STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1779-M PERB Decision No. 2891-M February 27, 2024

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Michaela F. Posner, and Ailyn Gonzalez, Attorneys, for Service Employees International Union, Local 1021; David Chiu, City Attorney, Jonathan Rolnick, Chief Labor Attorney, and Carlos Almendarez, Deputy City Attorney, for City and County of San Francisco.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by both parties to a proposed decision of an administrative law judge (ALJ). The dispute arose after Charging Party Service Employees International Union, Local 1021 (SEIU) filed a class action grievance alleging that Respondent City and County of San Francisco (City) discriminated against African American employees, including by extending their probationary periods and/or releasing them from probation. SEIU submitted a request for information (RFI) to the City, seeking information relevant to the grievance. The City refused to provide certain requested data, leading SEIU to file this charge. In the

current procedural posture, the only information still in dispute is disaggregated race/ethnicity data for employees the City released from probation and employees who had their probationary periods extended.

The complaint, as amended, alleges that the City violated the Meyers-Milias-Brown Act (MMBA) in three respects.[1] The ALJ dismissed two claims, finding that the City neither unilaterally changed the status quo nor engaged in direct dealing when it altered a form the City uses to ask employees to report their race and/or ethnicity. SEIU took no exceptions to the ALJ's conclusions on the unilateral change and direct dealing claims, and we therefore do not address them.[2]

The ALJ sustained one claim, however, finding that the City violated its duty to meet and confer in good faith by refusing to provide certain requested information. The City's exceptions assert that the ALJ erred in requiring the City to provide disaggregated race/ethnicity data. SEIU's exceptions, in turn, ask us to provide greater remedies than those the ALJ ordered. For the reasons explained below, neither party succeeds in its exceptions.[3]

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[1] The MMBA is codified at Government Code section 3500 et seq. All undesignated statutory references are to the Government Code.

[2] The ALJ's conclusions about the City's changes to the form are thus final and binding only on the parties to this case; they are otherwise non-precedential. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 3, fn. 4.)

[3] While the proposed decision directs the City to provide multiple categories of information, the City excepts only as to disaggregated race/ethnicity data. Our remedy includes an order to provide the additional information categories that the City no longer contests, but we express no opinion as to the ALJ's conclusions on those categories. (*County of Santa Clara* (2023) PERB Decision No. 2876-M, p. 3, fn. 3 [judicial appeal pending on other grounds].)

FACTUAL AND PROCEDURAL BACKGROUND[4]

For five decades, the federal Equal Employment Opportunity Commission (EEOC) has required state and local governments with 100 or more employees—including the City—to submit a biannual report containing employees' race/ethnicity and other demographic data. The EEOC uses this data for purposes such as comparing the City's workforce with the available labor force in the geographic area.

To collect the required information while onboarding new employees, the City asks them to voluntarily report their race/ethnicity on a self-identification form. When the parties' dispute arose, this form stated as follows: "[the City] reports information about the gender and race/ethnicity of its workforce to the federal government to comply with civil rights laws. The collected information is kept confidential and is aggregated when reported, so no individuals are identified." As required by federal law, when employees decline to self-report their race/ethnicity, a City employee completes the form based solely on visual perception.

At all relevant times, the City and SEIU have been parties to a Memorandum of Understanding (MOU) covering a City-wide miscellaneous bargaining unit. The MOU prohibits discrimination, stating in relevant part that "no person employed or applying for employment shall in any way be discriminated against because of that person's actual or perceived race. . ."

[4] The parties largely accede to the ALJ's factual findings, which we incorporate and supplement below.

I. SEIU Files a Grievance and Submits an RFI

On July 31, 2019, SEIU Field Supervisor Xiu Min Li filed a class action grievance alleging: "The City has engaged in individual, systematic and ongoing racial discrimination against African American employees by releasing them from probation unfairly and engaging in unfair discipline and employment actions. The known impacted employees include but are not limited to [employee names and information omitted]." Along with the grievance, Li sent the City an RFI seeking: (1) "A list of all probation releases across all City Departments in the last 3 years"; (2) "A list of all probation extensions across all City Departments in the last 3 years including those that are no longer working at [the City] and those that are still working at [the City]"; and (3) "name, employee ID, classification number and title, department, date of hire, date of release, ethnic/racial demographic, appointment status, personal phone number, home address and personal email address of each employee listed."

On August 8, 2019, City Classification and Compensation Director Steven Ponder responded to the RFI. Addressing the race/ethnicity data SEIU sought in its third request, Ponder wrote that the City "cannot provide" the data "because of employee privacy."

The parties continued to communicate about multiple aspects of the RFI. On August 20, 2019, Li e-mailed Ponder in relevant part:

> "As for racial/ethnic demographics, if you do not wish to provide raw data, please provide a summary or aggregate as to how many of these employees are black, Latino, white, etc. Moreover, again, the union maintains its right to the information going back 3 years and as requested, we

> believe the [C]ity has the info or the capacity to collect such info as similar data was provided to the union in the past or the Board of Supervisor[s].
>
> [¶] . . . [¶]
>
> "Please provide the info asap so we can proceed in the grievance process and/or file a PERB charge if necessary to compel the release of these data."

II. After SEIU Files This Charge, the Parties Continue Discussing SEIU's RFI

SEIU complied with the MMBA's six-month statute of limitations by filing this charge in January 2020.[5] After PERB's Office of the General Counsel issued a complaint in July 2020 and the City answered a month later, the parties continued to discuss the information SEIU sought, leaving the case in abeyance with no hearing date on the calendar. One issue the parties discussed during this time was SEIU's request that the City go beyond supplying aggregated race/ethnicity data and instead provide such data on a disaggregated basis for employees the City released from probation and for employees who had their probation extended. By e-mail dated November 5, 2020, Ponder rejected this request, as follows:

> "What we will not provide for this group is disaggregated information on race and gender by individual; we have and

[5] The City's exceptions include a conclusory paragraph regarding the six-month statute of limitations that applies to unfair practice charges. The City appears to claim that SEIU's unilateral change claim was untimely because SEIU "knew about the City's practice and policy more than six months prior to filing the charge." We need not resolve that issue, as the unilateral change claim is not before us. In the absence of any explanation as to how the statute of limitations could apply to the claim that the City failed to meet and confer in good faith when it refused to provide requested information, we find any such defense waived. In any event, we would reject any such defense given that SEIU filed this charge less than six months after the City refused to provide certain information.

> will continue to provide in this data aggregate where individuals cannot be identified.
>
> "This is consistent with the City's Employee Data Privacy which is attached.[6]
>
> "The basis for withholding race and gender by individual employee is based on the following:
> - "S.F. Admin. Code §§ 67.1(g)
> - "S.F. Admin. Code §§ 67.24(c)
> - "Cal. Gov. Code § 6254(c)
> - "Charter §16.130"

On November 18, 2020, in a final e-mail thread regarding race/ethnicity data, Li confirmed that the parties "did not reach agreement on what the city can provide" and reiterated that that SEIU "would take whatever [Ponder's] willing and able be provided [sic] now but that we continue to demand to receive the remaining info that the city insists it cannot provide." In a response e-mail the same day, Ponder reiterated that the City would not provide the disaggregated data SEIU sought. Ponder continued, "While we recognize your valid interest in this data, we also have a counterbalancing concern about employee privacy."

Despite the parties' clear disagreement on disaggregated race/ethnicity data in November 2020, this case remained in abeyance for almost 18 more months. During that time, the parties arbitrated the discrimination grievance, as discussed below.

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[6] The City's "Employee Data Privacy" is a two-page internal document prepared by Ponder regarding types of employee data the City collects and with whom it shares such information.

III. The Arbitrator Issues a Decision and SEIU Removes this Case from Abeyance

On March 10, 2022, Arbitrator David Weinberg denied SEIU's discrimination grievance, finding that the City did not violate the MOU when it released the three named employees from probation.

On April 13, 2022, SEIU asked PERB to remove this case from abeyance. On May 9, 2022, the ALJ provided notice that the formal hearing would take place on August 18-19, 2022. On the first hearing day, SEIU moved to amend the complaint to add the unilateral change and direct dealing allegations. The ALJ partially granted the motion but scheduled an additional day of hearing for December 2022, to allow the City time to prepare a defense against the new claims. The ALJ later moved the final hearing date to February 2023. After the parties filed post-hearing briefs, the ALJ issued the proposed decision in June 2023.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) In the following Discussion, Part I(A) explains the legal principles relevant to SEIU's request for disaggregated race/ethnicity data. Part I(B) applies those standards to the record. Part II addresses SEIU's request for an augmented remedy.

I. Information Requests Regarding Disaggregated Race/Ethnicity Data

A. Governing Legal Principles

An employer must normally provide an exclusive representative with all information that is necessary and relevant to its right to represent bargaining unit employees regarding mandatory subjects of bargaining. (*Butte-Glenn Community*

College District (2022) PERB Decision No. 2834, p. 9 (*Butte-Glenn*); *City and County of San Francisco* (2020) PERB Decision No. 2698-M, p. 6; *Contra Costa Community College District* (2019) PERB Decision No. 2652, pp. 5, 16-17 (*Contra Costa*); *Sacramento City Unified School District* (2018) PERB Decision No. 2597, p. 8 (*Sacramento*).) This is a liberal, discovery-type standard akin to the standard California courts use to determine relevance, and, notably, "necessary" and "relevant" are interchangeable terms that do not have separate meanings. (*Butte-Glenn*, *supra*, p. 9; *Contra Costa*, *supra*, pp. 5-6; *Sacramento*, *supra*, p. 8.)

Race/ethnicity information is relevant because of unions' critical role in working to prevent and mitigate employment discrimination. (See, e.g., *Contra Costa*, *supra*, PERB Decision No. 2652, pp. 16-17; *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, adopting proposed decision at pp. 10-11.) That role is particularly clear where, as here, the operative MOU includes a nondiscrimination clause. The City does not dispute that SEIU's request for disaggregated race/ethnicity data was relevant, but it refused to provide the data in disaggregated form because it believed doing so would unduly infringe on employee privacy rights.

Under the labor relations statutes we administer, a union's unique representational functions may allow it a right to sensitive or confidential information. (*City and County of San Francisco*, *supra*, PERB Decision No. 2698-M, p. 7; *Contra Costa*, *supra*, PERB Decision No. 2652, p. 18; *Sacramento*, *supra*, PERB Decision No. 2597, p. 11.) When an employer believes that a union has sought confidential information, settled procedural protocols govern how an employer must negotiate in

good faith over potential accommodations, and established substantive standards govern what must occur if the parties cannot work out an accommodation.

Procedurally, the employer must offer to bargain in good faith toward accommodating all legitimate competing interests, and if it instead unilaterally refuses to provide allegedly confidential information, it is liable for a violation without the need for further analysis. (*City and County of San Francisco*, *supra*, PERB Decision No. 2698-M, pp. 7 & 10-12; *County of Tulare* (2020) PERB Decision No. 2697-M, pp. 13-14 (*Tulare*); *Contra Costa*, *supra*, PERB Decision No. 2652, pp. 18-20; *Sacramento*, *supra*, PERB Decision No. 2597, pp. 12-14.) Bargaining parties may negotiate an accommodation that recognizes "that unions [can] be trusted to be discreet." (*Sacramento*, *supra*, p. 13, citation omitted.) Thus, among other possibilities, the parties may enter into a confidentiality agreement or other arrangement in which the requesting union agrees to limit its use of the information to a particular purpose, and to disclose such information to union employees or attorneys only if necessary for that purpose. (*Contra Costa*, *supra*, p. 19; *Sacramento*, *supra*, pp. 12-13; *Los Angeles Unified School District* (2015) PERB Decision No. 2438, p. 20 (*LAUSD*).)

While parties are often able to negotiate accommodations on privacy issues, alternatively the union may pursue an unfair practice charge. If the employer offered to bargain, and it bargained in good faith to the extent requested, then the focus of the charge becomes the substantive merits of the RFI and the privacy claim. Where the employer raised a significant privacy interest—meaning a legally protected interest that the RFI invades in a manner that is serious in both its nature and its scope—then a balancing test applies. (*Tulare*, *supra*, PERB Decision No. 2697-M, p. 13; *LAUSD*,

supra, PERB Decision No. 2438 pp. 13-14, citing *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 926.) Under this test, an employer has the burden to demonstrate that the privacy interest outweighs the union's informational need. (*City and County of San Francisco*, *supra*, PERB Decision No. 2698-M, p. 7; *Contra Costa*, *supra*, PERB Decision No. 2652, pp. 17-18; S*acramento*, *supra*, PERB Decision No. 2597, pp. 11-12 & 14, fn. 8; *LAUSD*, *supra*, pp. 7-8.)

In *LAUSD*, *supra*, PERB Decision No. 2438, a school district assigned teachers to educational service centers (ESCs) pending investigation for serious misconduct such as child abuse, physically abusing a staff member, or testing irregularities. (*Id*. at p. 2.) United Teachers Los Angeles (UTLA) requested an individualized list showing teachers assigned to ESCs. (*Id*. at p. 3.) The district asserted that teachers accused of serious wrongdoing had a significant privacy interest and should therefore have an opportunity to opt out of UTLA receiving their contact information. (*Ibid*.) We disagreed. Although teachers' privacy interest was significant because assignment to an ESC put them under a "cloud of suspicion," it did not outweigh UTLA's need to communicate with teachers assigned to ESCs so that it could assist them, develop ESC-related contract proposals, and investigate potential age discrimination or contract violations. (*Id*. at pp. 3, 7-10.) Permitting the district to solicit opt-outs from teachers, who might not recognize how this would impact UTLA's ability to represent them, would prevent UTLA from "efficiently" accomplishing its representational purposes. (*Id*. at p. 10.) It was preferable to have UTLA contact teachers assigned to ESCs and allow them to directly communicate about whether they wished to become

involved with or file a grievance, or if they otherwise desired assistance. (*Ibid*.) We also relied upon UTLA's promise to keep the information confidential (*id*. at p. 10), noting that unions are commonly entrusted with private employee information, as "[o]ne of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit" (*id*. at p. 11, citation omitted). Finally, it was of little import that the district had led teachers to believe they had a protected privacy interest, as such an employer promise or practice can only be dispositive if it derives from a significant privacy right established by law. (*Id*. at pp. 12-13 & fn. 5 [citing other authority].)

There is no PERB precedent specifically discussing disaggregated race/ethnicity information. However, our reasoning in *LAUSD*, *supra*, PERB Decision No. 2438, pp. 7-11, supports a union's need to receive such individualized information regarding probationary employees to pursue workplace antidiscrimination advances through grievances, bargaining for better assistance for probationary employees, or otherwise representing employees on issues of discrimination, harassment, or any interaction with the employer that can mean the difference between employment and unemployment. (See also *Contra Costa*, *supra*, PERB Decision No. 2652, pp. 15-16.)

Moreover, we find persuasive precedent elsewhere. In *The Bendix Corp.* (1979) 242 NLRB 62, the National Labor Relations Board (NLRB) found that employees have little, if any, confidentiality right in disaggregated data on their race and sex, and that any such privacy right did not outweigh the requesting union's need for the data. (*Id*. at p. 63, fn. 11 ["We fail to see how the considerations of secrecy and confidentiality apply to . . . the race and sex of applicants for employment."].) The NLRB required the

employer to provide the name, race, and sex of applicants for posted jobs, finding this information was necessary for the union to enforce the parties' contractual antidiscrimination clause. (*Id*. at p. 63.) Specifically, the union needed disaggregated information to efficiently investigate potential discrimination in filling posted positions. (*Id*., adopting proposed decision at pp. 70-71.) The NLRB explained that:

> "Inasmuch as the Union has a right to protect unit employees from discriminatory treatment by Respondent, it has the need for information related to race and sex in order to carry out this function. Furthermore, the antidiscrimination clause in the collective-bargaining agreement entitles the Union to this information to enable the Union to implement contractual policy and monitor the terms of the agreement. Thus, we find that the [demographic] information relating to bargaining unit employees is presumptively relevant and must be supplied by Respondent."

(*Id*. at p. 63; accord *Strategic Resources, Inc.* (2016) 364 NLRB 451, 462 & 467-470 [race, age, and gender of employees is presumptively relevant information that the employer must disclose to the exclusive representative upon request].)[7]

[7] California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, and we accordingly consider federal precedent only for its potential persuasive value. (*The Accelerated Schools* (2023) PERB Decision No. 2855, pp. 20-31; *Operating Engineers Local Union No. 3 (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10; *County of San Joaquin* (2021) PERB Decision No. 2761-M, pp. 24, 33, 45-48 & fn. 19; *City of Bellflower* (2020) PERB Order No. Ad-480-M, p. 11; accord *County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1073; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391.)

Likewise, courts have recognized that a plaintiff alleging discriminatory treatment may need access to personnel file information on other similarly situated employees to investigate claims of discriminatory practices. (See, e.g., *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515, 1519, fn. 6 [former city firefighter who sued for race discrimination was entitled to obtain personnel files of colleagues in city's fire department, despite city's claim that such discovery infringed on firefighters' privacy, because of need to assess potential evidence of race-based disparate treatment within the department].)

B. Application to SEIU's RFI

SEIU requested information relevant to its class action grievance asserting that the City violated the MOU's antidiscrimination provision by disproportionately releasing from probation or extending the probation of African American bargaining unit members. In response, the City stated that it would provide the data only in aggregate form. When an employer unilaterally states such a position without offering to bargain in good faith over accommodating all relevant interests, the employer violates its duty to bargain in good faith and no further analysis is necessary to establish liability. (See *ante* at p. 9.) Here, however, we continue with the analysis as if the City had offered to bargain. We do so both to provide guidance on the issues at stake and because the City came close to offering to bargain when it expressed a continuing desire to work with the union on the request.

To begin, the City does not contest that SEIU sought necessary and relevant information. Indeed, the City told SEIU it recognized the union had a "valid" interest. The ALJ, similarly, after hearing testimony about the need for disaggregated race and

ethnicity information, credited such testimony and concluded that SEIU needed the disaggregated data to competently perform its representational function. We agree, as SEIU needs to be able to contact African American unit members released from probation (or who had their probation extended) to help such employees and to investigate whether the experience of the three named employees in its grievance reflected a broader problem. SEIU needs to interview such employees to assess potential violations, defenses, and any other causes of racially skewed treatment of employees on probation, as well as to decide whether to push the case to arbitration, and if so to prepare for arbitration. (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 9-10 [union's ability to independently investigate potential grievance "is an essential tool for determining whether the grievance has any merit and, if it does, for providing effective representation"].) SEIU must be able to target its inquiries toward potential similarly situated employees so that it can "efficiently accomplish" these representational functions. (*LAUSD*, *supra*, PERB Decision No. 2438, p. 10.)

The City has not met its burden to prove that disclosing disaggregated race/ethnicity information to SEIU invades privacy in a manner that is serious in both its nature and its scope, much less that there is a serious privacy invasion that outweighs SEIU's laudable purpose in seeking the information. We reach this conclusion for multiple reasons. First, we find persuasive the NLRB and judicial precedent noted *ante* at pages 11-13. Stated simply, employees' privacy interest in their race/ethnicity is limited enough that it gives way to a union or plaintiff seeking to

investigate, prevent, ameliorate, or remedy workplace discrimination, as SEIU seeks to do here.

Indeed, it is important to step back and survey the overall context. In an ideal world, race/ethnicity information should not be stigmatizing in the least. Due to discrimination, we do not currently live in such an ideal world.[8] But that truth underscores why context matters so much. The City is not shielding race/ethnicity information from a third party that seeks to profit or benefit from the data, or that significantly risks taking actions harmful to the employees. Rather, the City raises the issue as an obstacle to disclosing data to the employees' exclusive representative.[9]

The data SEIU requested will assist in investigating potential discrimination and offering employees help vis-à-vis any race-based disparate treatment or disparate impact that City employees may be subject to during their probationary periods. As in *LAUSD*, *supra*, PERB Decision No. 2438, therefore, we find an employer interposing employees' alleged privacy interests is a particularly weak argument when it hinders

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[8] In a 2020 proposed decision in PERB Case No. SF-CE-1163-H, the ALJ found no significant privacy interest in disaggregated race and sex data, in part based on the ALJ's stated view that such information should not be stigmatizing. The employer took no exceptions and instead complied with the ALJ's order to provide such data to a requesting union. Thus, PERB Decision No. HO-U-1657-H is final and binding only on the parties involved, and it is otherwise non-precedential.

[9] Merely because an employer must provide information to a union in light of its role as an exclusive representative, the employer need not provide the same information to others. (*Boardman v. Inslee* (9th Cir. 2020) 978 F.3d 1092, 1110-1113 [law does not discriminate in providing union preferential access to information based on legal status as exclusive representative].) As in *Boardman*, if employees choose a different union as their exclusive representative, the informational rights at issue in this case would transfer to that union.

the same employees from receiving assistance, and such an argument does not normally outweigh a union's antidiscrimination purpose. (*Id*., adopting proposed decision at pp. 9-10; see also *Sacramento*, *supra*, PERB Decision No. 2597, p. 9 [personnel records of non-bargaining unit employees are relevant and necessary as a comparator, though in cases where the union has no need to speak to the employees or to know their names, it may be proper to redact names and use de-identified placeholders allowing all parties to track important figures across multiple records].)

While the City claims that Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) requires it to keep race and ethnicity information confidential, the City fails to demonstrate that is true. Rather, the City cites to section 709(e) of Title VII (42 U.S.C. § 2000e-8(e)), which prevents EEOC employees from publicizing certain data the agency obtains. If anything, this shows Congress knew how to protect confidentiality of race/ethnicity information and chose to place limits on the EEOC rather than on the government agencies required to collect and report such information. Thus, if either party gains a stronger argument in this case from the federal framework, it is SEIU, not the City.[10]

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[10] As noted, SEIU no longer pursues its unilateral change and direct dealing claims. This concession moots another City argument based on federal law: the City's claim that it cannot bargain about data collection practices because federal law establishes the manner of collection and the matter is therefore exempt from bargaining pursuant to *San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482, 1494 [holding that matters pertaining to promotion are normally subject to bargaining, but there is an exception for a city's decision made to comply with a federal consent decree]. To the extent the City has attempted to merge its unilateral change defense with its defense to SEIU's RFI, the argument has no traction as a reason to deny the RFI, as federal law imposes no confidentiality requirement on the City.

Nor do we find persuasive the City's citations to the California Public Records Act (CPRA).[11] The labor relations statutes we administer confer upon an exclusive representative, as part of its representational rights and duties, separate informational rights that are broader than those that the public holds, and which include access to sensitive and confidential employee information. (*Sacramento*, *supra*, PERB Decision No. 2597, pp. 10-12.) Indeed, a City witness noted this point in his testimony. CPRA defenses accordingly do not apply to RFIs arising under a labor relations statute. (*Id*. at p. 10; accord *Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 15, fn. 9; *Tulare*, *supra*, PERB Decision No. 2697-M, pp. 14-15, fn. 9.)

Moreover, the City mischaracterizes the CPRA. Its full argument on the CPRA is as follows: "Section 6254(c) of the Government Code states the public generally does not have a right to obtain disclosure of information that would 'constitute an warranted [sic] invasion of personal privacy,' and elsewhere affirms that the public is entitled to 'data regarding age, race, ethnicity, national origin, or gender . . . so long as the data contains no individually identifiable information.' (Gov. Code §§ 6254 (c), 6254.18.)" The quoted language about providing race and ethnicity information in a de-identified manner comes from former section 6254.18 (now recodified in sections 7926.400-7926.430), and it applies solely to employees and agents of reproductive health services facilities. As with the City's citation to federal law, this citation shows the Legislature knows how to explicitly require de-identification of race/ethnicity

[11] The CPRA was originally codified at section 6250 et seq. The CPRA Recodification Act of 2021, effective January 1, 2023, renumbered the law's provisions without any substantive change relevant to this case. (See §§ 7920.000-7931.000.)

information but has not done so for the City's employees, even as to requests from members of the public.[12]

The City also has its own public records regulations, which are part of the City's Sunshine Ordinance. The City cites two such provisions, found in sections 67.1 and 67.24(c) of the City's Administrative Code. Section 67.1 is a general statement affirming that, in the context of public meetings, City employees, among others, have a right of privacy, though that privacy interest gives way in favor of open meetings. Section 67.24(c) similarly does not aid the City, for multiple reasons: (1) it governs requests for personnel information from the public, not from an exclusive representative union; (2) its only reference to race or ethnicity appears in section 67.24(c)(1)(i), which covers only information on job applicants; and (3) the provision on job applicants, while poorly written and subject to more than one interpretation, may require disclosure of the ethnicity of each successful job applicant.

We next consider the City's reliance on Article 16 of its City Charter, entitled "Miscellaneous Provisions," and specifically to Section 16.130, entitled "Privacy First Policy." Section 16.130 states that it is "intended to provide guidance to the City when

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[12] Were a member of the public to submit a CPRA request for disaggregated race/ethnicity data, the general CPRA provision on personnel records would apply. Under that provision (formerly § 6254(c) and now recodified as § 7927.700), the outcome depends on balancing any potential privacy invasion with the benefit of disclosure to the public. (*Marken v. Santa Monica-Malibu Unified School Dist*. (2012) 202 Cal.App.4th 1250, 1272-1276.) We do not speculate on the outcome of such a hypothetical analysis, as it would be unlike the analysis here. Not only does a union have greater informational rights than the public, but, as discussed *post*, we are able to limit SEIU's use and disclosure of the data in a way that is impossible when a government agency fulfills a CPRA request.

considering the adoption of privacy-protective laws, regulations, policies, and practices for the City." Section 16.130(e)(5) states that the City shall "[d]iscourage the collection, storage, sharing, or use of Personal Information, including Personal Information that may identify an individual's race, religion or creed, national origin, gender, sexual orientation, age, physical or mental disability, or other potentially sensitive demographic information, unless necessary to accomplish a lawful and authorized purpose." And Section 16.130(e)(6) states that the City shall "[d]e-identify data sets, when collected for research, statistical, or other analytical purposes, thereby removing the ability to connect personal characteristics with specific individuals, and implement technical safeguards to prevent re-identification of information."

While the record contains no evidence regarding these provisions' genesis or intent, we glean from their language and placement in the Charter's "Miscellaneous Provisions," rather than in the Charter's separate, extensive provisions on labor and employment, that they were not necessarily enacted with the intent of impacting the City's labor relations. In any event, Section 16.130(e)(5) explicitly allows provision of identified information "to accomplish a lawful and authorized purpose."[13]

For these reasons, it is not difficult to harmonize the City's Charter, ordinances, policies, and practices with the MMBA principles explained above. Notably, however, if such harmonizing were not possible, the MMBA would preempt any conflicting local regulation or policy. (*County of Los Angeles v. Los Angeles County Employee Relations Com.*, *supra*, 56 Cal.4th at p. 917; *Building Material and Construction*

[13] Charter Section 16.130(e)(2) contains the same carve-out, using the same language.

Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 665; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202; *International Federation of Professional and Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557; *City and County of San Francisco* (2020) PERB Decision No. 2691-M, pp. 20-21, 31, 43 & 52.)

Furthermore, to the extent the City cites its own actions as creating a privacy right, we have already noted (*ante* at p. 11) that an employer normally does not create an obstacle to disclosure to an exclusive representative solely via the employer's own act. Rather, an employer's policy or promise of confidentiality typically becomes relevant to this analysis only if grounded in a previously existing privacy right.[14]

Finally, in *LAUSD*, *supra*, PERB Decision No. 2438, we noted that UTLA would use the information in question only as needed for proper purposes. (*Id*. at p. 10.) Similarly, we have often noted that one appropriate accommodation of competing interests is to restrict a union's use of information to limited, proper purposes. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 19; *Sacramento*, *supra*, PERB Decision No. 2597, pp. 12-13; *LAUSD*, *supra*, PERB Decision No. 2438, p. 20.) While such an extra precaution may not be strictly necessary here, it further erases any doubt as to

[14] The City has also waived the argument that it led employees to rely on the privacy of their race/ethnicity, as the City failed to preserve this argument in its exceptions.

the proper outcome. (See, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 38 [holding that "if intrusion is limited" and information is disclosed only "to those who have a legitimate need to know, privacy concerns are assuaged"].) Indeed, by adding a protective order to our remedy, we adopt a common judicial approach to allowing full discovery while minimizing intrusions on privacy. (See Lindemann, Grossman & Weirich, Employment Discrimination Law, Ch. 34.IIIA.1 (7th ed. 2023) (e-book) [noting that "blanket claims of privacy, even when based on statute or rule, often do not protect nonparty employee personnel files or similar information from discovery in discrimination cases, particularly when the court has entered a protective order to ensure confidentiality"].) We therefore direct SEIU to refrain from releasing disaggregated race/ethnicity information and to use such information only as needed to investigate and/or seek to prevent, lessen, ameliorate, or remedy potential workplace discrimination or other potential legal or contractual violations.

Accordingly, the City's showing of privacy invasion is small enough that there is no need to engage in balancing (*Tulare*, *supra*, PERB Decision No. 2697-M, p. 13), or, in the alternative, the City has not carried its burden of proving that a significant threat to a legitimate privacy right outweighs SEIU's representational needs (*ibid*). For the foregoing reasons, we affirm the ALJ's conclusion as to race/ethnicity data.[15]

[15] By the time the City complies with our order, most City employees at issue in the RFI will be former employees. We express no opinion whether SEIU may be able to help such employees, for instance by arguing that the City's eventual provision of information triggers applicable statutes of limitations. Irrespective of what percentage of former or current employees SEIU may be able to assist, the City cannot interpose new defenses that have arisen based on the passage of time. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 19.) To rule otherwise would frustrate SEIU's ability to investigate patterns and potentially achieve systemic change by bargaining for

II. SEIU's Exceptions as to Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the MMBA and the other acts we enforce. (MMBA, § 3509, subd. (b); *Mt. San Antonio Comm. College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068; *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26.) Remedial orders typically must rely to a degree on estimates; such estimates are preferable to allowing uncertainty—caused by unlawful conduct—to leave an unfair practice without any effective remedy. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 20; *Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21, fn. 13; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14, 26-27.)

The ALJ's proposed remedy would require the City to provide SEIU with the 2016-2019 information it sought, including disaggregated race/ethnicity data. While information from 2016-2019 is no longer the most useful data set for SEIU to fulfill its statutory purposes, PERB will rarely find that an RFI becomes moot, lest the delay of litigation end up allowing respondents to avoid their duties. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 19; see also p. 21, fn. 15, *ante*.) But circumstances such as this

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prospective, probation-related contract provisions. Similarly, by the time we issued *LAUSD*, *supra*, PERB Decision No. 2438, a considerable number of the teachers in question were no longer under investigation and/or were former employees, but that did not impact our order.

one lead us to require the respondent to provide both the data originally requested as well as a current version thereof if requested. (*County of Ventura* (2018) PERB Decision No. 2600-M, pp. 44 & 46.) Such an obligation would exist in any event by virtue of PERB's standard order to cease and desist further violations. (*National Labor Relations Bd. v. P*I*E Nationwide, Inc.* (7th Cir. 1990) 894 F.2d 887, 892 ["If a cease and desist order became moot by virtue of the respondent's discontinuing the specific illegalities that gave rise to the order, such orders would have no force at all—the respondent would comply for a day, declare the order moot, and resume its violations with impunity"].) However, it is worthwhile to be more explicit where possible, and we do so here by requiring the City to update the 2016-2019 data promptly upon receiving such a request from SEIU.

SEIU also seeks two other remedies. First, SEIU asks us to direct the City to alter its forms, practices, or policies relevant to soliciting race/ethnicity information. However, SEIU has filed no exceptions regarding the ALJ's decision to dismiss the complaint's unilateral change and direct dealing claims. Moreover, as shown in our remedial order, *post*, we need not order changes to forms, policies, or practices to effectuate the MMBA's purpose of providing SEIU with the information it needs to perform its statutory purposes. We therefore reject this exception.

Second, SEIU requests litigation expenses from this case and/or from the arbitration proceeding regarding its discrimination grievance. In its post-hearing brief to the ALJ, the City included only a summary paragraph regarding these requests, but in its exceptions, SEIU offers a more robust analysis. SEIU notes that, because the arbitration is now long since over, the information it receives after this decision

becomes final will be too late to change that outcome. Accordingly, SEIU urges that we apply precedent with an eye to the fact that failing to augment the proposed remedy may allow employers in the City's position to gain a benefit from intransigence.

With certain exceptions not applicable here, a party to a PERB matter seeking litigation expenses based upon its attorney fees and costs in that matter must normally prove that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11.) SEIU has not met that burden of proof here, as we do not find that the City acted in bad faith given that this was a case of first impression for PERB.

However, we apply a different standard when deciding if a respondent found to have committed an unfair practice must pay attorney fees and costs related to a separate proceeding—whether the proceeding is in court, in arbitration, or in another PERB matter outside of the unfair practice charge itself. A charging party can obtain such a remedy if it (or a party in privity with it) has engaged in the separate proceeding in material part to remedy, lessen, make up for, or stave off the impacts of the unfair practice. (*Victor Valley Union High School District* (2022) PERB Decision No. 2822, pp. 23-24; *Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, pp. 11-12; *City of San Diego* (2019) PERB Decision No. 2464a-M, p. 4; *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30; *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M, p. 3.) Similarly, we direct payment of a charging party's salaries or other bargaining and/or representation costs incurred in

material part due to an unfair practice, even absent a separate proceeding. (*City and County of San Francisco* (2023) PERB Decision No. 2858-M, pp. 15-17; *Alliance Judy Ivie Burton Technology Academy High et al.* (2022) PERB Decision No. 2809, pp. 14, 31-32, 34 (*Alliance*).) In either of those contexts, make-whole relief is proper if the charging party proves that the respondent's unlawful conduct caused harm and it is reasonably feasible to estimate the impact thereof. (*City and County of San Francisco*, *supra*, PERB Decision No. 2858-M, p. 15.)

SEIU's discrimination grievance was a separate proceeding, meaning we must determine whether our remedy should include any arbitration-related expenses as a make-whole remedy. At times, a union pursuing a grievance may incur greater expenses while marshalling additional evidence to make up for information that an employer unlawfully failed to provide, thereby creating a valid claim for make-whole compensation of extra expenses. Other potential make-whole scenarios could occur, for instance, if an unlawful failure to provide information degraded a union's ability to win in arbitration to such an extent that it became futile, which might make the union eligible for a make-whole remedy comprising full attorney fees and costs in the arbitration. A charging party should normally have an opportunity to establish such losses—including causation—in compliance proceedings. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 15 [PERB provides "a successful charging party the opportunity to prove losses in compliance hearings, unless the record has proven that there was no such harm"]; see also *City and County of San Francisco*, *supra*, PERB Decision No. 2858-M, p. 15; *Antelope Valley Community College District* (2023) PERB Decision No, 2854, p. 7; *Alliance*, *supra*, PERB Decision No. 2809,

p. 34; *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 29; *Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 32.)

SEIU is therefore correct in its broad point about unfair practice charges pertaining to information requests relevant to an arbitration or other separate proceeding. To make a union whole for an employer's refusal to provide information, as well as to deter future violations, it may be necessary in some such cases to order monetary compensation related to: (a) full or partial attorney fees or costs related to the proceeding for which the union sought information; and/or (b) extra staff time or other resources spent in relation to the proceeding or the underlying problem the union was attempting to solve.

In the unique circumstances of this case, however, there is no cause for compliance proceedings on potential monetary relief. SEIU kept this case in abeyance for 18 months, only removing the case from abeyance after the arbitrator had issued a decision rejecting SEIU's grievance. This litigation strategy guaranteed that the arbitration would finish before the PERB hearing began. Because most cases do not feature such facts, normally the employer risks potential monetary exposure if PERB eventually decides it unlawfully withheld information and thereby caused compensable harm. Indeed, an employer withholding information requested for potential use in an arbitration often leaves a union with a Hobson's choice: proceed to arbitration without certain information or ask the arbitrator for a long continuance to allow the union to obtain information by either completing an ongoing PERB case or pursuing subpoena compliance through superior court litigation and potential ensuing appeals. We do not suggest that a union in that situation waives its right to seek an order of arbitration

costs (including litigation expenses and staff time) merely because it proceeds with arbitration rather than asking for a continuance. However, proceeding with arbitration while leaving the PERB information request charge in abeyance for 18 months is a fundamentally different scenario, because it does not reflect a union that has continued to pursue its RFI in the hope of receiving an adequate response before arbitration. For that reason, monetary compensation related to arbitration expenses and/or staff time is unwarranted here.

ORDER

Based on the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, and 3506.5, subdivisions (a) and (b), by failing to adequately respond to an information request from Service Employees International Union, Local 1021 (SEIU). All other claims are DISMISSED.

Pursuant to MMBA section 3509, subdivision (b), we order as follows.

I. The City, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM failing or refusing to provide disaggregated employee information SEIU requests for the purpose of investigating potential discrimination against employees it exclusively represents.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within 30 days after this decision becomes final, provide SEIU with a list of SEIU-represented City employees who were released from probation, or whose probation was extended, between January 1, 2016 and January 1, 2019, showing

each employee's name, department, title, classification, identification number, appointment status, dates of employment, personal e-mail address and phone number, home address, and race/ethnicity.

2. Within 45 days of a request by SEIU, provide the information listed in paragraph B(1) for the period of January 1, 2019 through the date this decision becomes final.

3. Post at all locations where the City posts notices to employees represented by SEIU copies of the Notice attached hereto as an Appendix. An authorized agent of the City shall sign the Notice, indicating that the City will follow the terms of this Order, and the City shall maintain such postings for a period of 30 consecutive workdays. The City shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting the Notice, the City shall communicate it by electronic message, intranet, internet site, and other electronic means the City uses to communicate with SEIU bargaining unit employees.[16]

4. Notify OGC of the actions the City has taken to follow this Order by providing written reports as directed by OGC and serving such reports on SEIU.

II. SEIU and its representatives shall refrain from releasing disaggregated race/ethnicity information and shall use such information only as needed to investigate

[16] Any party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

and/or seek to prevent, lessen, ameliorate, or remedy potential workplace discrimination or other potential legal or contractual violations.

Chair Banks and Member Paulson joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1779-M, *Service Employees International Union Local 1021 v. City and County of San Francisco*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) has found that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by failing to provide relevant and necessary information to service Employees International Union, Local 1021 (SEIU) pursuant to the requirements of the MMBA.

As a result of this conduct, we have been ordered to post this Notice, and we will:

A. CEASE AND DESIST FROM failing to provide disaggregated employee information SEIU requests for the purpose of investigating potential discrimination against employees it exclusively represents, provided that SEIU shall refrain from releasing disaggregated race/ethnicity information and shall use such information only as needed to investigate and/or seek to prevent, lessen, ameliorate, or remedy potential workplace discrimination or other potential legal or contractual violations.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within 30 days after this decision becomes final, provide SEIU with a list of SEIU-represented City employees who were released from probation, or whose probation was extended, between January 1, 2016 and January 1, 2019, showing for each employee the following data: name, department, title, classification, identification number, appointment status, dates of employment, personal e-mail address and phone number, home address, and race/ethnicity.

2. Within 45 days of a request by SEIU, provide the information listed in paragraph B(1) for the period of January 1, 2019 through the date this decision becomes final.

Dated: _____ City and County of San Francisco

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.