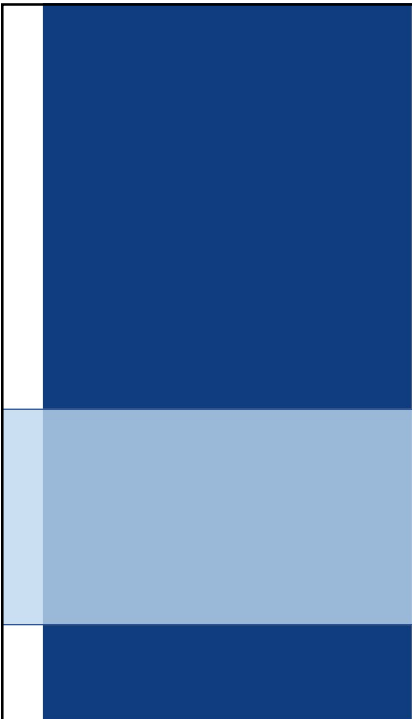
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	<b>When Information is Normally Maintained</b>

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	<ul style="list-style-type: none"><li>• The statute requires the information to be “normally maintained by the agency in the regular course of business” and “reasonably available.”</li><li>• The physical location of the requested information is irrelevant to whether it is “normally maintained.” Instead, the F.L.R.A. looks to whether “the information is subject to the agency’s control or can be retrieved and provided to the agency at its request.” <i>I.N.S., El Paso, Tx.</i>, 45 F.L.R.A. 1355 (1992).</li><li>• Absent an agreement to share information between the agency and IG, Inspector General investigatory documents are not normally maintained by the agency and not subject to disclosure. <i>Id.</i></li></ul>

## Information Normally Maintained

- In *V.A.M.C. Ft. Lyon*, 41 F.L.R.A. 1091 (1991), the union requested arbitration transcripts from the agency which the agency had paid for. The parties' arbitration agreement stated "if either party requests a transcript, that party will bear the entire cost of such transcript."
- The agency acknowledged that it had the transcript, but argued that the union could have bought it also.
- The F.L.R.A. held that the agency should have provided the transcript, but because the case was over and the union did not establish an additional need for it, the agency was not ordered to produce it.
- In general, whether the union can obtain information from other source, including its own bargaining unit, is irrelevant.



# When is Information “Necessary”

## “Necessary” Information

- The FSLMRS requires the requested information to be “necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.”
- Unions may request information to determine whether to file a grievance even if the subject is only potentially grievable. For example, the F.L.R.A. has repeatedly held that unions can request information relating to bargaining unit employees’ promotion to a non-bargaining unit position when the collective bargaining agreement does not include such violations. The question of whether the union can file a grievance is reserved for the grievance procedure, not information request ULP litigation. *IRS, Omaha, NE.*, 25 F.L.R.A. 181, 184-185 (1987)

- ## “Necessary” Information
- However, when a statute clearly removes certain subjects from the grievance procedure, that information is not necessary to the union. In *V.A., Long Beach, CA.*, 48 F.L.R.A. 970 (1993), a statute governing the Department of Veterans Affairs explicitly stated that collective bargaining “may not cover . . . Professional conduct or competence.” So, the union was not permitted to request information about a V.A. competency test.
  - The F.L.R.A. has also held that disclosing the names and home addresses of bargaining unit employees is appropriate and necessary for collective bargaining. While this decision may be different in the email era, the rationale that unions need direct access to the bargaining unit to adequately bargain on their behalf still applies. *Farmers Home Admin. Fin. Off.*, 23 F.L.R.A. 788 (1986).

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	<b>Guidance, Advice, Counsel, or Training</b>

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	<ul style="list-style-type: none"><li>• Section 7114(b)(4)(C) of the FSLMRS states that employing offices are not required to disclose guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.</li><li>• The F.L.R.A. interprets this provision to hold that agencies do not have provide information which falls into the following categories:<ul style="list-style-type: none"><li>(1) courses of action agency management should take in negotiations with the union;</li><li>(2) how a provision of the collective bargaining agreement should be interpreted and applied;</li><li>(3) how a grievance or a ULP charge should be handled; and</li><li>(4) other labor-management interactions which have an impact on the union's status as the exclusive bargaining representative of the employees. <i>NLRB</i>, 38 F.L.R.A. 506, 522-523 (1990).</li></ul></li></ul>

## Guidance, Advice, Counsel, or Training

- In *Army Corps, Portland, OR.*, 60 F.L.R.A. 413 (2004), the union complained to a manager about nepotism on a project. The agency investigated the allegation and found no wrongdoing. The union filed a grievance alleging that the project leader's hiring of his son violated the law.
- During the grievance process, the union requested the agency's investigative report. The agency responded that the report was exempt for disclosure as internal guidance to management for collective bargaining.
- The F.L.R.A. disagreed with the agency. The fact that this was an internal investigation does not automatically exempt it from disclosure. Moreover, even assuming that the report contained recommendations concerning steps management should take in improving the work environment, there was no basis for concluding that these recommendations constituted "strategic information concerning the bargaining process."

**Requests  
Prohibited by Law**

	<b>Requests Prohibited by Law</b>
	<ul style="list-style-type: none"><li>• The FSLMRS states that employing offices must provide requested information “to the extent not prohibited by law,” which requires parties to determine whether other statutes prohibit the disclosure of the information.</li><li>• These laws may be specific to the employing office or to the legislative branch. Note that many executive branch F.L.R.A. decisions on this topic analyze the Privacy Act and FOIA but those statutes do not apply to legislative branch offices.</li><li>• Regulations can prohibit disclosure with the force of law if they (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any procedural requirements imposed by Congress. <i>Air Force Academy, Colorado Springs, CO.</i>, 59 F.L.R.A. No. 161 at *5 (2004).</li></ul>

	<b>Final Thoughts</b>

	<b>Resources</b>
	<ul style="list-style-type: none"><li>• FLRA Materials<ul style="list-style-type: none"><li>• ULP Case Law Outline</li><li>• Guidance on Information Requests<ul style="list-style-type: none"><li>• <a href="https://flra.gov">flra.gov</a> → Resources &amp; Training → Guides &amp; Manuals → “Guidance on Information Requests”</li></ul></li></ul></li><li>• Peter Broida, <i>A Guide to Federal Labor Relations Authority Law and Practice</i> (2022)</li></ul>

	<b>Questions?</b>