



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR CHARLES WASHINGTON

DIRECTOR, ATLANTA SERVICE CENTER

FROM: Chief, Branch 3
Office of Assistant Chief Counsel (Disclosure Litigation)

SUBJECT: Union Request for Weekly Adjustment Reports

This memorandum is intended as a follow-up to the verbal response given by a member of my staff to your request for direction under the Privacy Act.

ISSUE

Whether the Privacy Act permits the local union vice-president to receive a copy of a weekly adjustment report which identifies the adjustments made to employee measurements in order to effectuate the Total Evaluation Performance System (TEPS) agreement between the Service and the NTEU.

CONCLUSION

The Privacy Act would permit the union representative to receive a sanitized copy of the report only if the representative can demonstrate that receipt of the report is necessary and relevant to the coordination of the TEPS agreement.

BACKGROUND INFORMATION

On October 23, 1998, this office received a question from you as to whether the Privacy Act prohibited the Service from providing a weekly adjustment report to the union representative who is a member of the local committee assigned the task of coordinating the Total Evaluation Performance System (TEPS) agreement.

It is our understanding that the TEPS agreement is part of the contract between the Service and the bargaining unit members of the service centers around the country. TEPS is the employee performance evaluation system used to evaluate all measured service center employees GS-08 and below. A measured employee is an employee who may or may not receive a measured appraisal, *i.e.*, an appraisal derived in part from systematically computed quality and quantity ratings. On a quarterly basis, TEPS calculates the performance summaries for measured quality

and quantity. Under the contract (NC V) these summaries are provided to the employees in January, April, July and October and cover the employees' performance for the preceding four full quarters. These performance summaries are not performance appraisals, but are evaluative recordations. Under Article 12, Section 17 of the contract, "[e]mployees will receive measured ratings in Quality based on their performance against numerical standards established by the Employer as described in subsection 14C." It is the duty of the local TEPS committee to assure that the section is implemented in accordance with the intent of the national parties.

Article 12, Section 19A of NC V, provides that the Weekly Individual Performance Report will be provided to affected employees. Section 19C provides that the union will receive, at a minimum, the following reports:

1. Monthly Branch Performance Report;
2. 2-Month Cumulative Branch Performance Report;
3. 3-Month Cumulative Branch Performance Report; and
4. Unit and Branch Distribution of Ratings - Quality/Quantity;
5. Calculated Base Point/Fixed Standards and Branch Base Points.

The contract further provides that "[n]othing in this section serves as a waiver of the Union's statutory right to additional information that is *reasonable and necessary* for it to perform its representational duties." Article 12, Subsection 19C (emphasis added).

The report which is the subject of this memorandum is an Individual Performance History Adjustment Report. It is not a report used to coordinate the TEPS agreement, but rather, is a report which contains the names, social security numbers (SSNs), hours, codes of work, volume of documents and adjustments for each employee in the service center, both bargaining unit and non-bargaining unit.

Our first recommendation to you was to require the union representative to request the report in writing by submitting his Privacy Act request to the Disclosure Office explaining a particularized need for the report. At the time we gave this recommendation, we had been assured that the names of non-bargaining unit employees and the SSNs of all employees could be sanitized. We have since been advised that it is impossible to separate the bargaining unit from non-bargaining unit employees. Moreover, we have been advised that the union representative requesting the report did not articulate a reason for needing the report beyond stating that the report was necessary and relevant for the coordination of the TEPS agreement.

LAW AND ANALYSIS

The Privacy Act prohibits the disclosure of an individual's records by an agency unless the individual consents or the disclosure falls into one of the statutorily

enumerated categories of nonconsensual disclosures. After reviewing the various exceptions to the prohibition on nonconsensual disclosures, we concluded that the only applicable exception was subsection (b)(3), "routine use."¹ 5 U.S.C. § 552a(b) provides in relevant part:

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 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. . . .

We determined that the system of records (SOR) which included the report to which the union representative sought access, was SOR Treasury/IRS 36.003, General Personnel and Payroll Records. We determined from reviewing the notice that the potentially applicable routine use was paragraph 15 which states: "provide information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation."

Based on the statute and the routine use published in the system notice, we concluded that the union representative would be entitled to the information pertaining **only** to bargaining unit employees if the representative could demonstrate that the report was necessary and relevant to his duties under the TEPS agreement. Neither the routine use nor the contract provide the union representative access to the information pertaining to non-bargaining unit employees.² We likewise conclude that the SSNs of all employees should be sanitized, because we cannot perceive how that data could meet the necessary and relevant threshold.

The crucial issue is whether the union representative can demonstrate that even a sanitized report is necessary and relevant to the coordination of the TEPS agreement. Given that the individual bargaining unit employees have a right to privacy with respect to the weekly adjustment report, the union representative has

¹"Routine use" is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7).

²Indeed, the Privacy Act would prohibit the disclosure of records of non-bargaining unit employees because they would not fall within the routine use exception to the prohibition of nonconsensual disclosures.

the burden of proving that his receipt of the report is necessary to coordinate the TEPS agreement. A mere statement that the union representative believes it is necessary is not sufficient to meet the standards of the Act. He has to demonstrate that he needs to know the identities of the employees and he must elucidate the purpose for which he is planning on using the report.³

When making the determination of whether the union representative has established that the disclosure of the report to him meets the necessary and relevant requirement, bear in mind that if the union representative is representing an individual employee who believes that adjustments were erroneously made, the representative can obtain a copy of the individual's Weekly Individual Performance Report from the individual employee. If the representative has questions with respect to that individual's weekly report, he can request additional information from labor relations pursuant to 5 U.S.C. § 7114. It is unnecessary for the union representative to have the entire weekly adjustment report for all employees in order to evaluate the adjustments made to one individual.

We have coordinated this opinion with the Office of the Assistant Chief Counsel (General Legal Services).

If you have any questions regarding this matter, call (202) 622-4590.

³We contacted the TEPS coordinators for the Andover Service Center, Memphis Service Center and the Austin Service Center. These coordinators all agreed that they do not release the type of weekly report to which the union representative here seeks access to their union representatives, nor have their union representatives requested such reports.