STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5810-E PERB Decision No. 2438 June 25, 2015

Appearances: Holguin, Garfield, Martinez & Quiñonez, APLC by Dana S. Martinez and Michael E. Plank, Attorneys, for United Teachers Los Angeles; Jacqueline M. Wagner, Assistant General Counsel, for Los Angeles Unified School District.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles Unified School District (District) to the (attached) proposed decision by an administrative law judge (ALJ). The complaint alleged that the District violated the Educational Employment Relations Act (EERA) section 3543.5(a), (b), and (c)[1] by refusing to provide to United Teachers of Los Angeles (UTLA or Union) the names and work locations of unit members who were temporarily reassigned during the District's investigation of the employees' alleged misconduct without first providing each employee with an opportunity to opt out of disclosure to UTLA. The ALJ determined that this conduct violated EERA.

The Board has reviewed the formal hearing record in its entirety. The record as a whole supports the findings of fact in the proposed decision, and the decision is well-reasoned

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

and consistent with applicable law. Accordingly, the Board hereby affirms the proposed decision and adopts it as the decision of the Board itself, supplemented by the following discussion of the District's exceptions.

FACTUAL SUMMARY

Educational Service Centers

When certificated employees are being investigated by the District for alleged serious misconduct such as child abuse, physical abuse of another staff member, or even student testing irregularities, they are reassigned to one of six educational service centers (ESC) during the investigation. Not all reassigned employees are disciplined and their stay at the ESC ranges from a few days to a significantly longer period.

Reassigned employees are expected to work at the ESC and continue to receive their full compensation. They are not immediately informed of the reasons for the reassignment, and the rules at each ESC vary. One ESC prohibited employees from using any electronic devices for their work. Another forbade employees from speaking with any other employee during the period of their reassignment.

UTLA's Request for Information

On February 6, 2013, UTLA, the exclusive representative of approximately 35,000 District certificated employees, demanded to bargain over the hours and duties of unit members reassigned to the ESCs. According to UTLA's President, Warren Fletcher (Fletcher), the Union was concerned over the differing expectations and duties at the different ESCs. UTLA was also concerned that the District was not following its criteria for determining when

an employee should be reassigned to an ESC and believed that a disproportionate number of employees over 40 years of age were being reassigned.[2]

In the context of this bargaining demand, UTLA requested on March 13, 2013, the names of teachers transferred to any of the six ESCs, or ordered to work from home, while they were being investigated for wrongdoing and the specific ESC location where each "housed" teacher was transferred. Fletcher testified that UTLA needed the information to communicate with its members to determine whether they required assistance and to develop proposals for changes to working conditions at the ESCs.

In response to UTLA's request, the District, asserting the employees' privacy interests, agreed to comply only after giving all reassigned teachers the ability to opt out of having their information released to UTLA.[3]

UTLA objected to the District's proposal for this opt-out procedure and offered to enter into a confidentiality agreement. UTLA also clarified that it did not seek information regarding disciplinary or investigation records. In spite of UTLA's objection, the District sent UTLA counsel draft language for the opt-out message it planned to send to the reassigned teachers. In response, UTLA reiterated its demand for the information and its objection to any opt-out procedure.

The District refused UTLA's offer to sign a confidentiality agreement and proceeded to notify all reassigned employees of UTLA's information request, providing them the ability to opt out of the request.

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[2] The collective bargaining agreement (CBA) between the parties, which was in effect during all times relevant to this case, contained a provision prohibiting discrimination on the basis of age.

[3] The District explained to UTLA that giving the Union the names of reassigned employees was tantamount to revealing to the Union that the named individuals are under District or criminal investigation for alleged serious misconduct.

In mid-May 2013, the District provided UTLA with the names and work locations of 261 of the 276 unit members who were assigned to an ESC at the time. Fifteen employees had opted out pursuant to the District's offer.

PROPOSED DECISION

The ALJ concluded that UTLA was entitled to the names and work locations for the reassigned unit members, because such information was necessary and relevant to UTLA's representation rights and duties. The requested information concerned issues within the scope of representation, was necessary to communicate with its bargaining unit, and enabled UTLA to investigate reported policy and contract violations. The ALJ concluded that the District's partial response did not satisfy UTLA's needs, because it prevented the Union from fully investigating suspected contract or policy violations.

In weighing the District's assertions of employee privacy against UTLA's need for the names and work locations of the reassigned employees, the ALJ noted that UTLA's request was limited to prevent unnecessary disclosure of information, that it expressly excluded any sensitive personnel or investigatory information, and that UTLA offered to keep the District's response confidential. Thus, the ALJ concluded that UTLA's interest in communicating with its unit members who were reassigned to the ESCs for the purpose of representation and bargaining regarding working conditions in the ESCs and to monitor compliance with the CBA and District policy outweighed the District's non-specific privacy assertions.

The ALJ rejected the District's assertion that complying with UTLA's information request necessarily implicates important employee privacy interests because the fact of being reassigned to the ESCs means the employees are under investigation for "egregious" misconduct. According to the ALJ, the reassigned employees had no reasonable expectation of privacy in their work locations, even if their reassignment to an ESC meant that they were

under investigation for alleged serious misconduct. He noted that the District routinely furnishes to UTLA the work locations of unit members not assigned to ESCs, and that the CBA gives UTLA a right of access to all District facilities, including ESCs. On balance, according to the ALJ, the District did not meet its burden of proving that any privacy concerns outweigh UTLA's need for the requested information.

As to the District's defense that disclosure of the remaining information is unnecessary because UTLA may obtain the requested information by direct contact with unit members, the ALJ concluded that none of UTLA's options for communicating with its members (including various internet fora, employee bulletin boards, and the telephone) was equivalent to obtaining the names and work locations from the District.

The ALJ also rejected the District's defense that its opt-out procedure was a good faith attempt to resolve the parties' dispute over UTLA's information request. According to the ALJ, the District did not satisfy its duty to bargain in good faith over this issue, because it never explained in negotiations why it rejected UTLA's proposal for a confidentiality agreement, but instead implemented the opt-out procedure without declaring impasse or completing EERA's impasse resolution procedures.

DISTRICT'S EXCEPTIONS

The District excepts both to the ALJ's findings of fact and conclusions of law contained in the proposed decision. It asserts that the ALJ erred in finding that some teachers were currently housed at ESCs for reasons other than serious or egregious misconduct, and that some teachers have been housed for reasons such as paperwork errors or testing irregularities. According to the District, only current practice is relevant, not any prior practice, and that currently only employees who are alleged to have engaged in egregious misconduct are reassigned to ESCs.

The District excepted to the ALJ's conclusion of law that the reassigned teachers lack a substantial privacy interest in their work locations. It contends that employees' privacy interest rests in not being identified as being under investigation for alleged egregious misconduct, an interest applicable even against the employee organization selected as the exclusive representative of these employees.

The District also excepted to the ALJ's legal conclusion that the District failed to fully comply with UTLA's information request. If UTLA was dissatisfied with receiving an incomplete response due to the individuals' opting out, it was, according to the District, obliged to reassert or clarify its request before filing the instant charge.

The District also excepted to the ALJ's rejection of the District's defense that UTLA had multiple ways of communicating with its members that excused the District from providing the requested teacher names and assignment locations. The District asserts that the ALJ erred in concluding that UTLA's alternate forms of communication were not the equivalent of being provided the requested information.

The District did not except to the ALJ's conclusion that the requested information was relevant and necessary to UTLA's discharge of the duty of representation. Nor did the District except to the ALJ's conclusion that the District did not satisfy its duty to bargain in good faith when it unilaterally implemented employee opt-out procedures.

UTLA'S RESPONSE

In UTLA's response to the District's exceptions, it argues that the record shows employees may be reassigned for a variety of reasons, including non-egregious conduct such as paperwork errors. UTLA argues that the ALJ was correct in finding that the District failed to carry its burden of proof that privacy concerns outweigh UTLA's need for the requested information. UTLA notes that it offered to enter into a confidentiality agreement with the

District to satisfy any concerns that the District may have had regarding employee privacy interests.

DISCUSSION

We first consider the District's exceptions to the ALJ's factual findings, and then consider the central issue in this case: whether under the circumstances of this case, the privacy interests of employees supersede the statutory collective bargaining rights of the exclusive representative of those employees.

Reasons For Reassignment to ESCs

The ALJ's factual finding that some teachers are reassigned at ESCs for reasons other than serious or egregious misconduct is supported by the record. Fletcher testified, without contradiction, that at the time of the hearing, at least one teacher was reassigned for incorrectly filling out a special education individualized education plan. (Reporter's Transcript (RT), pp. 71-72.) UTLA Director of Labor Relations John Bowes (Bowes) testified that teachers had been reassigned in the past for testing irregularities. (RT, p. 152.). Bowes did not definitively testify that only employees accused of egregious misconduct were reassigned as of the date of the hearing. For these reasons, the District's exception to this finding is rejected.

Employees' Privacy Interest Under EERA

We agree with the District that the reassigned employees' privacy interest in this case involves not their work location, but the fact of their reassignment to an ESC, which carries with it the cloud of suspicion. But that does not settle the ultimate issue of whether UTLA's interest in knowing who has been reassigned to the ESCs outweighs individual employees' interest in keeping from UTLA the fact that they have been accused of wrongdoing.

When faced with an assertion of employee privacy in response to a legitimate information request by an exclusive representative, PERB uses a balancing test and places the

burden on the employer to demonstrate that the privacy interest outweighs the union's need for the information. (*Golden Empire Transit District* (2004) PERB Decision No. 1704-M (*Golden Empire*); see also *Santa Monica Community College District* (2012) PERB Decision No. 2303 at Proposed Dec., p. 10 (*Santa Monica*); *Modesto City Schools and High School District* (1985) PERB Decision No. 479 (*Modesto)*; *City of Burbank* (2008) PERB Decision No. 1988-M, pp. 16-17 (*Burbank*).)

In applying this balancing test, PERB has ordered employers to provide exclusive representatives with requested relevant information that arguably implicates employees' privacy interests, e.g., information containing applicants' rating sheets used to award promotions or transfers (*Modesto, supra,* PERB Decision No. 479); employee contact information such as home addresses and phone numbers (*Golden Empire, supra,* PERB Decision No. 1704-M; *State Center Community College District* (2001) PERB Decision No. 1471; *Bakersfield City School District* (1998) PERB Decision No. 1262); reports of investigations of workplace complaints (*City of Redding* (2011) PERB Decision No. 2190-M (*Redding*); *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S; sick leave requests (*Burbank, supra,* PERB Decision No. 1988-M); and a list of unit members who did not have a retirement election form in their personnel file (*Santa Monica, supra,* PERB Decision No. 2303).

Most on point is the Board's decision in *Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 10-11, which held that the employer was obligated to comply with the union's request for names of employees disciplined for allegedly engaging in protected activity.[4] Private sector cases are in accord. (*Transportation Enterprises, Inc.*

[4] Cf. *City of Los Altos* (2007) PERB Decision No. 1891-M, holding that an exclusive representative is not entitled to automatically receive copies of notices of intent to dismiss unit

(1979) 240 NLRB 551, 561 [union entitled to employee disciplinary letters which are presumptively relevant to the union's obligation to police the administration of the CBA]; *Estrella Communications, Inc.* (1997) 323 NLRB No. 192 [union's request for unredacted copies of disciplinary notices, warnings, and records of disciplinary personnel actions was presumptively relevant despite employer's invocation of employees' right of privacy].)

It is uncontroverted that the information UTLA requested was necessary and relevant to the discharge of its duties as the exclusive representative to represent their members "in their employment relations with public school employers." (EERA, § 3543.1(a); *Rio Hondo Community College District* (1982) PERB Decision No. 260; *Redwoods Community College District* (1983) PERB Decision No. 293). In order to represent its unit members in this context, UTLA needed to be able to contact the reassigned teachers for several reasons. It needed to police the administration of the CBA and District policies to assure that certificated employees over 40 years of age were not disproportionately being reassigned to the ESCs or that no employees were being reassigned in violation of policy. (*State of California (Department of Corrections & 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"].) It needed to gather information from these teachers to assist the Union in developing proposals in the ongoing negotiations concerning the working conditions at the ESCs. While UTLA did not explicitly assert an interest in informing the reassigned employees of representational services it might offer in defending the employees in investigatory or disciplinary proceedings, exclusive representatives have an obvious interest in making their

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employees as a matter of course without a request for information from the employee organization.

services known to unit members. They can only efficiently accomplish this if they know where to contact the reassigned employees.

EERA secures the right of employees to be represented by employee organizations of their choice "in their professional and employment relationships." (EERA, § 3540.) Employees also have the right to participate in the activities of employee organizations "for the purpose of representation on all matters of employer-employee relations." (EERA, § 3543(a).) These rights are compromised if the employee organization cannot contact employees when they may be in most need of the organization's expertise and assistance.

In sum, the interest of the exclusive representative in knowing which unit members are potentially in need of its services, in policing the CBA and District policies regarding reassignment, and in collecting information from the reassigned employees weigh heavily in the balance against the individual employees' privacy interest.

We agree with the ALJ's conclusion that on balance, the District has not met its burden of proving that employee privacy interests outweigh UTLA's need for the requested information. In reaching this conclusion, we are further persuaded by the fact that UTLA attempted to tailor its request to accommodate privacy concerns. It did not seek employee personnel files or investigation reports, and offered to keep confidential the contact information, i.e., the identity and location of reassigned employees, a proposal that the District rejected without explanation.

If the reassigned employees did not wish to involve UTLA in their employment issues and did not want to reveal to the Union why they had been reassigned, they could simply tell the Union that, or just ignore its communication. The privacy intrusion is minimal in this case and is minimized even further by UTLA's offer to keep the information confidential. The employees' privacy interest in the fact they have been accused by their employer of

wrongdoing is far outweighed by the Union's exceptionally strong interests in being able to contact these members at their newly-assigned workplaces. As noted by one federal appellate court: "One of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit. Hence, a preference for confidentiality on the part of some . . . employees does not nullify [the union's] right to the information." (*WCCO Radio, Inc. v. National Labor Relations Board* (8th Cir. 1988) 844 F.2d 511, 515.)

The District argues that an employer's promise of confidentiality establishes a significant privacy interest that must be balanced against the Union's need for the information, relying on *Northern Indiana Public Service Co.* (2006) 347 NLRB 210 (*Northern Indiana*) and *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301 (*Detroit Edison*). These cases are of no assistance to the District's position.

The confidential information in question in *Northern Indiana, supra,* 347 NLRB 210 consisted of employer notes taken during investigatory interviews with employees in which the employer's promises of confidentiality preceded the interviews. ("Each individual spoke to [the employer's labor relations coordinator] voluntarily, and she prefaced her interviews by assuring each of them that she would keep their conversation confidential." (*Id.* at p. 210.)

Detroit Edison, supra, 440 U.S. 301 involved the question of whether an employer was obligated to produce test questions related to a psychological aptitude test administered to employment applicants, employee answer sheets, and the scores linked with the names of the employees who received them, when such information was relevant to a grievance filed by the employees' union. The employer administered the tests to applicants with the express commitment that each applicant's test score would remain confidential. The U.S. Supreme

Court found test secrecy to be "critical to the validity of any such program." (*Detroit Edison, supra*, 440 U.S. 301, 304.)

In both *Northern Indiana, supra,* 347 NLRB 210 and *Detroit Edison, supra*, 440 U.S. 301, the employer made specific, discrete promises of confidentiality that were at least arguably a partial inducement for the employees or employment applicants to take some action (in the case of *Northern Indiana*, to voluntarily agree to participate in an investigation; in *Detroit Edison*, to apply for positions at the company). In the present case, the District gave no assurance to the reassigned employees that their reassignment to the ESCs or the fact that they were being investigated for alleged misconduct would remain confidential. Even if the District had given such assurances, such promises would not necessarily defeat the Union's entitlement to the information. (*New Jersey Bell Telephone Co.* (1988) 289 NLRB 318 (*New Jersey Bell*) [employer may not use confidentiality as an excuse for failing to provide relevant information to union based on the employer's policy promising that a broad range of personnel information will be kept confidential].)

The District argues that its "practice of keeping confidential the identities of housed [reassigned] employees, bolstered by the opt-out option, communicates to employees that they have a privacy interest in their identities as housed employees." (Respondent's Exceptions, p. 5.) We disagree. First, the District did not have a "practice" of keeping the identities of reassigned employees confidential. The evidence shows that on December 3, 2013, the Los Cerritos Community Newspaper Group wrote to the District asserting that a certain teacher was reportedly assigned to the District "teacher jail," and asked for the allegations of misconduct and the date he was assigned to the facility. The District replied on December 17, 2013, refusing to disclose the allegations of misconduct based on exemptions to the Public Records Act (Govt. Code, § 6254(c), (f) and (k).) But the District readily informed the media

requestor of the date and location to which the identified teacher had been reassigned, making no effort to assert any exceptions to disclosure contained in the Public Records Act. (Charging Party, Exh. 3.)

As far as the evidence shows, the only "practice" or assurance of privacy the District communicated to employees regarding their reassignment was a procedure it implemented *after* UTLA requested the information, i.e., the opportunity to opt out of the request.[5] Taken together, this is not so much a privacy policy for employees' benefit as it is a subterfuge to avoid providing UTLA information to which it is entitled.

Constitutional Privacy Interests

The District also asserts these employees' constitutional right to privacy is secured by Article I, Section 1 of the California Constitution. We turn now to that argument.

The California Supreme Court ruled on a union's right to employee contact information (home addresses and telephone numbers), analyzing the question under both the Meyers-Milias-Brown Act[6] and Article I, Section 1 of the California Constitution. (*County of Los Angeles v. Los Angeles County Employee Relations Commission, et al.* (2013) 56 Cal.4th 905 (*County of Los Angeles*).) In assessing whether the constitutional right of privacy precluded a union's right to obtain employee contact information, the Court applied the framework established by *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*):

> An actionable claim [for invasion of privacy] requires three essential elements: (1) the claimant must possess a legally protected privacy interest . . . ; (2) the claimant's expectation of

[5] Even if the opt-out policy pre-dated UTLA's information request, it would not, by itself, justify the District's refusal to provide the information. (*New Jersey Bell, supra*, 289 NLRB 318, pp. 319-320 [fact that an employee does not consent to information being provided to exclusive representative does not constitute grounds for refusing to provide it]; *Utica Observer-Dispatch v. National Labor relations Board* (2d Cir. 1956) 229 F.2d 575, 577.)

[6] The MMBA is codified at Government Code section 3500 et seq.

> privacy must be objectively reasonable . . . ; and (3) the invasion of privacy complained of must be serious in both its nature and scope.

(*County of Los Angeles, supra,* 56 Cal.4th 905, p. 926.) If all three elements are established, the strength of the privacy interests is balanced against countervailing interests.

The Court in *County of Los Angeles, supra,* 56 Cal.4th 905 found that employees had a legally protected privacy interest in their home addresses and phone numbers.[7] Likewise, employees have a privacy interest in the fact that their employer has accused them of egregious misconduct. Thus, the first factor of the *Hill* test is satisfied.

Whether employees have a reasonable expectation of privacy is an objective entitlement, the existence of which depends on the surrounding context, such as customs, practices, and physical surroundings. (*County of Los Angeles, supra,* 56 Cal.4th 905, p. 927.) In this case, there are several factors that indicate the employees in question did not have an objective expectation of privacy in either their work location, or in the employer's allegations against them.

First, the District argues that its practice of withholding the identity of reassigned employees created a reasonable expectation of privacy. This claim is belied by the alacrity with which the District revealed the name of a reassigned employee to a news organization, as discussed *supra*, at pages 12-13.

As the ALJ determined, the reassigned employees were not informed by the District that they have any substantive privacy right in their new job assignment, and the employees

[7] However, after applying the balancing test set forth in *Hill, supra,* 7 Cal.4th 1, the Supreme Court concluded that the union's competing interest in fulfilling its duty to represent all unit members and the concomitant need to communicate with those employees outweighed privacy interests in home addresses and phone numbers.

were not directed to keep their identities or that of other reassigned employees confidential.[8] Thus, unlike in *Northern Indiana, supra,* 347 NLRB 210, there is no evidence that the District made any promises to reassigned employees that it would keep their names and work locations from UTLA.

The third element in analyzing a privacy claim, whether the invasion is serious in both its nature and scope, also works against claims of privacy in this case. As mentioned earlier, UTLA narrowly tailored its request to seek only the information it needed to perform its functions, i.e., the names and work locations of reassigned employees. UTLA's pledge of confidentiality with respect to the list of reassigned employees further mitigates its request being a "serious" invasion either as to nature or scope. Finally, the employees remain in control of the information concerning the accusations made against them. They can simply decline to reveal to UTLA those private facts.[9]

County of Los Angeles, supra, 56 Cal.4th 905, 926 requires a balancing of privacy interests against countervailing interests only if all three of the elements discussed above have been satisfied. Because we have determined that the employee's expectation of privacy is not objectively reasonable and that the invasion is not serious in nature or scope, it is not necessary to engage in the balancing test to assess the constitutional claim under Article I, Section 1 of the California Constitution.

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[8] Such a blanket direction to keep silent could be seen to interfere with employees' protected rights to representation and to participate in the activities of the employee organization of their own choosing. (See *Banner Health System* (2012) 358 NLRB No. 93 [employer may not prohibit employees from discussing ongoing investigations of employee misconduct unless it can show that witnesses needed protection, or that evidence was in danger of being destroyed or fabricated]; *Los Angeles Community College District (Perez)* (2014) PERB Decision No. 2404.)

[9] On the facts before us, we do not decide whether the exclusive representative is entitled to information about the allegations of misconduct in ongoing investigations because UTLA did not request it. The issue is therefore not before us.

For these reasons, we conclude that the constitutional privacy interest of the employees does not justify the District's conduct.

Duty to Reassert Request After Partial Compliance

After implementing its opt-out option over the vigorous and consistent objection of UTLA, the District provided the names and work locations of all but 15 of the reassigned employees on May 13, 2013. The ALJ determined that this partial response did not satisfy UTLA's legitimate needs because it prevented the Union from investigating the "full breadth of any policy violations." (Proposed Dec., p. 11.) According to the ALJ, UTLA was not obliged to repeat its request because it was sufficiently clear to the District that the partial compliance would not satisfy the request.

The District excepts to this conclusion, re-arguing that UTLA's failure to reassert its objection to partial compliance trumps its claim that the District committed an unfair practice, relying on *Oakland Unified School District* (1983) PERB Decision No. 367 (*Oakland*) and *Trustees of the California State University* (2004) PERB Decision No. 1732-H (*Trustees*). For reasons explained by the ALJ, we reject the District's contentions. UTLA did not waive its right to prosecute this unfair practice complaint by failing to repeat its unequivocal objection to the opt-out procedure and to what the District produced, viz., the incomplete information response. UTLA's entitlement to all of the requested information was not diminished by the District's production of only a portion of the information, even though that portion covered the majority of the ESC-housed employees. We also note that UTLA in fact *did* reiterate its demand for the information and its objection to any opt-out procedure after the District sent UTLA counsel draft language for the opt-out message it planned to send to the ESC-housed teachers.

We do not find *Oakland, supra,* PERB Decision No. 367 dispositive. In *Oakland*, the union requested information once and the District responded. The union did not object, reassert its request, or otherwise place the employer on notice that the response was inadequate before filing its unfair practice charge. The likely purpose of the Board's dismissal of the allegation in *Oakland* was to establish that an employer could not be charged with an unfair practice after it had partially complied with an information request unless it is placed on notice by the requestor that the partial compliance is inadequate.

Unlike the employer in *Oakland, supra,* PERB Decision No. 367, the District admits it understood the full scope of UTLA's information request prior to its partial production of teacher names, and the reason for the request. The District disregarded UTLA's objection to the opt-out procedure, rejected without explanation the Union's offer of confidentiality, and unilaterally proceeded with the opt-out. Taken together, these facts demonstrate the futility of UTLA reasserting or clarifying its objection to the opt-out procedure after the District's partial production of names and locations.

UTLA's request was the subject of significant discussion and negotiation. The District knew from the beginning that UTLA wanted the names and work locations of the reassigned employees. There was no ambiguity in the request that called for clarification after partial compliance by the District. The only dispute between the parties was the District's assertion of privacy and its insistence on implementing an opt-out procedure. Therefore, when the District provided UTLA with all but 15 names (withholding those who had opted out), it was on notice that this response would not satisfy UTLA, given the vigorous objection the Union had to the opt-out process in the first place. Under these circumstances to require UTLA to repeat or

clarify its request or objective, despite the District's clear understanding of both, would elevate form over substance.[10]

We also reject the District's implied argument that it substantially complied because nine of the employees who opted out were no longer in an ESC by the time the District provided UTLA the information. An unreasonable delay in providing requested information is tantamount to a failure to produce the information at all. (*Chula Vista City School District* (1990) PERB Decision No. 834.)

Here the District's delay in responding to UTLA's information request was caused by the District's unreasonable insistence on unilaterally implementing an opt-out process. To conclude that the District need not produce the names of those employees who are not currently housed at the ESCs because of retirement, termination, or return to the classroom would reward the District for its impermissible delay. What is relevant to our analysis are the withheld names at the time of UTLA's valid information request.

Alternate Forms of Communication

The District reasserts its argument that because various alternative forms of communication were at UTLA's disposal, the District was relieved of any duty to provide the information UTLA had requested. The ALJ rejected this claim: "The fact that UTLA might ultimately be able to obtain the requested information by contacting each of its 35,000 members through other means does not excuse [Los Angeles Unified School District] from providing necessary and relevant information already in its possession." (Proposed Dec., p. 15.)

[10] For the same reasons, reliance on *Trustees, supra,* PERB Decision No. 1732-H is unavailing, as that case relied on *Oakland, supra,* PERB Decision No. 367 in dealing with facts similar to *Oakland.*

We agree with the ALJ. The burden on UTLA of attempting to interview every reassigned teacher in person, or of having to send blanket communications to all 35,000 bargaining unit members requesting that reassigned teachers contact them, compared with the District's ease of providing the names and locations of reassigned teachers to UTLA, indicates that UTLA does not have "equal access to the same information from the same source." (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 35; *Redding, supra,* PERB Decision No. 2190-M ["SEIU's access to witnesses does not marginalize its interest in obtaining investigative reports in this case"]; *Finley Hospital* (2012) 359 NLRB No. 9, p. 5; *New York Times Co.* (1982) 265 NLRB 353 [alternative means of obtaining information do not excuse noncompliance].)

The District's argument that the reassigned members may contact UTLA with concerns is unavailing. UTLA's concerns include the possibility that different assignment locations may have different working conditions, and that older teachers may be disproportionately subjected to being reassigned at ESCs. A reassigned teacher at one ESC location would not have reason to know or suspect that the conditions at other ESC locations were different, or to know the relative ages of teachers at different District locations. UTLA could not discover disparities in working conditions at different ESCs unless UTLA members contacted them. UTLA would have no means of knowing which employees were reassigned at which location, apart from the overly burdensome process of appearing at each ESC and interviewing each teacher at that work place.

The District's reliance on *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H (*UCLA*) is misplaced. In that case concerning union access rights to work places, PERB noted that the availability of alternative access is an important factor in striking a reasonable balance

regarding access to health facilities.[11] The case before us here is a dispute over a request for relevant information, and alternative means of obtaining the information rarely negates the employer's duty to provide such information. (*Redding, supra,* PERB Decision No. 2190-M, p. 2.)

REMEDY

Where an employer has refused to provide information to which an exclusive representative is entitled, the appropriate remedy is to order the employer to provide an up-to-date list of the requested information, among other things. (*Santa Monica, supra*, PERB Decision No 2303.) We will do so in this case.

We note that UTLA offered to enter into a confidentiality agreement "wherein UTLA will agree to limit the use and dissemination of the information for representation and bargaining purposes only." (Charging Party Exh. 13.) We find that this proposal, originally rejected by the District, is sufficient to address the District's concerns that the names and reassignment locations will be disseminated. We will therefore include in the order a requirement of a confidentiality agreement in accordance with the terms proposed by UTLA applicable to UTLA and its agents and employees. (*Southern Ohio Coal Co.* (1994) 315 NLRB 836)

We will also order that the District cease and desist from unilaterally implementing the opt-out option.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Los Angeles Unified School District (District) violated the

[11] In *UCLA, supra,* PERB Decision No. 329-H, PERB concluded that the availability of alternative access sites other than on patient care floors obviated the need for the employer to provide more extensive access to those floors than it had already provided.

Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c) by refusing to provide United Teachers Los Angeles (UTLA) with the names and work locations of all certificated employees reassigned to Educational Service Centers or other locations while under investigation for misconduct, pursuant to UTLA's request for that information, and by unilaterally implementing its opt-out option.

Pursuant to EERA section 3541.5(c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to completely respond to UTLA's requests for information necessary and relevant to its representational duties, namely the names and work locations of bargaining unit members who have been reassigned to Educational Service Centers or other locations because such employees are under District investigation for alleged misconduct;

2. Unilaterally sending opt-out notifications to bargaining unit members with regard to UTLA requests for information to which UTLA is entitled under EERA, including but not limited to the names and location of bargaining unit members reassigned at Educational Service Centers;

3. Denying UTLA the right to represent its bargaining unit; and

4. Denying employees the right to be represented by UTLA.

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

1. Provide UTLA with a current list of the names and work locations of all bargaining unit members reassigned to Educational Service Centers or other locations during the pendency of District investigations of alleged misconduct, subject to UTLA, its agents and

employees, limiting the use and dissemination of the information for representation and bargaining purposes only.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its certificated employees represented by UTLA.

3. Written notification of the actions taken to comply with this Order shall be made to the Office of the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UTLA.

Chair Martinez and Member Banks 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. LA-CE-5810-E, *United Teachers Los Angeles v. Los Angeles Unified School District* in which all parties had the right to participate, it has been found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by refusing to provide United Teachers of Los Angeles (UTLA) with the names and work locations of all certificated employees reassigned to Educational Service Centers or other locations while under investigation for misconduct, pursuant to UTLA's request for that information, and by unilaterally implementing its opt-out option.

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

A. CEASE AND DESIST FROM:

1. Refusing to completely respond to UTLA's requests for information necessary and relevant to its representational duties, namely the names and work locations of bargaining unit members who have been reassigned to Educational Service Centers or other locations because such employees are under District investigation for alleged misconduct;

2. Unilaterally sending opt-out notifications to bargaining unit members with regard to UTLA requests for information to which UTLA is entitled under EERA, including but not limited to the names and location of bargaining unit members reassigned at Educational Service Centers;

3. Denying UTLA the right to represent its bargaining unit; and

4. Denying employees the right to be represented by UTLA.

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

1. Provide UTLA with a current list of the names and work locations of all bargaining unit members reassigned to Educational Service Centers or other locations during the pendency of District

investigations of alleged misconduct, subject to UTLA, its agents and employees, limiting the use and dissemination of the information for representation and bargaining purposes only.

Dated: _____ LOS ANGELES UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5810-E PROPOSED DECISION (5/14/2014)

Appearances: Holguin, Garfield, Martinez & Quiñonez, APLC, by Dana S. Martinez and Michael E. Plank, Attorneys, for United Teachers Los Angeles; Jacqueline M. Wagner, Assistant General Counsel, for Los Angeles Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an exclusive representative claims that a public school employer violated the duty to bargain in good faith under Educational Employment Relations Act (EERA)[1] by failing to respond fully to its information request. The employer denies any violation.

On May 3, 2013, United Teachers Los Angeles (UTLA) filed the instant unfair practice charge with Public Employment Relations Board (PERB or Board) against Los Angeles Unified School District (LAUSD). UTLA alleges that LAUSD gave only a partial response to its request for the names and work locations of employees who were temporarily reassigned during an investigation. On August 29, 2013, the PERB Office of the General Counsel issued a complaint alleging a violation of EERA sections 3543.5(a), (b), and (c). On September 18, 2013, LAUSD filed an answer to the PERB complaint admitting that UTLA made the request, but denying the remainder of the substantive allegations. LAUSD also asserted a series of affirmative defenses, including that the requested information was confidential.

[1] EERA is codified at Government Code section 3540 et seq.

The parties participated in an informal settlement conference on November 6, 2013, but the matter was not resolved. PERB held a formal hearing on February 7, 2014.

Closing briefs were due on April 7, 2014. UTLA filed its closing brief that day. LAUSD filed its own brief one day later but it was accepted by PERB with no objection from UTLA. On April 22, 2014, LAUSD filed a motion to reopen the record. UTLA filed its opposition to the motion on April 30, 2014. At that point, the record was closed and the matter was considered submitted for decision.

LAUSD'S MOTION TO REOPEN THE RECORD

LAUSD moves to reopen the record in this case to admit as a UTLA business record a document entitled "Local District 'Reassignment Form.'" LAUSD's request is expressly limited to the document itself. There were no declarations supporting any factual assertions made in the motion. PERB's Board may "reopen a completed record based on newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence." (*Regents of the University of California* (1987) PERB Decision No. 615-H (*UC Regents*), p. 14, citing *San Mateo Community College District* (1985) PERB Decision No. 543.) The new evidence must also be relevant to the issues raised in the existing complaint. (*UC Regents*, at p. 15; see also *County of Santa Clara* (2012) PERB Decision No. 2267-M, p. 3-4.) Those cases involved requests to reopen the record in a case before the Board itself pursuant to PERB Regulations 32320(a) and 32410(a).[2] Those same standards will be applied here in the absence of more specific guidance on how such requests are addressed when made to an Administrative Law Judge.

According to LAUSD, the Local District Reassignment Form demonstrates that in April 2014, UTLA communicated with the same employees at issue in its information request and

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

sought their contact information. Nothing on the form supports this assertion. The form is undated and does not describe how it was distributed by UTLA, if at all. Nor does it describe whether any employees completed the form for UTLA. As explained above, LAUSD's motion is limited by its express terms to the form itself. Moreover, even assuming LAUSD's assertions to be true, LAUSD has not explained how UTLA's efforts to contact certain unit members in 2014 is relevant to LAUSD's failure to respond to UTLA's 2013 request for information about similarly situated employees. Accordingly, LAUSD's motion is denied.

FINDINGS OF FACT

The Parties

LAUSD is a public school employer within the meaning of EERA section 3540.1(k). UTLA is an exclusive representative within the meaning of EERA section 3540.1(e).

UTLA represents the roughly 35,000 certificated employees at LAUSD. UTLA and LAUSD are parties to a Collective Bargaining Agreement (CBA) whose terms were in effect at all times relevant to this case. The CBA contains provisions for UTLA's access to LAUSD facilities and bulletin boards, employees' right to accept or reject UTLA assistance in discipline matters, and unit members' protections from discrimination.

LAUSD's Investigative Reassignment Process

LAUSD has a practice of temporarily reassigning some of its employees accused of misconduct to one of five Educational Service Centers (ESCs). Reassigned employees are sometimes referred to as "housed" employees, and the ESCs are sometimes derisively referred to as "teacher jail." Pursuant to the access provisions of the CBA, LAUSD allows UTLA representatives to access the ESCs, although there was reportedly one instance where a UTLA representative was denied access under circumstances not disclosed for the record. On at least one occasion, LAUSD allowed a public official to tour an ESC.

Employees are typically housed while LAUSD investigates alleged misconduct. While some employees are housed for only a matter of days, others are reassigned for significantly longer. Not all reassigned employees are eventually disciplined. Nor is every disciplined employee housed beforehand. Housed employees are expected to work during their reassignment and continue to receive their full compensation.

UTLA President Warren Fletcher testified that LAUSD policy allows unit members to be reassigned when the allegations of misconduct are so serious that it "makes sense" to relocate the employee during the investigation. John Bowes, then-LAUSD's Director of Labor Relations, confirmed Fletcher's testimony, stating that housing is used for "allegation[s] of egregious misconduct, whether sexual misconduct allegations involving an employee with a child or another staff member, [or] allegations of physical abuse with a child or another staff member[.]" In practice, however, UTLA was informed that LAUSD actually reassigns employees for a variety of reasons ranging from "serious misconduct all the way to paperwork errors." Bowes's testimony was consistent with those reports stating, "I know teachers have been housed in the past for testing irregularities."

Newly housed employees are not immediately informed of the purpose of their reassignment. Employees are issued a set of workplace protocols that, at the times relevant to this case, differed at each ESC. For example, the instructions for one ESC precluded employees from using any electronic devices, including computers, for their work. Some ESC protocol forms prohibited use of music players, others did not. Some ESC forms specified fixed break periods, some did not. One ESC protocol form forbade unit members from speaking with any other employee for the duration of the reassignment.

<u>UTLA's Bargaining Demand and Initial Information Request</u>

On February 6, 2013, UTLA demanded, in writing, that LAUSD:

> bargain over the hours and duties applied to any temporarily housed bargaining unit members. This includes, but is not limited to, hours of assignment, on-site/off-site obligations, break-periods, duties assigned and other work rules that may be applied.

Fletcher informed LAUSD during bargaining sessions that UTLA was concerned about "widely differing expectations and duties" at the different ESCs. Fletcher also testified about UTLA's concerns that LAUSD was not following its existing criteria for when a unit member should be housed and that a disproportionate share of housed employees were over 40 years old, which could implicate the CBA's anti-discrimination provisions. In connection with its bargaining demand, UTLA requested copies of all instructional protocols from the ESCs.

LAUSD responded to this initial information request by providing the workplace protocol forms for each ESC. LAUSD also provided a "Housed Employee Data Sheet," stating, among other things, that there were 263 housed unit members at the time.

UTLA's March 13, 2013 Information Request

On March 13, 2013, UTLA requested the names, employee number, and work location for employees depicted on the Housed Employee Data Sheet. Fletcher told LAUSD in bargaining that UTLA viewed such information as "a basic right of the exclusive representative in order just to be able to do our job." He reminded LAUSD that it regularly provided UTLA with teachers' work assignments and that LAUSD could not create "a different class of employees about whom we did not have the right to know [their] assignment." Fletcher explained that UTLA needed the information to communicate with its members to determine whether they required assistance and to develop proposals for changes to working conditions at the ESCs.

Bowes responded to UTLA's request on March 14, 2013. He said that LAUSD would comply with the request after informing all housed employees of UTLA's request that "they

would have a short period of time where they could opt out of having their information released." The parties subsequently referred to this process as an "opt-out procedure." UTLA objected to LAUSD's proposal for an opt-out procedure.

On March 20, 2013, Bowes sent UTLA attorney Jesus Quiñonez draft language for the opt-out message it intended to send to all housed unit members. In response, UTLA reiterated both its demand for the information and its objection to any opt-out procedure.

On April 3, 2013, LAUSD sent UTLA an e-mail message authored jointly by Bowes and LAUSD attorney Dick Fisher about the outstanding information request. They stated:

> [G]iven the fact that most all of the housed employees are under investigation for allegations of serious misconduct, we believe giving UTLA their name is the same thing as volunteering to UTLA not only their identity but also telling UTLA that most of the named individuals are under District or criminal investigation or for alleged serious misconduct.

Bowes and Fisher also asserted that UTLA would ultimately receive the identities of "a large percentage" of housed employees because they believed most would not opt-out. They questioned why such a response would not be sufficient for UTLA's needs.

On April 24, 2013, UTLA attorney Dana Martinez limited UTLA's request to only housed unit members' names and work location (not employee numbers). Martinez clarified that UTLA was not seeking any discipline or investigation records from LAUSD and expressed UTLA's willingness to enter into a confidentiality agreement.

Bowes and Fisher responded to Martinez on April 26, 2013, stating that privacy protections were needed because "each of the housed employees is still the subject of an investigation or charges involving serious misconduct and was removed from his or her assignment for that reason[.]" They acknowledged UTLA's willingness to keep the disclosed information confidential but did not specify why that proposal did not satisfy their privacy concerns. They also acknowledged that UTLA already possessed the name and employee

number for all unit members. Thus, the only information UTLA lacked was which unit members were assigned to an ESC.

On or around April 26, 2013, LAUSD contacted all housed unit members and told them that LAUSD would provide their names and work locations to UTLA unless they opted out of such disclosure. On or around May 13, 2013, LAUSD provided UTLA with the names and work location for 261 of the 276 unit members assigned to an ESC at the time. The parties did not communicate further about UTLA's information request.

ISSUE

Did LAUSD violate the EERA by failing to provide UTLA with the names and work location of all housed unit members upon request?

CONCLUSIONS OF LAW

UTLA accuses LAUSD of violating EERA by failing to adequately respond to its information request. EERA entitles exclusive representatives to all information "necessary and relevant" to the discharge of their duty of representation. (*Santa Monica Community College District* (2012) PERB Decision No. 2303 (*Santa Monica CCD*), proposed decision, p. 6, citing *Stockton Unified School District* (1980) PERB Decision No. 143).) Failure to provide such information upon request is a breach of the duty to bargain in good faith and violates EERA sections 3543.5(a), (b), and (c). (*Santa Monica CCD,* p. 3; *Compton Community College District* (1990) PERB Decision No. 790, p. 6.)

Necessary and Relevant Request

PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of requested information. (*Santa Monica CCD*, *supra*, PERB Decision No. 2303, proposed decision, p. 6, citing *Trustees of the California State University* (1987) PERB Decision No. 613-H.) Requests for information relating to issues within the scope of

representation are considered presumptively relevant. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333 (*Saddleback Valley USD*), proposed decision, p. 22, citing *Ventura County Community College District* (1999) PERB Decision No. 1340.) Similarly, information enabling a union to communicate with its members is viewed as intrinsically relevant to its representational duties. (*Bakersfield City School District* (1998) PERB Decision No. 1262 (*Bakersfield City SD*), proposed decision, pp. 17-18.) According to the Board, "'data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with its employees.'" (*Id.*, quoting *Prudential Insurance Co. v. NLRB* (2nd Cir. 1969) 412 F.2d 77, p. 80.)

In this case, UTLA's request was necessary and relevant to its representation of the certificated unit for multiple reasons. First, UTLA sought the information to investigate reports that unit members were reassigned in violation of existing policy. EERA's definition of the "scope of representation" expressly includes an employer's "transfer and reassignment policies." (EERA, § 3543.2(a).) Therefore, information relating to LAUSD's application of its reassignment policies is presumptively relevant. (*Saddleback Valley USD*, *supra*, PERB Decision No. 2333, proposed decision, p. 21.)

Second, PERB has consistently found that information relating to specific unit members was necessary and relevant where the requesting union was actively representing that group of employees. For instance, in *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista City SD*), the Board found that the names, address, and job assignments of non-unit member substitute teachers was necessary and relevant to the parties' negotiations over the misclassification of employees as long-term substitutes. (*Id.* at p. 58-60.) In *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I (*LA Superior Court*), PERB similarly found

that a request for unit members' job assignments prior to a strike was necessary and relevant to investigating hiring inconsistencies after the strike. (*Id.* at warning letter, p. 13-14.) In *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio CCD*), PERB held that the disciplinary records of employees involved in a union-sanctioned public demonstration was necessary and relevant to the union's efforts to protect its members from unlawful discrimination. (*Id.* at pp. 10-11.)

Here, it is undisputed that the parties were bargaining over the terms and conditions of housed unit members at the time UTLA's information request was discussed. As in *Bakersfield City SD, supra*, PERB Decision No. 1262, UTLA's request for the names and work locations of housed unit members was needed to identify and communicate with the employees most affected by those negotiations. And as in *Chula Vista City SD, supra*, PERB Decision No. 834 and *LA Superior Court, supra*, PERB Decision No. 2112-I, UTLA sought that information while actively representing those employees in negotiations.

LAUSD argues that UTLA does not have an unfettered right to review its unit members' personnel records citing as support *City of Los Altos* (2007) PERB Decision No. 1891-M. There, a union asserted the right to receive copies of all employee discipline concurrent with the employee even absent a request or a particular representational purpose. The Board dismissed the case, holding "without a request, [the union] has no right to the disciplinary information they argue they are entitled to as a matter of course." (*Id.* at p. 4.) Had the union in that case requested information from the employer, the Board suggested that it would have balanced the union's need for the information against any specific privacy interests implicated. (*Ibid.*) The present situation is distinguishable because UTLA actually requested the information at issue in this case. Furthermore, UTLA did not seek any disciplinary records from LAUSD. To the extent that disciplinary or investigatory information

is necessarily implicated by UTLA's information request, this case bears closer resemblance to *Mt. San Antonio CCD, supra*, PERB Decision No. 224. In that case, the Board held that disclosure of disciplinary information was necessary and relevant to the union's specific representational purpose. (*Id.* at pp. 10-11.) Here, unlike in *City of Los Altos*, the information requested by UTLA was not for some broad, unspecified purpose. Rather, as in *Mt. San Antonio CCD*, UTLA sought information relating to housed unit members for the particular purpose of representing those employees' interests in ongoing bargaining and investigating specific reports about policy violations and discrimination.

LAUSD's Partial Response

An employer does not breach its duty to provide information where it partially complies with the request and the requesting party fails to communicate its dissatisfaction, follow up, reassert, or clarify its request. (*City of Redding* (2011) PERB Decision No. 2190-M, proposed decision, p. 14, citing *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778 (other citations omitted).)

In this case, LAUSD provided UTLA with the names and work locations of 261 of purportedly 276 housed unit members on May 13, 2013. Although UTLA did not reassert its request after that, it is undisputed that UTLA consistently and vocally opposed any form of an opt-out procedure. UTLA offered alternative ways to address LAUSD's concerns but it never deviated from the position that use of an opt-out procedure was unacceptable. LAUSD never expressed that there was any ambiguity to UTLA's position and it knew it was implementing the opt-out procedure over UTLA's objections.

In addition, LAUSD's partial response did not satisfy UTLA's needs. Fletcher explained to LAUSD that it was concerned about reported violations of its reassignment policies. UTLA was also concerned that LAUSD was engaging in age discrimination.

LAUSD's partial disclosure prevented UTLA from investigating the full breadth of any policy violations.

Based on these facts, the record was already sufficiently clear that LAUSD's May 13, 2013 response would not satisfy UTLA's demand. UTLA was not required to reassert that position again after May 13, 2013.

Employee Privacy

LAUSD argues that it should not be required to produce the remaining information for privacy reasons. An employer may be excused from responding to a request for otherwise necessary and relevant information where it compromises employee privacy. (*Los Rios Community College District* (1988) PERB Decision No. 670, p. 13; *Modesto City Schools and High School District* (1985) PERB Decision No. 479 (*Modesto*), pp. 10-11.) In those cases, "the Board is required to balance the privacy interests of employees against the union's need for the information." (*Golden Empire Transit District* (2004) PERB Decision No. 1704-M (*Golden Empire TD*), p. 8.)[3] The employer bears the burden of proving that the privacy interests at stake outweigh the union's need for the information. (*Ibid.*; see also *Santa Monica CCD*, *supra*, PERB Decision No. 2303, proposed decision, p. 10.) The California Supreme Court recently relied upon *Golden Empire TD* when deciding an information request case. (*County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905 (*County of LA*), pp. 921-922, 925, also citing *Bakersfield City SD*, *supra*, PERB Decision No. 1262; *Modesto.*)

[3] *Golden Empire TD*, *supra*, PERB Decision No. 1704 appears to concern a transit district whose collective bargaining rights are covered by sections of the Public Utilities Code not enforced by PERB. (See Pub. Util. Code, § 101001 et seq.) This apparent anomaly does not alter the Board's analysis of the employer's obligations in information request cases which was expressly adopted by later Board decisions as well as by the California Supreme Court. In a subsequent case, the Board explained that it reached the merits of the dispute in *Golden Empire TD* because neither party contested PERB's jurisdiction. (*San Diego Trolley, Inc.* (2007) PERB Decision No. 1909-M, dismissal letter, p. 4.)

In *Golden Empire TD*, *supra*, PERB Decision No. 1704-M, the Board rejected the argument that the employer could refuse to provide employee contact information on the grounds that 4 of roughly 200 employees requested confidentiality. (*Id.* at pp. 7-8.) It concluded that the four employees' requests were insufficient to justify the employer's refusal to respond. The Board then ordered the employer to provide the names and contact information for all represented employees. (*Id.* at pp. 8-9.) In contrast, the Board found that an employer was not required to produce an investigative threat assessment report about a job applicant that included a detailed evaluation of the applicant's personal background as well as the information about the Governor's security detail. (*State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S (*Department of Consumer Affairs*), at pp. 26-27.) The union in that case stated that it wanted the information only to independently evaluate the thoroughness of the investigation. (*Id.* at p. 27.)

As explained in more detail above, UTLA has established that the names and work locations for the housed unit members were needed because that information concerned issues within the scope of representation, were necessary to communicate with its bargaining unit, and enabled UTLA to investigate reported policy and contract violations. Unions have a significant interest in such information. (*Saddleback Valley USD*, *supra*, PERB Decision No. 2333, proposed decision, p. 21; *Bakersfield City SD*, *supra*, PERB Decision No. 1262, proposed decision, pp. 17-18; *Chula Vista City SD*, *supra*, PERB Decision No. 834, pp. 58-60.) Unlike in *Department of Consumer Affairs*, *supra*, PERB Decision 1711-S, UTLA's request was limited to prevent unnecessary disclosure of information from LAUSD. It expressly excluded any sensitive personnel or investigatory information. It also offered to keep LAUSD's response confidential.

LAUSD argues that disclosure necessarily implicates employee privacy rights because all the housed employees are under either a criminal or internal investigation for "egregious" misconduct. Those assertions were not proven at hearing. Witnesses from both parties testified that employees were housed for reasons ranging from egregious sexual misconduct to paperwork errors. LAUSD has not shown or even asserted that the information it withheld after its May 13, 2013 response concerned employees who were under investigation for any serious misconduct. LAUSD's non-specific assertions of privacy rights are insufficient to satisfy its burden of proof. (See *City of Burbank* (2008) PERB Decision No. 1988-M, p. 16.)

Moreover, LAUSD has not established that housed employees have any substantial privacy interest in their work locations in this case. In *County of LA*, *supra*, 56 Cal.4th 905, the court balanced a union's request for unit member contact information against those employees' privacy rights by applying its invasion of privacy analysis. (*Id.* at p. 926.) To state a claim under such an analysis, a plaintiff would need to show that there was (1) a legally protected privacy interest; (2) an objectively reasonable expectation of privacy; and (3) a serious invasion of that privacy interest. (*Ibid.*) Applying those standards here, LAUSD has failed to establish the second element of this test, that the employees at issue have any reasonable expectation of privacy in their work locations. The record shows that LAUSD regularly furnishes other work location information to UTLA upon request. According to LAUSD, the parties' CBA gives UTLA access to all LAUSD facilities, including ESCs. LAUSD has allowed a public official to tour an ESC as well. In addition, newly housed employees are not informed that they have any substantive privacy interest in their job assignment. Nor are they directed to keep the identities of other housed employees in their vicinity confidential. The mere fact that employees have requested privacy through the opt-out

procedure is an insufficient basis to reject an information request. (*Golden Empire TD, supra*, PERB Decision No. 1704-M, pp. 7-8.)

Based on these facts, LAUSD has not shown that employees have a reasonable expectation of privacy in the fact that they are at an ESC. LAUSD cites no case standing for the proposition that employees have any substantial privacy interest in their job assignment.[4] On balance, LAUSD has not met its burden of proving that any privacy concerns outweighs UTLA's need for the requested information.

UTLA's Alternative Access

LAUSD also argues that disclosure of the remaining information is unnecessary because UTLA may obtain the requested information by direct contact with its unit members. An employer is not required to produce requested information if the requesting union has equal access to that information from the same source. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 35.) In those cases, the employer must still notify the requesting party where the information is located. (*Ibid.*) On the other hand, the Board rejected the assertion that a union was not entitled to requested information about an investigation where it could have obtained similar information through alternative means. (*City of Redding, supra*, PERB Decision No. 2190-M, p. 2.)

In this case, LAUSD maintains that UTLA has multiple ways of communicating with its members including various Internet fora, employee bulletin boards, and the telephone. However, none of these options equal the employee records LAUSD has at its disposal. The

[4] The cases cited by LAUSD refer to information concerning mental examinations (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, p. 841), bank transactions (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, p. 656), urine test results (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, p. 15), applications for membership in a private association (*Olympic Club v. Superior Court* (1991) 229 Cal.App.3d 358, pp. 362-363), and names and telephone numbers (*Life Technologies Co. v. Superior Court* (2011) 197 Cal.App.4th 640, p. 653).

fact that UTLA might ultimately be able to obtain the requested information by contacting each of its 35,000 members through other means does not excuse LAUSD from providing necessary and relevant information already in its possession. This argument is rejected.

LAUSD's Bargaining Conduct

LAUSD also asserts that there was no violation here because its proposal for an opt-out procedure was a good faith attempt to resolve the parties' dispute. In *County of LA, supra*, 56 Cal.4th 905, the court held that parties may bargain in good faith over ways to ameliorate any privacy issues, including possibly agreeing to an opt-out procedure. (*Id.* at p. 932.) LAUSD did not, however, fully satisfy its duty to bargain in good faith. During negotiations, "unilateral changes cannot be implemented until the parties have either reached agreement or impasse after exhausting the statutory impasse resolution procedures." (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S, proposed decision, p. 20, citing *PERB v. Modesto City School District* (1982) 136 Cal.App.3d 881, p. 900; *NLRB v. Katz* (1962) 369 U.S. 736, p. 754.) In this case, LAUSD and UTLA never reached agreement over how to address any privacy issues. Nor did LAUSD explain in negotiations why UTLA's proposal for a confidentiality agreement was unacceptable. Neither party declared impasse or engaged in EERA's mandated impasse procedures. (See EERA, § 3548 et seq.) Accordingly, LAUSD was not privileged to unilaterally implement its opt-out procedure. Its failure to satisfy its bargaining obligations is only further evidence that its response to UTLA's information request violated the duty to bargain in good faith.

UTLA's request for the names and work locations of all housed unit members was necessary and relevant to its duty as exclusive representative of certificated personnel. LAUSD has not asserted a persuasive reason for refusing to provide all of the requested information. Accordingly, its conduct violated EERA sections 3543.5(a), (b), and (c).

REMEDY

PERB has broad remedial powers under EERA section 3541.5(c), including:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In *Santa Monica CCD, supra*, PERB Decision No. 2303, PERB held that an appropriate remedy in cases involving the failure to provide requested information include an order to cease and desist from violating EERA, to provide an up-to-date list of the requested employee information, and to post a notice of the violation. (*Id.* at p. 3.) These are appropriate remedies here as well. Therefore, LAUSD is ORDERED to cease and desist from refusing to respond to UTLA's requests for information that is necessary and relevant to its representational duties and from interfering with protected rights. LAUSD is further ORDERED to produce an up-to-date response to UTLA's request for the names and work locations of housed unit members. Finally, LAUSD is ORDERED to post a notice of this violation at all work locations where notices to LAUSD employees customarily are placed. (See *Ibid.*)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c). LAUSD violated EERA by refusing to provide United Teachers Los Angeles (UTLA) with the names and work locations of all housed certificated employees, pursuant to UTLA's request for that information.

Pursuant to EERA section 3541.5(c), it hereby is ORDERED that LAUSD, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to properly respond to UTLA's requests for information necessary and relevant to its representational duties;

2. Denying UTLA the right to represent its bargaining unit; and

3. Denying employees the right to be represented by UTLA.

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

1. Provide UTLA with an up-to-date list of the names and work locations of all housed bargaining unit members;

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in LAUSD customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of UTLA, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UTLA.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

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. LA-CE-5810-E, *United Teachers Los Angeles v. Los Angeles Unified School District*, in which all parties had the right to participate, it has been found that Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by refusing to provide United Teachers Los Angeles (UTLA) with the names and work locations of all housed certificated employees, pursuant to UTLA's request for that information.

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

A. CEASE AND DESIST FROM:

1. Refusing to properly respond to UTLA's requests for information necessary and relevant to its representational duties;

2. Denying UTLA the right to represent its bargaining unit; and

3. Denying employees the right to be represented by UTLA.

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

1. Provide UTLA with an up-to-date list of the names and work locations of all housed bargaining unit members

Dated: _____ LOS ANGELES UNIFIED SCHOOL DISTRICT

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.