STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1437-H PERB Decision No. 3034-H July 1, 2026

Appearances: Leonard Carder by Kate Hallward, Paul Sindberg, and John Henry Vansant, Attorneys, for American Federation of State, County & Municipal Employees Local 3299; Sloan Sakai Yeung & Wong by Timothy Yeung, Attorney, for Regents of UC of California.

Before Krantz, Krausse, and Ortega, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on both parties' exceptions to a proposed decision issued by an administrative law judge (ALJ). The case centers on a request for information (RFI) that Charging Party American Federation of State, County & Municipal Employees Local 3299 (AFSCME) submitted to Respondent Regents of the University of California (UC). The RFI sought health and safety records pertaining to employees at Lawrence Berkeley National Laboratory (LBNL), a national research laboratory that UC operates. While the United States Department of Energy (DOE) owns LBNL, UC

runs it pursuant to a contract with DOE known as "Contract 31." There is no dispute that UC is the employer of all AFSCME-represented employees at LBNL.

AFSCME's unfair practice charge and the ensuing complaint alleged that UC violated its duty to meet and confer in good faith under the Higher Education Employer-Employee Relations Act (HEERA; Gov. Code, § 3560 et seq.) by failing to provide AFSCME with records it requested.[1] The ALJ sustained AFSCME's claim and issued a compromise remedy intended to comply with the Privacy Act of 1974 (Privacy Act; 5 U.S.C. § 552a). Both parties filed exceptions to the ALJ's order. Having considered the parties' arguments, we reach the following factual findings, legal conclusions, and remedial order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. Exposure and Hazard Assessment at LBNL

UC conducts regular hazard and exposure assessments, which are described in detail in LBNL's Environment, Safety, and Health Manual (ESH Manual). Hazard assessments are preliminary evaluations of a particular activity, whereas exposure assessments involve a more comprehensive evaluation of "the acceptability of workplace exposures to environmental agents." These assessments arise in various circumstances, such as during the planning phase of new operations, upon request from a customer, in follow-up to observations or concerns identified during a review, or

[1] To "meet and confer" means to bargain. (Cal. Code Regs., tit. 8, § 32096.)

[2] The ALJ's factual findings, to which the parties largely accede, are mainly based on the parties' joint Statement of Stipulated Facts and Stipulated Exhibits. We incorporate and supplement many of the ALJ's factual findings below.

pursuant to technical program requirements or targeted evaluations. The ESH Manual provides that records of exposure and hazard assessments "are generally considered employee exposure records and therefore shall be retained for at least 75 years after termination of employment."

LBNL employees are required to wear devices called "dosimeters" when performing certain tasks. Dosimeters measure the levels of radiation employees are exposed to at any given time. UC maintains employees' dosimeter measurements throughout their employment. Employees can review these results at any time through an online portal. UC provides employees with annual dose reports listing the types of radiation for which they were monitored and the results. UC maintains each employee's dose history information and permits employees to request a dose history report for 90 days following termination or departure from employment.

UC also maintains a manual called the Radiological Control Manual (RC Manual) in an online system that employees can access if they are logged into the LBNL computer system. The RC Manual is only accessible to employees.

II. AFSCME's RFI

On February 7, 2023,[3] AFSCME representative Rebecca Gilpas e-mailed UC Employee and Labor Relations Consultant Katie Fuller. AFSCME requested that UC provide six categories of records, for the past five years, related to the health and safety of AFSCME-represented employees at LBNL. Specifically, AFSCME sought:

> "(1) Exposure assessments (radiological, chemical, etc.);
> "(2) Hazard assessments (radiological, chemical, etc.);
> "(3) Annual dosimeter dose reports;

[3] All further dates are in 2023, unless otherwise designated.

> "(4) Radiation monitoring system reports;
> "(5) OSHA logs; and
> "(6) The Radiological Control Manual (online links are broken.)"

AFSCME requested that UC provide the information as it became available.

On March 27, Gilpas e-mailed Fuller a second time, reiterating AFSCME's February 7 requests and noting that UC had failed to respond.

On March 28, Fuller forwarded AFSCME's RFI to UC Principal Employee & Labor Relations Consultant Shelbi Rodriquez. On March 29, Rodriquez e-mailed Gilpas, identifying herself as the person who handles AFSCME's LBNL-related RFIs, acknowledging receipt of the RFI, and stating that she would be in touch as she received the information.

On April 19, Gilpas e-mailed Rodriquez, reiterating AFSCME's RFI and asking UC to explain its delay. Rodriquez responded later that day, explaining that she had recently been out of the office for over a week, but that she had requested the information and would provide it as she received it. Approximately 18 minutes after writing to Gilpas, Rodriquez e-mailed LBNL Medical Director Timur Durrani, sharing the RFI and asking who she should contact to obtain the requested records.

On May 30, Ronald Shimkowski, a Business Division Director in DOE's Office of Science, e-mailed Miriam Bartos, a DOE FOIA/Privacy Act Officer.[4] Shimkowski forwarded a string of e-mails that included AFSCME's RFI, and he asked for guidance on how to respond.

[4] FOIA is an acronym for the Freedom of Information Act (5 U.S.C. § 552).

Bartos responded by e-mail approximately 37 minutes later. She advised Shimkowski that some of the records at issue "likely are Privacy Act records" if they contain "individuals' records," whereas others are "more generic records (not identifiable to specific individuals)" and would therefore not be Privacy Act records. More specifically, as to request 1 (exposure assessments), request 3 (annual dosimeter dose reports), and request 5 (OSHA logs), Bartos stated that she needed clarification as to whether the Union was seeking generic information or individualized records. Bartos opined that request 2 (hazard assessments), request 4 (radiation monitoring system reports), and request 6 (radiological control manual) appeared to be seeking non-Privacy Act records. With respect to the "non-Privacy Act records" requested by AFSCME, Bartos opined that for some of those records, DOE would "need to review the requested records to see if a FOIA request is necessary," whereas for other records, DOE "would need a FOIA request" to release those records.

On or about June 13, Gilpas e-mailed Rodriquez again, noting that AFSCME still had not received any of the information it had originally requested on February 7 and had sought again on both March 27 and April 19. Gilpas asked Rodriquez to send whatever information she had collected by the end of the day and all remaining information by June 30.

Rodriquez responded to Gilpas by e-mail, still on June 13. Rodriquez first stated that AFSCME's RFI "was reviewed by our Legal Office, in conjunction with the Department of Energy." Rodriquez then asserted that the RFI was "unduly burdensome and overbroad as currently requested," but she did not identify which items of information included in the RFI were burdensome or overbroad, why they

were overbroad, or what burden would be involved in producing the information. Rodriquez also inquired as to the "timeframe" for the request, even though the RFI had expressly requested documents for the past five years.

Rodriquez further asserted that the requested documents "are owned by the DOE and would require a FOIA request." Next, Rodriquez asked: "[F]or Nos. 1, 2, and 6, LBNL requests clarification as to whether AFSCME is requesting general information, or individual specific information." The June 13 response concluded by including a link to a document called the "DOE Occupational Radiation Exposure Monitoring Summary," although Rodriquez did not indicate to which request this document pertained.

AFSCME did not respond to Rodriquez's June 13 e-mail. The union filed its unfair practice charge on September 15.

On February 2, 2024, PERB's Office of the General Counsel issued a complaint alleging that on or about March 27, April 19, and June 13, 2023, UC failed and refused to provide the requested information.

On May 8, 2024, Theresa Leone, LBNL's Chief Laboratory Counsel, sent a letter to DOE's Chief Counsel, James Durant, asking for DOE's "concurrence" with UC's assertions that (1) all the information requested by AFSCME is "owned by the DOE," and (2) all the requested information "fall[s] under the Privacy Act and/or FOIA," and therefore cannot be provided to AFSCME "without further approvals by DOE." On May 20, 2024, Durant responded that DOE does own all the information requested, and that all such records "would need to be requested under the FOIA . . . , or, under the Privacy Act if the union . . . obtained requisite permissions . . . ." Durant also

forwarded an e-mail from Todd Burns, a DOE employee whose title is not included in the record, which contained a slightly more detailed analysis of the issues on which Durant's conclusions were apparently based. Burns agreed that "the records are in fact Government-owned" and that AFSCME would need to request the records via a FOIA request or under the Privacy Act with permission from individual employees. Burns closed his analysis by stating that "[w]ithout seeing the records, it is difficult to determine what would be released/withheld, but I would suspect most of the information would be protected from disclosure."

At the formal hearing in this matter, the parties opted to forgo witness testimony. They jointly submitted a statement of stipulated facts and a set of stipulated exhibits. Among other stipulations, the parties agreed that AFSCME's RFI is necessary and relevant to its right to represent bargaining unit employees regarding mandatory subjects of bargaining. They also agreed that the requested information exists, that it is not maintained in any "individual personnel files," and that UC had not provided any of it as of the date the parties reached their stipulations.

DISCUSSION

When resolving exceptions to a proposed decision, we apply a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, we need not address arguments that the ALJ sufficiently addressed. (*Ibid*.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.)

The statutes PERB administers confer upon an exclusive representative, as part of its representational rights and duties, a right to information that is broader than

the public's right to review public records. (*Butte-Glenn Community College District* (2022) PERB Decision No. 2834, p. 15 (*Butte-Glenn*).) 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. (*City and County of San Francisco* (2024) PERB Decision No. 2891-M, pp. 7-8 (*San Francisco*); *Butte-Glenn*, *supra*, p. 9; *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. (*San Francisco*, *supra*, p. 8; *Butte-Glenn*, *supra*, p. 9; *Contra Costa*, *supra*, pp. 5-6; *Sacramento*, *supra*, p. 8.)

A party responding to an information request must exercise the same diligence and thoroughness as it would in other business affairs of importance. (*Imperial Irrigation District* (2023) PERB Decision No. 2861-M, p. 46 (*Imperial Irrigation*); *Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 10; *Sacramento*, *supra*, PERB Decision No. 2597, pp. 8-9.) An unreasonable delay in providing information constitutes as much of a violation as an outright refusal. (*Imperial Irrigation*, *supra*, p. 46; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 20 (*Petaluma*).) Moreover, an employer's duty to provide information is not limited to information it owns; rather, it extends to all information that is available to it. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 26 [partially overruled on other grounds].)

Thus, once a party receives a request for relevant information, it must either promptly and fully supply the information or timely and adequately explain its reasons for not doing so. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, pp. 9-10; *Sacramento*, *supra*, PERB Decision No. 2597, p. 8.) Where a union requests information that is relevant and necessary to its representational responsibilities, the employer's unjustified failure to provide that information is a per se violation of its bargaining duty, and a charging party is not required to show harm or prejudice as part of its prima facie case. (*Butte-Glenn*, *supra*, pp. 9-10.)

The employer bears the burden of proving any defenses, limitations, or conditions on the disclosure of relevant information. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 10; *Sacramento*, *supra*, PERB Decision No. 2597, p. 8; *Petaluma*, *supra*, PERB Decision No. 2485, p. 23.) An employer's primary defenses to producing relevant information are waiver, privacy, undue burden, an absolute or qualified privilege, or that a request seeks information that does not exist. (*Imperial Irrigation*, *supra*, PERB Decision No. 2861-M, p. 46; *Butte-Glenn*, *supra*, p.10; *County of Tulare* (2020) PERB Decision No. 2697-M, p. 14 (*Tulare*).)

Because a union's right to information is distinct from, and often broader than, the public right to access records, exemptions from public disclosure set forth in a public records act are not valid defenses to a union's request pursuant to a labor relations statute. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 17; *Tulare*, *supra*, PERB Decision No. 2697-M, p. 14, fn. 9; *Sacramento*, *supra*, PERB Decision No. 2597, p. 10 [collecting cases]; accord *Postal Service* (1991) 305 NLRB 997, 1004-1005 [although FOIA applies to the postal service, FOIA "establishes rights of

the public-at-large to information in government files," and exceptions to those rights "apply directly only to those rights and not to rights created under other statutes" such as the National Labor Relations Act (NLRA)].)

A responding party waives any defenses to disclosure that it fails to raise promptly after receiving a request. (*Imperial Irrigation*, *supra*, PERB Decision No. 2861-M, p. 46; *Tulare*, *supra*, PERB Decision No. 2697-M, p. 14.) Moreover, if an information request requires clarification, is unduly burdensome, or seeks private information, the responding party is not permitted to deny the request outright and must instead offer to bargain in good faith regarding appropriate accommodations. (*Imperial Irrigation*, *supra*, p. 46; *Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 10; *Tulare*, *supra*, p. 14; *Sacramento*, *supra*, PERB Decision No. 2597, pp. 11-12.) A union should reassert or clarify its information request upon receiving a partial response from the employer, though the union may file a charge without doing so when it is sufficiently clear that the response did not fully satisfy the request. (*Butte-Glenn*, *supra*, p. 14.)

A union's unique representational functions may allow it a right to sensitive or confidential information. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 8; *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 a potential accommodation, and established substantive standards govern what must occur if the parties cannot work out such accommodations. (*San Francisco*, *supra*, pp. 8-9.) 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. (*Id*. at p. 9; *Tulare*, *supra*, PERB Decision No. 2697-M, pp. 13-14; *Contra Costa*, *supra*, pp. 18-20; *Sacramento*, *supra*, pp. 12-14.) Bargaining parties may negotiate accommodations that recognize unions can be trusted to be discreet. (*Sacramento*, *supra*, p. 13.) For instance, 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. (*San Francisco*, *supra*, p. 9; *Tulare*, *supra*, p. 13; *Contra Costa*, *supra*, p. 19.)

If the employer offers to bargain over privacy concerns, and it bargains in good faith to the extent requested but the parties fail to reach an agreement, then PERB must evaluate the substantive merits of the information request and privacy claim to resolve the union's ensuing unfair practice charge. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 9.) Where the employer raises a significant privacy interest—meaning a legally protected interest that the information request invades in a manner that is serious in both its nature and its scope—then a balancing test applies. (*Ibid*.; *Tulare*, *supra*, PERB Decision No. 2697-M, p. 13; *Contra Costa*, *supra*, PERB Decision No. 2652, p. 18.) Under this test, an employer has the burden to show that the privacy interest outweighs the union's informational need. (*San Francisco*, *supra*, p. 10.) PERB may tip the balance by directing the receiving union to refrain from releasing the information other than as needed for specific purposes. (*Id*. at p. 21.)

Where privacy rights outweigh a requesting party's need for information, resulting redactions should be narrowly tailored to address the privacy rights at issue, and the redacting party should use de-identified placeholders to make the redacted information as useful as possible. (*San Francisco*, *supra*, p. 16; *Tulare*, *supra*, p. 14; *Sacramento*, *supra*, PERB Decision No. 2597, p. 13, fn. 7.)

In Part I below, we briefly recount why UC's liability for violating HEERA is no longer in serious dispute. In Part II, we analyze the remedy issues that lie at the heart of both parties' exceptions.

I. Liability

On February 7, AFSCME requested information relevant to the health and safety of employees it represents. Indeed, the parties stipulated that the RFI was entirely necessary and relevant. We would reach this conclusion even absent the parties' stipulation, as employee health and safety constitute a core subject within the scope of representation. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 275; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 620.)

In response to AFSCME's RFI, UC violated HEERA when it failed to exercise the same diligence and thoroughness as it would in other business affairs of importance. (*Imperial Irrigation*, *supra*, PERB Decision No. 2861-M, p. 46.) To begin, UC was not justified in its delay before responding. UC's first substantive response was more than four months after AFSCME's request, on June 13, and only came after AFSCME sent three follow-up requests reflecting the union's increasing frustration with UC's inattention to its HEERA duties. There is no cause for us to repeat the ALJ's

thorough discussion of UC's delay or the ALJ's application of precedent holding that even delays of six weeks or two months can be unreasonable in the absence of legitimate justification. However, we supplement the ALJ's analysis by noting that in the cases the ALJ cited, the employer provided the information after six weeks or two months. (See, e.g., *Petaluma*, *supra*, PERB Decision No. 2485, pp. 24–25.) Here, in contrast, UC's response more than four months after AFSCME's request only provided a link to a single document—a national DOE Occupational Radiation Exposure Monitoring Summary—and UC did not indicate to which request this document might have been responsive, if any.

Moreover, UC's tardy response was careless and unsubstantiated. One factor supporting this conclusion requires brief explanation. As noted above, on May 30, Bartos e-mailed Shimkowski that she needed clarification as to whether AFSCME was seeking "generic information or individualized records" in request 1 (exposure assessments), request 3 (annual dosimeter dose reports), and request 5 (OSHA logs). But by the time UC attempted to send that inquiry to AFSCME two weeks later (on June 13), UC badly mishandled the inquiry. Instead of asking about requests 1, 3, and 5, UC asked about requests 1, 2, and 6. Specifically, UC wrote, "for Nos. 1, 2, and 6, LBNL requests clarification as to whether AFSCME is requesting general information, or individual specific information."

Although an employer may seek clarification of an information request, UC's attempt to do so suffered from multiple independent defects. First, as noted, the response was unreasonably delayed. Second, even had UC responded in a timely manner, an employer seeking to rely on the Privacy Act must at minimum identify that

statute or otherwise place the requesting union on notice of the asserted legal constraint; UC did neither. Third, even were we to set those deficiencies aside, UC sought clarification as to requests 1, 2, and 6, whereas the underlying concern identified by DOE pertained to requests 1, 3, and 5. This mismatch further demonstrates that UC did not exercise the diligence and thoroughness required in responding to an information request. (*Imperial Irrigation*, *supra*, PERB Decision No. 2861-M, p. 46.) Fourth, UC belatedly asserted, without explanation, that the request was "unduly burdensome and overbroad," and requested clarification of the timeframe despite the RFI's express five-year limitation. UC thereby waived its defenses to liability by failing to raise them timely, failing to substantiate them, and failing to offer to bargain over any asserted issues.

Had UC's inquiry timely and properly asked about requests 1, 3, and 5, AFSCME's failure to respond would have waived any right to individualized records in those categories. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, pp. 11-15.) While we do not find a waiver given UC's highly deficient approach to the RFI, AFSCME's failure to answer UC's jumbled inquiry is relevant to remedy. Specifically, AFSCME's failure to respond, combined with AFSCME's later decision to forgo witness testimony at the hearing in this case, prevented it from establishing a strong public interest in unredacted record disclosures. This dearth of evidence becomes relevant for the reasons described *post*, at pp. 36-37.

II. Remedy

The remedy for failure to provide information normally includes an order to provide the requested information upon the charging party's request, irrespective of

whether intervening events may have created new potential defenses to providing the requested information. (*Butte-Glenn*, *supra*, PERB Decision No. 2834, p. 19; *Children of Promise Preparatory Academy* (2019) PERB Order No. Ad-473, pp. 4-5.)

In this case, UC's exceptions assert that the ALJ's proposed remedy would violate federal law. UC thus invokes the principle that, even where an employer has violated a collective bargaining statute through delay, waiver of defenses, or other defects in its response to an RFI, PERB retains discretion to account for legitimate third-party privacy interests when fashioning a remedy. (*Tulare*, *supra*, PERB Decision No. 2697-M, p. 15; *Contra Costa*, *supra*, PERB Decision No. 2652, p. 20.) This principle does not negate the underlying violation but may limit the scope of the relief ordered. Accordingly, rather than remanding for the parties to bargain, it is appropriate to direct a PERB compliance officer to oversee the disclosure process, ensuring prompt implementation of the Board's order while accommodating all legitimate competing interests. (*Tulare*, *supra*, p. 15.)

We adopt this approach here. As prior decisions recognize, legal frameworks external to PERB-administered statutes—most commonly those establishing privacy protections—may impact our remedy in an RFI case. (*San Francisco*, *supra*, PERB Decision No. 2891-M, pp. 16, 18-19; *Contra Costa*, *supra*, PERB Decision No. 2652, pp. 20-26.) In our analysis below, we begin with the specific applicable framework governing disclosure of OSHA forms, then address broader Privacy Act and FOIA principles, and finally explain how those frameworks inform the remedial order in this case.

A. Federal and State Regulations Regarding Union Access to OSHA Forms

In November 2018, UC submitted a formal written request for a variance from certain federal health and safety regulations. DOE granted the variance in 2019. It identifies specific Cal/OSHA regulatory requirements that UC would follow at LBNL in lieu of analogous federal requirements. To identify which Cal/OSHA requirements were sufficient to replace federal requirements, UC's variance application compared federal rules in the Code of Federal Regulations, title 10, section 851 with their California counterparts, classifying each pairing as presenting either "no gap," a "partial gap," or a "gap." Where a "gap" or "partial gap" existed, UC was required to follow the federal standard.

As relevant here, UC's variance application established that there was "no gap" between Cal/OSHA's recordkeeping and worker-access requirements and their federal counterparts under the Code of Federal Regulations, title 10, section 851.20, thereby permitting UC to use Cal/OSHA Forms 300, 300A, and 301 in lieu of the corresponding federal forms promulgated by the federal Occupational Safety and Health Administration (federal OSHA). Notably, the federal forms have the same numbers, titles, and information fields as their state counterparts. (www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf [last accessed June 30, 2026]; https://www.dir.ca.gov/dosh/puborder.asp [last accessed June 30, 2026].)

Federal and state regulations provide as follows regarding a union's right to receive copies of OSHA Forms 300, 300A, and 301.

1. Form 301

Form 301 is titled “Injury and Illness Incident Report.” The left side of the form includes identifying and personal information, such as the employee’s name, address, date of birth, date of hire, gender, treating physician, treatment location, and whether emergency room treatment or overnight hospitalization was needed. The right side of the form includes the date and time of the incident and narrative descriptions such as “[w]hat was the employee doing just before the incident occurred,” as well as fields regarding “[w]hat happened,” “[w]hat was the injury or illness” and “[w]hat object or substance directly harmed the employee.” (www.osha.gov/sites/default/files/OSHA-RK-Forms-Package.pdf [last accessed June 30, 2026].)

Both federal and state regulations require employers to disclose Form 301 to a union, redacting the left-side fields and leaving the right-side fields intact. The operative federal regulation instructs employers as follows:

> “When an authorized employee representative asks for copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within 7 calendar days. You are only required to give the authorized employee representative information from the OSHA 301 Incident Report section titled 'Tell us about the case.' You must remove all other information from the copy of the OSHA 301 Incident Report

> or the equivalent substitute form that you give to the authorized employee representative."[5]

(29 C.F.R. § 1904.35(b)(2)(v)(B).)

Accordingly, the federal regulation does not enumerate specific fields to be redacted; instead, it defines the scope of required disclosure by reference to a single section to be provided, with all other fields redacted. The redacted sections comprise the personal and identifying information on the left side of the form, while the non-redacted section, now renamed as "Information about the case," includes the above-described information from the form's right side.

California's counterpart regulation achieves the same result by directing employers to redact the personal and identifying fields on the left side of the form before providing Form 301 to an exclusive representative:

> "When an authorized employee representative asks for copies of the Cal/OSHA Form 301 Incident Reports or equivalent forms for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within seven (7) calendar days but with the following personally identifying information deleted: 1. Name; 2. Address; 3. Date of birth; 4. Date of hire; 5. Gender; 6. Name of physician; 7. Location where treatment was provided; 8. Whether the employee was treated in an emergency room;

[5] An "authorized employee representative" is "an authorized collective bargaining agent of employees." (29 C.F.R. § 1904.35(b)(2)(i); Cal. Code Regs., tit. 8, § 14300.35(b)(2)(A).)

> and 9. Whether the employee was hospitalized overnight as an in-patient."

(Cal. Code Regs., tit. 8, § 14300.35(b)(2)(E)(2).) Thus, California law matches federal law in affording unions the right to receive all data on the right side of the form. (*Ibid*.)

2. Forms 300 and 300A

Form 300 is titled "Log of Work-Related Injuries and Illnesses." It includes, for each recorded incident, the employee's name and job title, the date and location of the event, a description of the injury or illness, and its classification. Form 300A is titled "Summary of Work-Related Injuries and Illnesses." It contains aggregated, annualized data and does not include identifying information for individual employees.

State and federal law are, once again, fully aligned regarding a union's right to receive Forms 300 and 300A. The operative state regulation directs employers as follows:

> "When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored Cal/OSHA 300 forms or a current or stored annual summary for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant Cal/OSHA 300 forms and annual summaries by the end of the next business day . . . . May I remove the names of the employees or any other information from the Cal/OSHA Form 300 before I give copies to an employee, former employee, or employee representative? No. You must leave the names on the Cal/OSHA Form 300. However, to protect the privacy of injured and ill employees, you may not record the employee's name on the Cal/OSHA Form 300 for certain 'privacy concern cases,' as specified in Sections 14300.29(b)(6) through 14300.29(b)(9)."

(Cal. Code Regs., tit. 8, § 14300.35(b)(2)(C).)

The federal government's counterpart regulation uses almost identical language:

> "When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day . . . . May I remove the names of the employees or any other information from the OSHA 300 Log before I give copies to an employee, former employee, or employee representative? No, you must leave the names on the 300 Log. However, to protect the privacy of injured and ill employees, you may not record the employee's name on the OSHA 300 Log for certain 'privacy concern cases,' as specified in § 1904.29(b)(6) through (9)."

(29 C.F.R. § 1904.35(b)(2)(iii)-(iv).)[6]

3. Summary of a Union's Right to Receive OSHA Forms

Accordingly, the federal and state frameworks have the same substantive effect. Under either regulatory scheme: (1) Form 300A is fully disclosable because it contains no individualized information; (2) Form 300 must be produced in full; the form will include identifying information except in designated privacy concern cases; and (3) Form 301 must be produced in redacted form, with personally identifying information removed but the incident narrative and related details disclosed.

[6] Employers' duty to provide unions with Form 300 includes incidents involving employees outside of the bargaining unit. (OSHA Standard Interpretation, Sept. 9, 2005, https://www.osha.gov/laws-regs/standardinterpretations/2005-09-09-0 [last accessed June 30, 2026].)

The UC-DOE variance confirms this equivalence. It expressly relies on California Code of Regulations, title 8, section 14300.35(b)(2) and concludes that there is “no gap” between state and federal requirements governing disclosure of injury and illness records to authorized employee representatives.

B. The Privacy Act and FOIA

The Privacy Act is codified at section 552a of title 5 of the United States Code, entitled “Records maintained on individuals.” The statute defines a “record” as “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” (5 U.S.C. § 552a(a)(4).) It defines a “system of records” as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” (*Id*., § 552a(a)(5).)

Every federal agency that maintains a system of records must publish in the Federal Register a notice describing that system and the procedures for individuals to access records pertaining to them. (5 U.S.C. § 552a(e)(4).)

Federal government contractors maintaining systems of records must comply with the Privacy Act. (5 U.S.C. § 552a(m); 10 C.F.R. § 1008.1(c); Federal Acquisition Regulation (FAR) 52.224-2, codified at 48 C.F.R. § 52.224-2.)

In Contract 31 between UC and DOE, Section I.124 is titled "ACCESS TO AND OWNERSHIP OF RECORDS." It provides in relevant part:

> "(a) *Government-owned records*. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the Government and shall be maintained in accordance with 36 Code of Federal Regulations, Chapter XII, -- Subchapter B, 'Records Management.' The contractor shall ensure records classified as Privacy Act system of records are maintained in accordance with FAR 52.224.2 'Privacy Act.'
>
> "(b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
>
> "(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except those records described by the contract as being operated and maintained by the Contractor in Privacy Act system of records."

Federal regulations require DOE to include the above-quoted provision in Contract 31. (48 C.F.R. §§ 970.0407-130, 970.5204-3.)[7]

[7] Although "an employer normally does not create an obstacle to disclosure to an exclusive representative solely via the employer's own act," an employer entering

Section H.7 of Contract 31, titled "Privacy Act Records," requires UC to maintain five specific systems of records, including, as pertinent here: (1) "Personnel Radiation Exposure Records" (a system labeled as DOE-35); and (2) "Occupational and Industrial Accident Records" (a system labeled as DOE-38).[8] Contract 31 further requires that, to the extent records in a system of records are covered by the Privacy Act and implementing regulations, UC must abide by these rules.

The dosimeter reports that AFSCME requested likely fall within DOE-35, as they reflect radiation exposure levels recorded for individual LBNL employees. In contrast, the record does not establish to what extent (if any) exposure assessments, hazard assessments, and radiation monitoring system reports contain identifying information regarding individuals. If these records do contain such information, they would likewise fall under DOE-35. As noted above, OSHA Forms 300 and 301 contain identifying information regarding individuals, but Form 300A does not. Forms 300 and 301 therefore fall within DOE-38, while Form 300A contains no individually identifiable information and therefore does not implicate the Privacy Act.

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into a contract can be relevant, as here, where the resulting privacy protection is "grounded in a previously existing privacy right." (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 20.)

[8] The parenthetical number designation for each system of records refers to the official "System of Records Number" published by DOE in the Federal Register pursuant to the Privacy Act. The DOE-35 system of records is defined in a notice published January 9, 2009, appearing at Volume 74, pages 1037-1039 of the Federal Register. The DOE-38 system of records is defined in a notice published the same day, appearing at 74 Fed. Reg. 1039-1042.

The Privacy Act's central restriction provides that an agency or contractor may not disclose any record contained in a system of records without the prior written consent of the individual to whom the record pertains, unless a statutory exception applies. (5 U.S.C. § 552a(b).)

Because RFIs by federal employee unions frequently implicate the Privacy Act, federal courts and the Federal Labor Relations Authority (FLRA) have developed the most extensive body of law addressing the interaction between the Privacy Act and a union's right to information. For unions representing federal employees, that right arises under the Federal Service Labor-Management Relations Statute (FSLMRS; 5 U.S.C. § 7101 et seq.), which requires agencies to furnish relevant and necessary information to an exclusive representative "to the extent not prohibited by law." (5 U.S.C. § 7114(b)(4).) The phrase "not prohibited by law" incorporates the Privacy Act, limiting the duty to furnish information where Privacy Act restrictions apply. (*U.S. Dept. of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 493-494 (*DOD v. FLRA*).)

Similarly, because federal contractors subject to the Privacy Act are often private entities, the National Labor Relations Board (NLRB) has addressed the same interaction in cases arising under the NLRA. (See, e.g., *Goodyear Atomic Corp.* (1983) 266 NLRB 890 (*Goodyear*), enf'd. 738 F.2d 155 (6th Cir. 1984).)

Most decisions of the FLRA, NLRB, and federal courts which address the Privacy Act in the context of a union's RFI analyze one of three Privacy Act exceptions: (1) the FOIA exception; (2) the exception for de-identified data used for statistical research or reporting; or (3) the routine use exception. We discuss each

below, with primary focus on the FOIA exception, which is the most frequently litigated.

1. The FOIA Exception

An agency or contractor may disclose Privacy Act records to the extent they are disclosable under FOIA. (5 U.S.C. § 552a(b)(2).) FOIA, in turn, requires that public records be disclosed unless such records fall under one of nine specific exemptions. (5 U.S.C. § 552(b); *Milner v. Department of Navy* (2011) 562 U.S. 562, 564 (*Milner*).) The FOIA exception is the broadest Privacy Act exception, because FOIA's nine exemptions are construed narrowly and agencies must produce all records not covered by an exemption. (*Milner*, *supra*, at p. 571 [noting FOIA's "goal of broad disclosure" and instructing that exemptions be given a "narrow compass"]; *Department of Air Force v. Rose* (1976) 425 U.S. 352, 360-361 [FOIA's "dominant objective" is to promote "disclosure, not secrecy"].) Thus, "[t]he net effect of the interaction between the two statutes is that where the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency." (*News-Press v. U.S. Dept. of Homeland Sec.* (11th Cir. 2007) 489 F.3d 1173, 1189.)

Where an employer invokes the Privacy Act in response to a union's RFI and the union relies on the FOIA exception, the resolution often turns on FOIA's "Exemption 6," which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." (5 U.S.C. § 552(b)(6).) Thus, through a "somewhat convoluted path of statutory cross-references," the Privacy Act only bars disclosure of personnel,

medical, and similar files to the extent such disclosure "would constitute a clearly unwarranted invasion of personal privacy." (*DOD v. FLRA*, *supra*, 510 U.S. 487, 495.)

Analyzing Exemption 6 to determine its application to specific facts requires balancing the public interest in disclosure—principally public understanding of the operations or activities of the government—against the potential harm an individual would face based on disclosure of private information. (*DOD v. FLRA*, *supra*, 510 U.S. 487, 495.) Thus, "information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose," unlike "information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." (*Id*. at p. 496 [internal quotation marks and citation omitted].) The inquiry does not turn on the "purposes for which request for information is made," since any member of the public has as much right to disclosure as the requesting party, and the FSLMRS does not grant a requesting union "special status" for Privacy Act purposes. (*Id*. at pp. 496 & 499.)

It bears noting that PERB-administered statutes do grant an exclusive representative special status. (See pp. 10-11, *ante*.) Accordingly, under the balancing test that we apply in cases not involving the Privacy Act, we weigh the union's particularized need for the information against the privacy interests at stake, and order disclosure unless the privacy interests outweigh the union's needs. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 10; *Tulare*, *supra*, PERB Decision No. 2697-M, p. 13; *Contra Costa*, *supra*, PERB Decision No. 2652, p. 18.)[9]

[9] There are other important differences between PERB's balancing test and that which applies under FOIA Exemption 6. For instance, PERB can order a charging party union to keep records or information confidential (*San Francisco*, *supra*, PERB

The NLRB and FLRA normally apply a balancing test that is akin to PERB's test in that it considers the union's particularized need. In fact, the FLRA applied its standard balancing test in RFI cases involving the Privacy Act—thereby balancing the union's need for the information against the harm of disclosure—until the Supreme Court held that this approach must give way to the FOIA Exemption 6 balancing test in cases involving that exemption. (*DOD v. FLRA*, *supra*, 510 U.S. 487, 490-496.)

As noted above, we will craft our remedy in this case with due regard to the Privacy Act. Because it is a federal statute, Supreme Court precedent such as *DOD v. FLRA*, *supra*, 510 U.S. 487 controls our Privacy Act interpretation. The main consequence is as follows: whereas FOIA exemptions do not independently bar disclosure under HEERA (see pp. 9-10, *ante*), the Privacy Act can constrain disclosure of certain records, and in evaluating such cases we apply the FOIA Exemption 6 standards explained in *DOD v. FLRA*, *supra*, 510 U.S. 487.

The FLRA integrated precedent and described the applicable framework in *U.S. Dep't of Transp. Fed. Aviation Admin, New York TRACON Westbury* (1995) 50 FLRA 338) (*FAA Westbury*), explaining that when a federal agency claims the Privacy Act bars disclosure and a requesting union interposes the FOIA exception, the agency has the initial burden to show: "(1) that the information requested is contained in a 'system of records' under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy

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Decision No. 2891-M, p. 21), and a California public entity providing a union with information need not provide it to the public (*id*. at p. 15, fn. 9, citing *Boardman v. Inslee* (9th Cir. 2020) 978 F.3d 1092, 1110-1113 [collective bargaining disclosures are distinct from public records disclosures and do not trigger public access rights]).

interests." (*Id*. at p. 345.) If the agency meets this burden, then the union must: "(1) identify a public interest that is cognizable under the FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest." (*Ibid*.) At that point, it is necessary to "balance the privacy interest against the public interest." (*Ibid*.)

If the public interest in disclosure outweighs the privacy interest, then a record may be disclosed in unredacted form. (See, e.g., *National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency* (D.D.C. 1984) 583 F. Supp. 1483, 1485-1488 [granting FOIA request by veterans' group based on public interest in helping veterans exposed to radiation]; *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr. Decatur, Georgia* (2019) 71 FLRA 428, 445-449 (*VA Decatur*) [rejecting argument of Veterans Administration that Privacy Act required documents to be produced only in redacted form].) In contrast, if the public interest in disclosure does not outweigh that privacy interest, FOIA requires the federal agency or contractor to segregate identifying information (typically via redaction) and disclose the remainder of the record. (5 U.S.C. § 552(a)(8)(A)(ii) & (b), final par.; *Department of Air Force v. Rose*, *supra*, 425 U.S. at pp. 374 & 381-382 [although redaction of identifying information provides individuals with imperfect privacy protection, redaction is a time tested and practical means of implementing FOIA's clear segregation requirement].)

These principles explain why the regulatory scheme governing OSHA forms is consistent with the Privacy Act. (See pp. 16-20, *ante*.) Form 300A contains no identifying information and therefore does not fall under the Privacy Act. Next, the required redactions to Form 301 ensure that they are disclosable under FOIA. Finally,

the regulatory framework reflects a considered federal determination that disclosing Form 300 does not constitute a clearly unwarranted invasion of personal privacy, particularly given that employers must follow the "privacy concern" rules when filling out Form 300. Moreover, consistent with *DOD v. FLRA*, *supra*, 510 U.S. 487, federal OSHA has determined that Forms 300, 300A, and 301 are largely disclosable to the public in similar form. (Improve Tracking of Workplace Injuries and Illnesses, 88 Fed. Reg. 47254, at pp. 47257 & 47278 (July 21, 2023).)

UC reprises the argument it belatedly raised when it e-mailed AFSCME that "it appears [the requested] documents are owned by the DOE and would require a FOIA request." In supporting this argument, UC acknowledges that an employer's duty to provide information is normally not limited to information it owns and instead extends to all information available to it. (*Regents of the University of California*, *supra*, PERB Decision No. 2094-H, p. 26 [partially overruled on other grounds].) Yet, UC claims, this doctrine does not apply when documents in its possession are technically owned by the federal government.

We have carefully reviewed UC's assertion and find that while there is no question the Privacy Act applies to UC as a federal contractor, it is incorrect to claim that AFSCME must submit a FOIA request to DOE rather than an RFI to UC. FOIA establishes a mechanism for the public to access federal records; it does not displace any independent statutory right to information arising under a collective bargaining statute. And Contract 31 does not purport to require a union seeking DOE-owned information from UC to file a FOIA request, nor does it otherwise purport to limit UC in complying with HEERA by providing records that fall within a Privacy Act exception.

Precedent confirms this conclusion. First, the NLRB (and the Sixth Circuit, on appeal) required Goodyear, a DOE contractor, to provide a union with the following de-identified documents, without a FOIA request: (1) "Results of clinical and laboratory studies undertaken of any employees"; (2) "Information concerning occupational illness and accident data relating to workmen's compensation claims, and OSHA records"; and (3) "Description of radiation sources in the plant." (*Goodyear*, *supra*, at p. 896.) The record in *Goodyear* was clear that the union had made a written request to Goodyear, not a FOIA request. (*Id*. at p. 891.)

Other decisions further confirm that FOIA is not an exclusive procedure, and that a union can therefore obtain records directly pursuant to its rights under a collective bargaining statute, including the FSLMRS and the NLRA. (See, e.g., *Department of Justice v. Federal Labor Relations Authority* (D.C. Cir. 1998) 144 F.3d 90, 92 [union representing employee accused of theft, falsification, and conduct unbecoming an officer was entitled to "sanitized" [de-identified] documents pertaining to similar discipline against other employees, without submitting FOIA request]; *Postal Service*, *supra*, 305 NLRB 997, 1004-1005 [Postal Service, though subject to FOIA, must furnish documents pursuant to request under NLRA, as FOIA "establishes rights of the public-at-large to information in government files. The exceptions to those rights . . . apply directly only to those rights and not to rights created under other statutes"]; *VA Decatur*, *supra*, 71 FLRA 428, 438 & 445-449 [where union submitted RFI but not FOIA request, employer provided union with redacted records but FLRA, applying *FAA*

Westbury, *supra*, 50 FLRA 338, found FSLMRS and Privacy Act required unredacted disclosure].)[10]

These same authorities undercut UC's argument based on *United States ex rel. Touhy v. Ragen* (1951) 340 U.S. 462 (*Touhy*), 36 Code of Federal Regulations section 1222.32, and regulatory provisions requiring UC to maintain DOE-owned records. UC argues that "an information request under HEERA directed to the University seeking DOE-owned records should be treated no differently than if such a request was directed to the DOE itself" and "the principles underlying the *Touhy* doctrine readily illustrate why such a request is impermissible unless AFSCME follows federal law." We disagree and instead affirm the ALJ's analysis, which identified multiple flaws in UC's argument. Among other issues, the ALJ correctly noted that the Housekeeping Statute underlying *Touhy* expressly provides that it "does not authorize withholding information from the public or limiting the availability of records to the public." (5 U.S.C. § 301; see also *Exxon Shipping Co. v. U.S. Dept. of Interior* (9th Cir. 1994) 34 F.3d 774, 777.)

In any event, the above-noted authorities defeat UC's interpretation of the regulatory scheme by illustrating that a FOIA request is not the exclusive means for a union to obtain records. For instance, *Goodyear*, *supra*, 266 NLRB 890, 892 makes clear that a DOE contractor must provide necessary and relevant records to an

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[10] The FLRA General Counsel's Guidance on Information Requests further confirms this principle, stating as follows: "One of the exceptions to the Privacy Act is the FOIA. If the information is subject to disclosure under FOIA, then the Privacy Act does not prohibit its release. *DOD v. FLRA*, 510 U.S. 487 (1994)." (https://www.flra.gov/system/files/webfm/OGC/Guidances/GUIDANCE%20ON%20INFORMATION%20REQUESTS.pdf [last accessed June 30, 2026], p. 8.)

exclusive representative without a FOIA request, if a Privacy Act exception applies. While the proposed decision discussed *Goodyear*, UC did not address it in its exceptions.

The regulatory treatment of OSHA forms further undermines UC's claim that AFSCME must submit a FOIA request for any DOE-owned records. Indeed, federal and state regulations require UC to provide Form 300 and redacted Form 301 to AFSCME without resort to FOIA, notwithstanding federal ownership of those records.

For the above reasons, we place little weight on informal communications from DOE employees that UC solicited. At most, such informal communications are entitled to limited persuasive weight. Here, they are unpersuasive because they postdate UC's obligation to respond, do not identify any binding legal constraint, and do not address the Privacy Act's exceptions or the availability of redacted disclosures.

Nevertheless, in an abundance of caution and to facilitate efficient compliance, we recognize that a FOIA request may in some circumstances be the most rapid means to obtain records. Accordingly, our remedial order will empower the compliance officer with discretion, as part of ensuring prompt records disclosure in a manner consistent with this decision, to require that AFSCME or UC utilize FOIA procedures if helpful in implementing our order. This procedural authority does not reflect any legal requirement that AFSCME proceed through FOIA but instead allows flexibility in choosing the best means to achieve prompt compliance.

2. <u>De-Identified Records Used for Statistical Research and Reporting</u>

The Privacy Act permits disclosure of records "to a recipient who has provided the agency with advance adequate written assurance that the record will be used

solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable." (5 U.S.C. § 552a(b)(5).)

The NLRB found this exception applied in *Goodyear*, *supra*, 266 NLRB 890. There, an exclusive representative requested a broad range of health and safety records to prepare for collective bargaining. (*Id*. at pp. 893-894.) The employer, a DOE contractor, asserted the Privacy Act as a defense. (*Id*. at p. 891.) The NLRB, noting that the union had never requested individualized information and would receive only de-identified records, found that these circumstances functionally satisfied the Privacy Act's exception for statistical research and reporting records. (*Id*. at pp. 891-892.) The employer appealed the NLRB's decision and the Sixth Circuit affirmed, finding the employer's Privacy Act defense to be "without merit" given that NLRB's order required only disclosure of de-identified records that do "*not* violate the Privacy Act." (*Goodyear Atomic Corp. v. National Labor Relations Bd.*, *supra*, 738 F.2d 155, 156 [emphasis in original].)

Like the union in *Goodyear*, *supra*, 266 NLRB 890, AFSCME did not provide an explicit written assurance that it would use records solely as a statistical research or reporting record. But as with the Privacy Act's FOIA exception, we interpret the Privacy Act's statistical research exception in line with federal precedent. Such precedent holds that the determinative concern is whether the data is de-identified, and how the information will be used. The Sixth Circuit decision affirming *Goodyear* guides us to find that it is sufficient to order UC to disclose records in a de-identified manner and to require AFSCME to limit its use and disclosure of even these de-identified records. Accordingly, our order will include such a limitation on AFSCME.

Notably, the result in *Goodyear*, *supra*, 266 NLRB 890 would have been the same had the NLRB and Sixth Circuit instead analyzed the Privacy Act's FOIA exception, as de-identifying records normally erases any "clearly unwarranted invasion of personal privacy" that might otherwise exist. (See, e.g., *Department of Air Force v. Rose*, *supra*, 425 U.S. at pp. 380-381 [summaries of military honor code cases must be disclosed with identifying information redacted after in camera review]; *Forest Service Employees for Environmental Ethics v. U.S. Forest Service* (9th Cir. 2008) 524 F.3d 1021, 1023 [in response to FOIA request seeking report on fire in which two firefighters died, Forest Service properly provided report with all witness names redacted]; *News-Press v. U.S. Dept. of Homeland Security*, *supra*, 489 F.3d at pp. 1178 & 1206 [where news organization sought names and addresses of individuals who applied for federal disaster aid or made insurance claims, government lawfully redacted names but "failed to meet its heavy burden" of showing that disclosing addresses would constitute a "clearly unwarranted invasion of personal privacy"]; *Department of Justice v. Federal Labor Relations Authority*, *supra*, 144 F.3d 90, 92 [where union representing employee accused of theft, falsification, and conduct unbecoming an officer agreed to accept de-identified documents pertaining to similar discipline against other employees, government could not establish "any countervailing anti-disclosure interests"].)

3. The Routine Use Exception

The Privacy Act also permits disclosure of records "for a routine use as defined in subsection (a)(7) of [the Privacy Act] and described under subsection (e)(4)(D)." (5 U.S.C. § 552a(b)(3).) Subsection (a)(7) of the Privacy Act defines "routine use" to

mean “the use of such record for a purpose which is compatible with the purpose for which it was collected,” while subsection (e)(4)(D) requires every agency to publish in the Federal Register “each routine use of the records contained in the system, including the categories of users and the purpose of such use.”

The only “routine use” that is potentially relevant in this case is the following definition from the DOE-38 Systems of Records Notice: “A record from this system may be disclosed as a routine use for the purpose of an investigation, settlement of claims, or the preparation and conduct of litigation to (1) persons representing the Department in the investigation, settlement or litigation, and to individuals assisting in such representation; (2) others involved in the investigation, settlement, and litigation, and their representatives and individuals assisting those representatives; (3) witness, potential witness, or their representatives and assistants, and any other person who possesses information pertaining to the matter, when it is necessary to obtain information or testimony relevant to the matter.” (74 Fed. Reg. 1040.) The brief, stipulated record in this case is insufficient to assess whether any records AFSCME sought could fall under this exception.

C. Application to AFSCME’s RFI

Several parameters apply to all our remedial directives. First, to the extent we order UC to provide AFSCME with records, we order such production for the five-year period AFSCME sought, and we also order UC to provide updated records promptly upon receiving such a request from AFSCME. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 23.)

Second, to the extent we order redaction, UC shall use de-identified placeholders that facilitate tracking across multiple records. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 16; *Tulare*, *supra*, PERB Decision No. 2697-M, p. 14; *Sacramento*, *supra*, PERB Decision No. 2597, p. 13, fn. 7.)

Third, because redaction can provide imperfect protection to individual privacy (see p. 28, *ante*), we issue a complementary safeguard and direct AFSCME to use the records it receives only to investigate health and safety issues at LBNL and to pursue measures to prevent, lessen, ameliorate, or remedy such issues, including through collective bargaining. (*San Francisco*, *supra*, PERB Decision No. 2891-M, p. 21.)

Finally, OGC or a designee shall resolve any compliance disputes that arise in a manner consistent with this decision, issuing clear, written orders after in camera review of all necessary records. (*Tulare*, *supra*, PERB Decision No. 2697-M, pp. 15-16.) The compliance officer may, but need not, direct UC or AFSCME to submit a FOIA request to the extent the compliance officer finds that doing so will assist in expeditiously resolving this matter.

1. Exposure Assessments, Hazard Assessments, Radiation Monitoring System Reports, and Dosimeter Reports

As noted above, the record does not establish to what extent (if any) exposure assessments, hazard assessments, and radiation monitoring reports contain any identifying information. If some of these records do not contain identifying information, then they are not Privacy Act records. (5 U.S.C. § 552a(a)(4).) To the extent that these records do contain identifying information, there is little evidence as to the nature and significance of any privacy interest and whether the public interest in unredacted disclosure would outweigh any such privacy interest. While dosimeter dose reports

likely contain identifying information, there is similarly little evidence as to the nature and significance of any privacy interests and whether any public interest in unredacted disclosure would outweigh those privacy interests.

The dearth of evidence in this case results, in part, from the parties' decision to forgo witness testimony and instead rely on a narrow, stipulated set of facts. Assuming for the sake of argument that many records AFSCME seeks may contain identifying information, we find the record insufficient to assess whether unredacted disclosure would be permissible under FOIA Exemption 6. While this circumstance could cut against either party, we are mindful that the partial disclosures required in our remedial order may wholly or partially satisfy AFSCME's needs, or prompt AFSCME to submit more targeted follow-up requests (which could include assisting employees in requesting their own individualized records). Accordingly, we order only a non-intrusive disclosure consistent with that exemption: UC must produce exposure assessments, hazard assessments, dosimeter dose reports, and radiation monitoring system reports prepared at LBNL during the relevant timeframe, with any identifying information for any individual redacted.

In the alternative, *Goodyear*, *supra*, 266 NLRB 890 and *Goodyear Atomic Corp. v. National Labor Relations Bd.*, *supra*, 738 F.2d 155, 157, guide us to the same result under the Privacy Act's exception for de-identified records to be used for statistical research or reporting. (See pp. 32-33, *ante*.)

Our decision is without prejudice to AFSCME seeking unredacted Privacy Act records in the future without obtaining individual employee consent. If the union does so and the parties are unable to reach agreement, a more developed record—through

in camera inspection or subpoenas to persons familiar with the documents in question—would allow for a more complete analysis. Unless and until such a case reaches us, we express no opinion on the extent to which the outcome could be different under any of the exceptions detailed herein.

2. OSHA Forms 300, 300A, and 301

As discussed above, AFSCME has a legal right to receive copies of Forms 300 and 300A, as well as redacted copies of Form 301. (See pp. 16-20, *ante*.) Federal regulations represent a considered federal determination regarding the appropriate balance between transparency and employee privacy in workplace injury reporting, and these regulations therefore provide strong evidence that disclosure of such information—subject to specified limitations—does not constitute a clearly unwarranted invasion of personal privacy. State regulations reflect the same analysis, and DOE has permitted UC to use state forms at LBNL because there is no gap between state and federal law on these matters. We order UC to produce all OSHA Forms 300, 300A, and 301 prepared at LBNL during the relevant timeframe, with only the redactions mandated by law.

3. The Radiological Control Manual

The ALJ found that the RC Manual is not subject to the Privacy Act and is not otherwise so confidential that UC can lawfully decline to disclose it to AFSCME. UC's only exception to this conclusion is based on its argument that HEERA does not require UC to provide any records that are DOE-owned. As discussed above, that argument lacks merit. Accordingly, UC must produce a copy of the RC Manual.

ORDER

Based upon the foregoing, and the entire record in the case, the Public Employment Relations Board (PERB or Board) finds that Regents of the University of California (UC) violated its duty to meet and confer in good faith under the Higher Education Employer-Employee Relations Act (HEERA; Gov. Code, § 3560 et seq.) by failing to adequately respond to an information request from American Federation of State, County & Municipal Employees Local 3299 (AFSCME).

Pursuant to sections 3563 and 3563.3 of the Government Code, we order as follows.

I. UC, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing or refusing to provide records and information to AFSCME regarding employee health and safety in a manner consistent with this decision.

2. Failing or refusing to meet and confer in good faith with AFSCME in a manner consistent with this decision.

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

1. Based upon instructions of a compliance officer appointed by PERB's Office of the General Counsel (OGC), furnish AFSCME with copies of the following Lawrence Berkeley National Laboratory (LBNL) records prepared during the five-year period preceding February 7, 2023: (a) all exposure assessments, hazard assessments, dosimeter dose reports, and radiation monitoring system reports, with any identifying information for any individual redacted; (b) all OSHA Forms 300, 300A, and 301, with only the redactions mandated under OSHA regulations; and (c) the

Radiological Control Manual. Redacted portions shall be replaced by de-identified placeholders that facilitate tracking across multiple records.

2. If requested by AFSCME within 30 days after this decision becomes final, furnish AFSCME with copies of LBNL records in the categories listed in paragraph B(1) prepared during the period of February 7, 2023, through the date this decision becomes final. Redacted portions shall be replaced by de-identified placeholders that facilitate tracking across multiple records. This Order does not address AFSCME's rights with respect to records generated after this decision becomes final, which are governed by the parties' rights and obligations under HEERA.

3. Post copies of the Notice attached hereto as an Appendix at all locations where UC posts notices to LBNL employees represented by AFSCME. An authorized agent of UC shall sign the Notice, indicating that UC will follow the terms of this Order, and UC shall maintain such postings for a period of 30 consecutive workdays. UC 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, UC shall communicate it by electronic message, intranet, internet site, and other electronic means used by UC to communicate with AFSCME-represented LBNL employees.[11]

[11] Any party may ask 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.

4. Take any other actions that OGC directs to effectuate this decision, including submission of public record act requests or submission of matters for in camera review.

5. Notify OGC of the actions UC has taken to follow this Order by providing written reports as directed by OGC and concurrently serving AFSCME with such reports.

II. AFSCME and its representatives shall: (a) use records received pursuant to this Order only to investigate health and safety issues at LBNL and to pursue measures to prevent, lessen, ameliorate, or remedy such issues, including through collective bargaining; (b) refrain from otherwise releasing or disclosing such records; and (c) take any other actions that OGC directs to effectuate this decision, including submission of public record act requests.

Members Krausse and Ortega 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-1437-H, *American Federation of State, County & Municipal Employees Local 3299 v. Regents of the University of California*, in which all parties had the right to participate, the Public Employment Relations Board (PERB or Board) found that the Regents of the University of California (UC) violated its duty to meet and confer in good faith under the Higher Education Employer-Employee Relations Act (HEERA; Gov. Code, § 3560 et seq.) by failing to adequately respond to an information request from American Federation of State, County & Municipal Employees Local 3299 (AFSCME).

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to provide records and information to AFSCME regarding employee health and safety in a manner consistent with PERB's decision.

2. Failing or refusing to meet and confer in good faith with AFSCME in a manner consistent with PERB's decision.

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

1. Based upon instructions of a compliance officer appointed by PERB's Office of the General Counsel (OGC), furnish AFSCME with copies of the following Lawrence Berkeley National Laboratory (LBNL) records prepared during the five-year period preceding February 7, 2023: (a) all exposure assessments, hazard assessments, dosimeter dose reports, and radiation monitoring system reports, with any identifying information for any individual redacted; (b) all OSHA Forms 300, 300A, and 301, with only the redactions mandated under OSHA regulations; and (c) the Radiological Control Manual. Redacted portions shall be replaced by de-identified placeholders that facilitate tracking across multiple records.

2. If requested by AFSCME within 30 days after PERB's decision becomes final, furnish AFSCME with copies of LBNL records in the categories listed in paragraph B(1) prepared during the period of February 7, 2023, through the date this decision becomes final. Redacted portions shall be replaced by de-identified placeholders that facilitate tracking across multiple records.

3. Take any other actions that OGC directs to effectuate PERB's decision, including submission of public record act requests or submission of matters for in camera review.

Dated: _____ Regents of the University of California

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.