

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-42-03

(UNFAIR LABOR PRACTICE)

OREGON AFSCME LOCAL 3581,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF OREGON,)	AND ORDER
REAL ESTATE AGENCY,)	
)	
Respondent)	
_____)	

Upon objections filed by both parties, oral argument was held on October 1, 2004, to a recommended decision issued on May 13, 2004, by Administrative Law Judge (ALJ) James W. Kasameyer. A hearing was held before Administrative Law Judge B. Carlton Grew on February 6 and 23, 2004, in Salem, Oregon. The hearing closed with the submission of post-hearing briefs on March 22, 2004. Post-hearing, this case was reassigned to ALJ Kasameyer.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Tessa Sugahara, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On July 31, 2003, Oregon AFSCME Local 3581 ("AFSCME" or "Union") filed this unfair labor practice complaint alleging that the Real Estate Agency ("REA" or "Agency") violated ORS 243.672(1)(e) by refusing to provide information to the Union upon request. On October 30, 2003, the Agency filed a timely answer, admitting and denying certain allegations, and raising affirmative defenses.

The issue is:

Did the Agency refuse to provide information to AFSCME in violation of ORS 243.672(1)(e)?

Having the full record before it, this Board makes the following:

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. REA is a public employer within the meaning of the Act. AFSCME is a labor organization within the meaning of the Act and is the exclusive representative of a unit of Agency employees.

2. REA consists of a Real Estate Board, the real estate commissioner, and staff. Scott Taylor is the real estate commissioner and ultimate authority within the Agency. The Agency's mission is not only to protect the real estate consumer but to maintain a healthy real estate industry. The industry group with which the Agency deals most frequently is the Oregon Association of Realtors ("OAR"). The Agency fulfills education, compliance, and enforcement functions regarding real estate licensees. It responds to complaints against realtors by real estate consumers and levies penalties in appropriate cases. It also solicits input from, among others, the OAR and its representatives.

3. The compliance and enforcement functions of the Agency are carried out by its Regulation Division, headed currently by Mark Moseley, regulation division manager. Moseley reports directly to Taylor. He supervises a number of investigator/auditors ("investigators"). When the Agency receives complaints from consumers regarding real estate licensees, these complaints are first reviewed by Moseley. He determines if investigation is warranted, and if so, assigns the case to an investigator. The investigator then seeks to obtain information from both the complaining party and the real estate licensee regarding the transaction in question. The purpose of this investigation is to ascertain facts. The investigator has little or no discretion regarding which conduct is to be investigated or how the investigation is carried out.

4. After the investigative report is completed, it is sent to Moseley for review. He decides what proceedings will be taken by the Agency against the licensee named in the complaint. Moseley decides whether to engage in negotiations with those individuals whose conduct has given rise to complaints, or to seek immediate formal penalty. The function of the investigator in these negotiations is merely to supply facts as requested by

Moseley. If a settlement is reached at the Division level, the investigation ends there. If no settlement is reached, then Moseley recommends appropriate enforcement measures to Taylor, the ultimate decision maker.

5. In December 2002, the Agency received several letters from the OAR and its general counsel complaining bitterly about disciplinary action proposed against several brokers. Among other things, OAR complained that the brokers had not received a fair shake from the Agency, that Agency representatives seemed over zealous and "out to get" the licensees.

6. In February 2003, an item in "*Broker Bytes*," the official OAR newsletter, asked realtors to tell the Agency if they had any complaints about the behavior of Agency employees. Sharon Woods saw a copy of this and discussed it with realtors that she knew. She was told that the Agency had asked the OAR to insert this article in its publication.

7. Woods was one of the grievants in an AFSCME grievance concerning promotions. After filing the grievance, she came to feel that her supervisor was retaliating against her for filing the grievance. This grievance was pending during the spring of 2003, when the request for information was made. Other investigators, including Lynne Moore, spoke to real estate licensees, from whom they also received quite direct indications that the Agency was preparing to move against one or more members of the bargaining unit.

8. The Agency did not solicit complaints from the real estate industry against real estate investigators during the period in question. However, Taylor was disturbed enough by the letters received from OAR and its general counsel in December 2002 that he convened a meeting on March 21, 2003, to discuss the Agency's procedures and to discuss the OAR's complaints.

9. Present at this meeting were some members of the Real Estate Board, the chairman of the OAR and other prominent realtors, Taylor, and Moseley. Taylor's secretary, Betty Reynolds, also attended. She took notes of the meeting. It is her summary of the meeting—and the notes on which it is based—that are the subject of this proceeding. Hereafter, this document will be referred to as the Reynolds memorandum.

10. Taylor set ground rules for the meeting: there were to be no complaints against individual investigators, and discussion was to be limited to procedures currently in place at the Agency and ways to understand and improve them. Nevertheless, the attendance roster at the meeting was deliberately arranged so that it would not be a "public meeting" under Oregon law. Taylor wished comments made at the meeting to be kept confidential, and in fact, assured participants that all remarks made at the meeting would be kept confidential. According to Taylor, this promise of confidentiality was necessary to ensure that he received

honest comments from industry representatives. At hearing, industry representatives testified that they wished the meeting to be held in confidence because they feared retaliation from the investigators.

11. This record provides no basis for these concerns. Taylor testified that, in his tenure at the Agency, he knew of no instance of retaliation on the part of any Agency employees against any real estate licensees, let alone investigators. Any such action would result in discipline. In any event, investigators simply lack sufficient discretion in decision-making authority to do so. Finally, Taylor and Moseley, both of whom had the power to retaliate against licensees, attended the March 21 meeting.

12. Members of the bargaining unit were extremely concerned about what took place at the March 21 meeting, fearing that the Agency was soliciting complaints against investigators by licensees, upon which the Agency could take action against investigators. On May 7, 2003, AFSCME requested copies of all correspondence from or to Taylor or his immediate subordinates regarding the March 21 meeting "in order to evaluate the merits of a potential grievance." AFSCME repeated its request on May 19, 2003. On May 23, 2003, the Agency sent all the records which the Union had requested "except for one potentially exempt record for which the Agency has requested advice from its Assistant Attorney General." The document in question was the Reynolds memorandum. In other words, on May 23, 2003, the Agency knew which documents the Union wanted, and why. It turned over all but the Reynolds memorandum.

13. Soon after May 23, 2003, AFSCME representative Neil Bednarczyk spoke to several assistant attorneys generals ("AAGs") in an effort to obtain the Reynolds memorandum. The Agency claimed confidentiality because Taylor had pledged confidentiality to all participants of the March 21, 2003, meeting.

14. On June 20, 2003, Bednarczyk wrote to AAG Sugahara, attempting to clarify the Union's previous request for records, and to expand that request to include "all communications from 7/1/02 to the present * * * regarding the REA investigators and their efforts to do the job they were trained to do." His justification included reference to "extraordinary circumstances" at REA, to retaliation against Union officials and members who filed or participated in the promotion grievance. He also referred to certain letters written by licensees or their trade organizations that were critical of Agency investigators or Agency enforcement procedures.

15. On July 10, 2003, Sugahara responded by questioning the relevance of the Union's request. She took the position that the Union needed to describe the specific conduct, action, or circumstances referenced before the Agency would respond to the expanded request for documents. She also reiterated the Agency's position that the Reynolds memorandum was confidential.

16. Nevertheless, on August 29, 2003, the Agency furnished the Union with voluminous documents relating to the expanded discovery request of June 20, 2003, including a memo prepared by Taylor regarding the March 21 meeting in which he summarized the discussions which had taken place there. According to REA, it took Agency employees 88½ hours to compile these materials. The Reynolds memorandum was not among them. The Agency has never furnished this document to the Union.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Agency violated ORS 243.672(1)(e) when it refused to furnish AFSCME with the Reynolds memorandum.

DISCUSSION

In analyzing cases in which it is alleged that a public employer has failed to furnish information requested by a labor organization in violation of ORS 243.672(1)(e), this Board begins with the premise of full disclosure. *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999). In determining whether a public employer has a duty to produce information, we generally look at four factors: (1) the reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kinds of information requested; and (4) the history of labor relations between the parties. *OSEA, Chapter 68 v. Colton School District*, Case No. C-124-81, 6 PECBR 5027 (1982).

When an employer claims that information sought by a labor union is confidential in nature, additional analysis is needed. In these cases, this Board balances the union's need for information against the employer's legitimate and substantial confidentiality interests. In appropriate cases, there may be alternatives to complete disclosure. *See, e.g., Lincoln City Police Employees' Association v. City of Lincoln City*, Case No. UP-32-98, 18 PECBR 203 (1999). We urge the parties to take a common sense approach, *Colton School District*.

In this case, each party relies on existing Board precedent to support its position. According to AFSCME, its requests for the Reynolds memorandum were numerous and sufficiently supported on grounds of relevancy to potential grievances and to contract negotiations. The Union argues that the relevance objections raised by the Agency are not valid because the Agency furnished all but one document in response to AFSCME's first request for information, and because the Agency raised its relevance objections too late in the process. As for the Agency's confidentiality claim, AFSCME argues that REA has not

met its burden of proof, since the only basis for its claim to confidentiality was Taylor's statement that all comments made at the March 21 meeting would be kept confidential. AFSCME also notes that the licensees' claimed fear of retaliation is unfounded.

In response, the Agency argues that AFSCME's request for information was not relevant to a "specific grievance or contract matter" and does not involve an "identifiable grievance." According to REA, AFSCME offered insufficient evidence before the hearing to allow it to determine relevancy; and the evidence offered at hearing in this regard came too late in the process, since the Agency could not act upon it in a timely manner. REA further argues that the Union's generalized fear of harm to its members was not a sufficient justification for its requests for information. In addition, REA also argues that since AFSCME was furnished with a written outline of the March 21 meeting by Taylor, the Union received the information contained in the Reynolds memorandum, only in a different form.

In reaching our conclusion that the Agency failed in its duty to furnish AFSCME with the Reynolds memorandum, we first note that only two of the four *Colton School District* factors are at issue in the case: the reason given for the request and the type of information sought. We turn first to the issue of relevance.

As stated in *Oregon State Police Officers' Association v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718, 727 (1989), "[a]ll the union needs to establish is that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members." In *Olney Education Association v. Olney School District 11*, Case No. UP-37-95, 16 PECBR 415, 418 (1996), *aff'd* 145 Or App 578, 931 P2d 804 (1997), this Board ruled that a public employer's obligation to furnish information attaches when that information is of "probable or potential relevance to a grievance" or contract matter.

On May 7, 2004, AFSCME requested the Reynolds memorandum as part of its first request for information regarding the March 21 meeting. It sought copies of all correspondence related to the meeting in order to evaluate the merits of a potential grievance. REA accepted this rationale. It knew what documents the Union wanted, and why. In fact, on May 23, 2003, it sent AFSCME all the documents which had been requested, except for one "potentially exempt record": the Reynolds memorandum. While the Agency continued to assert relevance objections, it also conceded the relevance of AFSCME's June 20 expanded request for documents. Again, REA furnished all documents sought except the Reynolds memorandum.

In its first request for information, AFSCME established that it sought documents in order to evaluate the merits of a potential grievance. Contrary to the position taken by the Agency, AFSCME did not need to identify a specific action upon which a grievance would be filed nor a specific set of facts which, in the view of the Agency, would

support the Union's request for information. Moreover, the Agency waived its right to assert relevancy as a basis to refuse to furnish the Reynolds memorandum to AFSCME, for it furnished every single other document sought by the Union in its two separate requests for information. In short, while AFSCME met its obligation under the Act, REA failed to do so.

We turn next to the Agency's confidentiality defense. In cases dealing with this issue, this Board has narrowly applied the confidentiality exception to the employer's duty to furnish information. Thus in *OSEA v. Pleasant Hill School District*, Case No. DR-5-86, 9 PECBR 9054 (1986), this Board held that information must be disclosed to a union even though it was exempt from disclosure under ORS Chapter 192, Oregon's public records law, unless the information was specifically prohibited from disclosure by that or other statute. Compare *OLPNA v. OSH*, Case No. UP-46-86, 9 PECBR 9063 (1986) (confidential medical records prohibited from disclosure under ORS Chapter 179 could not be obtained even where sought in aid of a pending grievance). In other cases we have held that a labor organization may compel production of police internal affairs investigation records, *MCCOA v. Multnomah County Sheriff's Office*, Case No. UP-21-86, 9 PECBR 9529, amended 10 PECBR 105 (1987), whether or not internal investigation reports are deemed disciplinary in nature, *City of Lincoln City*. In each of these cases, public employers raised concerns regarding possible retaliation against individuals because of certain statements made by them during the investigations, comments by the investigating officers, or similar matters. These were much more weighty concerns than those raised by the Agency in this case. Nevertheless, this Board held that the employer had a duty to produce the information to the labor organization under appropriate safeguards.

Here, the Agency has failed to meet its burden of proving that legitimate and substantial concerns regarding confidentiality outweigh AFSCME's need for the information contained in the Reynolds memorandum. The Agency's sole justification for confidentiality is that attendees at the March 21, 2003, meeting were assured that their comments would be held confidential. The basis for this promise was REA's concern that, otherwise, licensees would not be frank and open for fear of retaliation by investigators. There is no statutory or regulatory prohibition against disclosure. The record shows no basis for any fears of retaliation by licensees.

Moreover, REA's evidence undermines its confidentiality claim. The March 21 meeting was conducted under ground rules which prohibited complaints against specific investigators and limited discussion to procedures currently in place, and ways to understand and improve them. If that was all that was discussed, there is no reason to hold it confidential. The Agency has not articulated a substantial confidentiality or privacy interest sufficient to outweigh its duty to furnish the Reynolds memorandum to the Union.

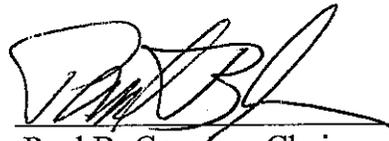
Finally, REA did not satisfy its duty to accommodate AFSCME's request for the Reynolds memorandum. This Board has recognized that in appropriate cases an employer

may furnish relevant information to a labor organization in a form different from that sought by the Union. *City of Lincoln City*. The Agency did not do this. It refused to furnish AFSCME with the Reynolds memorandum, and instead furnished it with another document prepared by Taylor in which he summarized issues raised at the meeting. The Union wanted the Reynolds memorandum because it documented what actually took place at the March 21, 2003, meeting. What the Agency gave instead was Taylor's version of what he thought appropriate to share with AFSCME regarding the March 21, 2003. These are two very different things.

ORDER

The Agency shall provide AFSCME with a copy of the Reynolds memorandum, including supporting notes

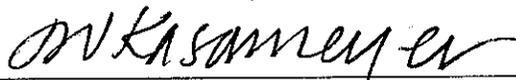
SIGNED and ISSUED this 31 day of October 2005.



Paul B. Gamson, Chair

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Rita E. Thomas, Board Member

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James W. Kasameyer, Board Member¹

*Board Member Thomas Dissenting:

The request for information is not mature. In *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03 20 PECBR 924, 930-31, n. 2 (2005), we wrote:

“* * * This Board has held that the Public Employee Collective Bargaining Act (PECBA) right of a labor

¹**Member Kasameyer recused himself from this case. The two remaining Board Members do not agree on the outcome

We therefore invoke the so-called “rule of necessity.” Under that rule, a decision-maker who is recused is nevertheless permitted to participate when a case could not be heard otherwise. *United States v. Will*, 449 US 200 (1980); *Oregon State Police Officers Association v. State of Oregon*, 323 Or 356, 361, n. 3, 918 P2d 765 (1996); *Hughes v. State of Oregon*, 314 Or 1, 5, n. 2, 838 P2d 1018 (1992); and *Bobo v. Kitzhaber*, 193 Or App 214, 89 P3d 1189, n. 3 (2004). This is such a case.

“* * * This Board has held that the Public Employee Collective Bargaining Act (PECBA) right of a labor organization to obtain an employer’s investigative material does not mature until the employer has made the decision to take adverse action against an employee, or otherwise creates a situation in which the material has ‘probable or potential relevance to a grievance or other contractual matter.’ *Washington County School District v Beaverton Education Association and Nelson*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). See also *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff’s Office*, Case No. UP-66-92, 14 PECBR 270, 270C, n. 3 (1993); and *Oregon Education Association and Moberg v Salem Keizer School District # 24J*, Case No. UP-55-96, 17 PECBR 188 (1997).”

In *Beaverton* we ordered release of investigative notes because the labor agreement made release of investigatory materials a contractual matter.

Here there is no grievance, the employer has taken no adverse action, and the contract does not require release of the meeting notes, or what is called the Reynolds memorandum. In this regard, the request fails to meet the relevancy factor in our well-settled case law regarding the duty to release information. Early on in the request for information, AAG Sugahara questioned the relevance of the Union’s request for information in general, and she indicated for the second time that the Agency’s position was that the Reynolds memorandum was also confidential.²

I do not believe the record was established by the Agency to find the Reynolds memorandum confidential. Certainly the Agency could have redacted names from the memorandum to protect meeting participants from being identified if there was the possibility of retaliation.

However, the information request for the Reynolds memorandum is not mature, and this Board does not require the release of information merely because a union or its members fear that something may be a foot. We do not enforce fishing expeditions into an employers business. For us to order release of information, the union must show that there

²That the Agency released volumes of other requested information has no bearing on whether the Agency had a duty under the PECBA to release the Reynolds memorandum. Sugahara appropriately asked, on July 10, 2003, for the Union to describe the specific conduct, action, or circumstance on which the information request was based. Apparently the Agency decided that releasing most of the requested information would have no impact on the Agency. That decision has no bearing on why the Reynolds memorandum was withheld.

is a grievance or other ripe contractual matter for which that information is needed. The Union failed to show a mature grievance or contractual matter that would require release of the Reynolds memorandum.



Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.