

Issue: Compliance – Grievance Procedure (documents); Ruling Date: July 15, 2013;  
Ruling No. 2013-3642; Agency: Department of Motor Vehicles; Outcome: Agency in  
Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of Motor Vehicles  
EDR Ruling No. 2013-3642  
July 15, 2013

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) regarding alleged noncompliance with the grievance procedure by the Department of Motor Vehicles (the “agency”) in failing to produce requested documents.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s first compliance ruling (EDR Ruling Number 2013-3626) in this case and are incorporated herein by reference. In EDR Ruling Number 2013-3626, issued June 10, 2013, the agency was ordered to respond to document requests submitted by the grievant, either by producing responsive documents or by explaining why production was not possible, within five business days of receipt of that ruling.<sup>1</sup>

On June 14, 2013, the agency notified the grievant by letter that “the process of gathering documents [was] underway” and “reiterat[ing] its concern” that many of the grievant’s document requests were overbroad. The grievant sought a second compliance ruling from EDR on June 18, 2013, arguing that the agency was not in compliance with the terms of EDR’s first compliance ruling.<sup>2</sup> On June 28, 2013, the agency provided a comprehensive response to the grievant’s document requests, stating that responsive documents have been or will be produced and raising specific objections to several of the grievant’s requests.<sup>3</sup>

DISCUSSION

The grievance statutes provide that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party, in a timely fashion.”<sup>4</sup> EDR’s

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<sup>1</sup> EDR Ruling No. 2013-3626.

<sup>2</sup> The grievant has not presented any evidence that he has notified the agency of its failure to comply with EDR’s order and allowed the agency five workdays to correct the noncompliance, as required by Section 6.3 of the *Grievance Procedure Manual*. However, in the interest of expediently resolving the issues in this case, EDR will address the grievant’s compliance request as if he had properly followed this procedure.

<sup>3</sup> This ruling will use placeholder names for individuals named in the grievant’s requests for documents. The parties may remedy any confusion as to the specific individuals indicated by referring to unredacted copies of their correspondence.

<sup>4</sup> Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. Just cause is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.”<sup>5</sup> For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.<sup>6</sup> The statute further states that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”<sup>7</sup>

In EDR Ruling Number 2013-3626, EDR ordered the agency to respond to the grievant’s document requests “either by producing the documents or . . . explaining why production is not possible” within five workdays of the agency’s receipt of the ruling.<sup>8</sup> It appears from the parties’ correspondence that there may have been some misunderstanding about the nature of this order. EDR Ruling Number 2013-3626 ordered the agency to respond to the grievant’s document requests in a manner consistent with the grievance procedure.<sup>9</sup> The agency was ordered to provide such a response *either* by producing the documents as requested *or* explaining why production was not possible within five workdays of its receipt of the ruling. Although the agency did not provide the required response until June 28, 2013, outside the five workday period, EDR does not agree with the grievant’s conclusion that this is as an “act of defiance” or bad faith on the agency’s part, and does not consider the agency’s response as indicative of an intent to “withhold documents from the grievant” contrary to an order from this Office. The issues presented by this grievance are complex and the agency has noted that the large volume of documents sought by the grievant will require time to assemble and produce. In addition, the grievant has not further narrowed or refined the scope of his requests. Although the grievant notes that over three months have elapsed since his initial request for documents, several compliance rulings and other proceedings have stayed the grievance process multiple times during that period.<sup>10</sup>

#### *Agency’s General Objections*

The agency has raised a number of concerns related to the ongoing document disclosure issues that have arisen in this case. Specifically, the agency argues that: (1) the grievant’s request for documents created during the period of January 2011 to the present is overly broad and not related to the allegation letter and suspension that are the subject of his most recent grievance; (2) the grievant has requested documents related to issues that are the subject of grievances by other former employees of the agency, and the agency has requested a waiver from such other grievants in order to expedite and facilitate disclosure of documents; (3) the grievant should be responsible for all costs incurred in complying with his document requests; (4) the grievant seeks an “unreasonable amount of information” related to a nonparty to the grievance (“Employee D”) and the agency requests a protective order from EDR to restrict disclosure of documents

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<sup>5</sup> *Id.* at § 9.

<sup>6</sup> *See, e.g.*, EDR Ruling Nos. 2008-1935, 2008-1936.

<sup>7</sup> Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

<sup>8</sup> EDR Ruling No. 2013-3626.

<sup>9</sup> *See Grievance Procedure Manual* § 8.2

<sup>10</sup> *See* EDR Ruling No. 2013-3626.

containing information about Employee D; and (5) the grievant seeks disclosure of documents not related to the currently challenged management actions.<sup>11</sup>

Documents and electronically stored information, as defined by the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form.”<sup>12</sup> The grievant has requested responsive documents for a time period that begins on January 2011 and extends to the present. The agency argues that this request is overly broad and that only documents dating from August 1, 2011 to March 5, 2013 should be produced.<sup>13</sup> It appears that the documents sought by the grievant that were created between January 2011 and August 2011 relate solely to the grievant’s claim that another employee of the agency violated DHRM Policy 1.60, *Standards of Conduct*, during this time. The grievant has not demonstrated specifically how such documents sought from this time period relate to the currently challenged management actions. As a result, EDR concludes that such documents are not relevant to the currently grieved management actions.

The agency appears to have conceded to produce documents dating from August 1, 2011. The most recent grievance filed by the grievant was initiated on March 23, 2013. EDR believes it is reasonable for the grievant to discover documents created until such time as that grievance was initiated. Therefore, only documents created between August 1, 2011 and March 23, 2013 will be responsive to the requests at issue in this ruling.

The agency has also requested that the grievant and several other nonparties who have pending grievances that challenge different agency actions agree to mutually waive confidentiality to aid in the agency’s effort to disclose documents. Should the grievant wish to obtain such a waiver allowing the agency to produce documents that may contain private, confidential, and/or personal information, he may do so and provide the agency with that information. It is not, however, within EDR’s authority to require such a waiver. The agency’s inability to obtain a waiver of confidentiality from nonparties should not act as a barrier to the production of documents. However, by failing to obtain such waivers the grievant may receive fewer documents or documents in a more redacted format, and also potentially incur greater costs for document production.

While the agency appears to seek a ruling from EDR on the potential costs of complying with the grievant’s document requests, EDR cannot provide such a decision at this time. A party who requests documents may be charged “a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.”<sup>14</sup> In interpreting this section, EDR will look to other analogous laws and regulations for guidance as necessary. Thus, the agency’s stated intent to seek payment from the grievant of costs associated with document production is consistent with the grievance procedure to the extent the costs are associated with documents yet to be produced. When producing the grievant’s requested documents, it may be a prudent for the agency to state

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<sup>11</sup> In addition, the agency has expressed some concern about duplicative production of documents that it has previously given to the grievant. Any documents that the agency has already provided to the grievant need not be produced again.

<sup>12</sup> Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

<sup>13</sup> March 5, 2013 is the date on which the most recently grieved management action occurred.

<sup>14</sup> *Grievance Procedure Manual* § 8.2.

the estimated total cost of production and request a deposit of one-half of that amount prior to producing the requested documents.<sup>15</sup>

With respect to the grievant's requests for information about Employee D, a nonparty, the *Grievance Procedure Manual* allows the party producing documents to protect the legitimate privacy interests of third parties.<sup>16</sup> Responsive documents that are relevant to the challenged management actions may be redacted as appropriate to preserve Employee D's privacy. In seeking to prevent disclosure of personal information, the agency has asked that EDR issue a protective order relating to any information about Employee D that is not relevant to the grieved management actions. Having reviewed the Code of Virginia, it is not clear that this Office has the authority to issue such an order. The agency's request must, therefore, be respectfully declined.

The agency further claims that the grievant is "using the current grievance for discovery related to . . . not yet filed termination grievances." The grievance procedure permits a party to request documents related to the "management actions or omissions grieved."<sup>17</sup> From the information submitted by the parties, it appears that the grievant is currently challenging a pre-disciplinary suspension and the agency's issuance of an allegation letter. While EDR interprets the phrase "relating to" broadly in the context of document disclosure, the agency is not required to disclose documents that pertain to subsequent management actions if such documents are not related to the currently grieved management actions. The grievance procedure's discovery process is intended to facilitate the disclosure of documents related to management actions being challenged, not to allow parties to obtain documents in contemplation of future action, grievance-related or otherwise. Given the broad language in the Code of Virginia that all documents "relating to the actions grieved" must be disclosed, however, it would be difficult to demonstrate that documents about conduct described in an allegation letter which later led to the issuance of formal disciplinary action(s) are not relevant to the current grievance.

The agency has also suggested, several times, that facilitation with EDR may be a means of resolving the ongoing document disclosure issues in this case. Parties having difficulty resolving compliance issues may request facilitation, but this process is available only if both parties agree.<sup>18</sup> The grievant has not responded either positively or negatively to the agency's request, and in the absence of such response EDR must conclude that the grievant does not agree to facilitation in this case.

#### *Grievant's General Objections*

In response to the agency's objections discussed above, the grievant has raised several additional claims related to documents that he believes are relevant to the grievance. First, the grievant has requested that EDR order the agency to create a privilege log detailing any documents that are withheld due to a claim of legal privilege. He also seeks the production of

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<sup>15</sup> See EDR Ruling Number 2010-2921 n.6 and EDR Ruling Nos. 2010-2628, 2010-2629 for further discussion of an agency's ability to request payment of a deposit before producing documents in certain cases for records sought under the Virginia Freedom of Information Act ("FOIA"). This practice would appear to be reasonable under the grievance procedure. See EDR Ruling Nos. 2011-2787, 2011-2788.

<sup>16</sup> *Grievance Procedure Manual* § 8.2.

<sup>17</sup> *Id.*

<sup>18</sup> *Grievance Procedure Manual* § 8.11.

documents relating to the interview of another employee of the agency, Employee S. Finally, the grievant argues that the agency has not produced notes and recordings created by another employee, Employee G, or documents about “when the agency first entered [the grievant’s] email account,” despite its claims that the documents relating to Employee G have been produced.

The grievant expresses concern that the agency has withheld documents and requests that EDR order the creation of a privilege log describing the nature of any documents that the agency claims are protected by a legal privilege. The *Grievance Procedure Manual* states that if documents are withheld due to a claim of irrelevance or just cause, including legal privilege, then the withholding party must provide “a written explanation of each claim” to the requesting party.<sup>19</sup> The grievance procedure does not require, nor has EDR ever ordered, the production of a privilege log detailing documents withheld based on a claim of irrelevance or just cause. The agency must provide the grievant with a written explanation of any such claims consistent with the grievance procedure, not a privilege log.<sup>20</sup> Any dispute between the parties as to documents withheld may be addressed by EDR in a compliance ruling.

In addition, the grievant claims that the agency interviewed an employee, Employee S, about events that “foretold [the grievant’s] suspension and termination” and should disclose a transcript and/or recording of this interview to the grievant. The interview with Employee S was taken as part of an investigation of potential misconduct by another employee of the agency who allegedly made disparaging or derogatory comments about the grievant and other employees. The agency determined that this interview was not relevant and did not previously give the grievant documents relating to this interview. EDR has reviewed a transcript of the interview with Employee S and understands the agency’s determination that this interview was not relevant to the grievant or the challenged management actions. However, this interview could be viewed as broadly (if tangentially) related to the grievance in that it references the grievant and the events that gave rise to the issuance of his suspension and discipline. As a result, the agency must provide the grievant with a copy of either the transcript or recording of the interview of Employee S **within ten workdays of its receipt of this ruling.**

The grievant further argues that the agency has withheld documents created by Employee G and information about its access to the grievant’s state email account, despite its claim that documentation relating to Employee G has already been produced. To the extent that the agency has not given the grievant documents created by Employee G,<sup>21</sup> it must do so **within ten workdays of its receipt of this ruling.** The grievant further claims to have requested documents regarding the agency’s access of his state email account through the grievance procedure.<sup>22</sup>

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<sup>19</sup> *Grievance Procedure Manual* § 8.2. EDR does not interpret this language to require the creation of a privilege log.

<sup>20</sup> For example, stating that additional responsive documents exist as to a particular document request, but are being withheld due to an identified privileged basis would be sufficient.

<sup>21</sup> There does not appear to be a dispute as to the relevance of these documents.

<sup>22</sup> DHRM Policy 1.75, *Use of Electronic Communications and Social Media*, states the following:

No user shall have any expectation of privacy in any message, file, image or data created, sent, retrieved, received, or posted in the use of the Commonwealth’s equipment and/or access. Agencies have a right to monitor any and all aspects of electronic communications . . . . Such monitoring may occur at any time, without notice, and without the user’s permission.

The grievant seems to suggest that the agency has acted improperly in allegedly accessing information in his state email account; according to DHRM policy, this is not the case.

EDR, however, has reviewed nothing that would suggest how such documents are relevant or material to the grieved management actions. Thus, the agency need not produce these documents, if they exist.

*Document Requests in Dispute*

The grievant submitted a list of twenty-six separate categories of requested documents to the agency on March 29, 2013. In its response on June 28, 2013 the agency responded individually to each of the twenty-six requests. For many of the requests, the agency stated that it will produce relevant, responsive documents or has already done so. The agency has also objected to some requests and sought guidance from EDR on others. This ruling will address only those document requests over which disputes continue to exist or that otherwise require further discussion from EDR. Such requests are discussed below in the numbered order in which they were originally submitted to the agency.

8. *“All email to or from [Employee D].”*

The grievant claims that Employee D’s actions, beginning in January 2011, violated the Standards of Conduct and that emails to or from Employee D are relevant to demonstrate Employee D’s state of mind, motivation, and actions during that period. The grievant asserts these documents are relevant to his claims. He claims that the agency retaliated against him for reporting Employee D’s allegedly improper conduct and that documents describing her conduct and the agency’s response to her complaints are relevant to his grievance. The agency argues that this request is overly broad and that the grievant seeks these documents to “further humiliate and harass” Employee D. The agency has, however, conceded that some responsive documents may be related to the grieved management actions, and that it will produce such documents.

As currently stated, the grievant’s request seeks email over a large span of time and does not distinguish between ordinary, work-related correspondence and communications specifically related to Employee D’s alleged violations of the Standards of Conduct. Responsive documents would undoubtedly include a vast amount of information that would be, in large part, irrelevant to the management actions at issue. As a result, this request is overly broad and production of responsive documents would be unduly burdensome. Although this request is overly broad, relevant emails to or from Employee D may be responsive to other categories of documents sought by the grievant.<sup>23</sup>

12. *“All interviews of co-workers which have been taken up to this time. These would include specifically all emails that you are relying upon either favorable or unfavorable to our client in support of your allegation letters and complaints from [Employee D] and other coworkers.”*

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<sup>23</sup> For example, the grievant also seeks documents that relate to “all investigations of complaints against [Employee D]” and “all investigations of complaints made by [Employee D].” The agency has stated that it will produce documents responsive to these requests as they relate to the grievant, and it is possible that email to or from Employee D may be responsive as well.

The agency states that it has disclosed “transcripts of all interviews conducted” that relate to the grievant’s claims and will provide audio recordings of these interviews. The agency also states that it has provided all relevant documents related to any allegation letters issued to the grievant.

The remainder of this request is confusing. EDR is unable to determine the connection between the grievant’s request for documents relating to interviews of co-workers and his request for all documents relating to complaints from co-workers. While some complaints may be specifically related to the grievant or issues he has raised, responsive documents would also include information about complaints from any employee and about any employee, with no connection to the grievant or the challenged management actions. As a result, this request is overly broad and production of responsive documents would be unduly burdensome. However, relevant information about complaints may be responsive to other types of documents sought by the grievant.<sup>24</sup>

13. *“All emails referencing the name of [employees] to and from [agency management and human resources staff].”*
14. *“All emails to and from [agency management and human resources staff] referencing [certain division employees].”*
15. *“All emails and notes involving all issues or problems with LES [local] Division.”*

The grievant argues that these requests seek information related to the “acts and omissions of agency management” as they relate to him and his work unit, the agency’s alleged retaliation against him, and its decision to wrongfully suspend and discipline him. He claims that emails referring to specific individuals and/or his work unit will demonstrate the rationale behind the agency’s decision to discipline and transfer the grievant and other employees. The agency states that it has produced documents responsive to these requests that are relevant, but asserts that these requests are overly broad and seek information far broader than the scope of his current grievance.

As phrased, this request would result in the disclosure of any emails referencing the grievant, his work unit, and other employees of the agency for a period of over eighteen months. While there may be records of some emails that relate to the grievant’s claim that he was improperly disciplined and suspended, most would be completely unrelated to any of the management actions at issue. Because responsive documents would largely consist of irrelevant information, this request is overly broad and production of responsive documents would be unduly burdensome. However, relevant emails to and from management may be responsive to other categories of documents sought by the grievant. For example, documents responsive to Request 16, which the agency states it has produced or will produce, would appear to cover an appropriately relevant scope of email, making Requests 13, 14, and 15 essentially moot.

17. *“All emails and notes which reference transfer and reorganization of people assigned to the [Office L] and [Division A] to include, but not*

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<sup>24</sup> For example, the grievant seeks documents that relate to “all investigations of complaints against [Employee D]” and “all investigations of complaints made by [Employee D].” Information about complaints submitted to the agency may be responsive to these requests.



*limited to the reorganization of people assigned to the [Office L] and [Division A].”*

The grievant asserts that both he and other employees from his work unit were transferred as part of an ongoing series of retaliatory actions by the agency. He seeks information related to any such reorganization to evaluate the management decisions that informed the agency's actions. The agency argues that this request is not relevant to the issues grieved. As it is currently phrased, this request is not tailored to seek information relating to alleged retaliation by the agency, but would result in the disclosure of documents relating to the reorganization of an entire work unit. While some documents responsive to this request may be related to the grievant's claims that his transfer was retaliatory, most would seem to be unrelated to any alleged theories of retaliation. Because responsive documents would largely consist of irrelevant information, this request is overly broad and production of responsive documents would be unduly burdensome. If the grievant wishes to submit a request for documents related to the agency's alleged retaliation that is more narrowly tailored to seek information related to the management actions at issue, he may do so.<sup>25</sup>

22. *“Please provide in electronic format all ATBAS phone records for state landlines and cellular phone lines of [agency management and human resources staff].”*

23. *“All emails, calendars, notes and communications taken place between all handlers of this case concerning [the grievant] from August 1, 2011 up through and including the present date and time.”*

The grievant claims that phone records will demonstrate that “communications took place” between certain individuals, “for how long” these communications lasted, and the impact of any communication “on forming senior managements [sic] opinions, perceptions and following actions.” He further argues that calendars are relevant to show agency management's activities during the time in which there were workplace disputes involving Employee D and the grievant. The grievant believes that emails, calendars, notes, and other communications will support his claim that the agency failed to respond appropriately to such ongoing workplace issues. In response, the agency has offered to produce phone records of calls allegedly made by the grievant to Employee D, and asserts that the remainder of the grievant's requests are overly broad.

Documents containing calendars, phone records, emails, and other communications could result in the disclosure of some amount of potentially relevant evidence. However, this request seeks all information of this type as it pertains to certain members of agency management. Clearly, responsive documents would undoubtedly include information created in the ordinary course of business that would be entirely irrelevant to the management actions at issue.<sup>26</sup> As a result, EDR concludes that these requests are overly broad and production would be unduly burdensome, and therefore there is just cause for the agency to not produce documents

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<sup>25</sup> Relevant documents relating to transfer of employees from the grievant's work unit may be responsive to other categories of documents sought by the grievant.

<sup>26</sup> Furthermore, it is not clear that the production of the requested phone records would provide any information whatsoever that would be material to the issues grieved.


responsive to this request.<sup>27</sup> Should documents exist that are responsive to this request that actually relate to the management actions grieved, they would likely be subject to disclosure under one of the grievant's many other document requests.

### CONCLUSION AND ADDITIONAL MATTERS

The agency is ordered to produce responsive documents, as discussed in both the agency's response and in this ruling, **within ten workdays of its receipt of this ruling**. The agency must produce responsive documents in its possession or control.<sup>28</sup> It is not required to create any documents in response to the grievant's requests if such documents do not exist.<sup>29</sup>

In closing, EDR cannot overstate the importance of moving all grievances through the management resolution steps as quickly and efficiently as possible upon receipt of this compliance ruling. The parties are encouraged to make a good faith effort to resolve any disputes that may arise before seeking further rulings from EDR.

EDR's rulings on matters of compliance are final and nonappealable.<sup>30</sup>



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<sup>27</sup> It appears that the grievant may have also sought these and perhaps other documents under the provisions of FOIA. EDR has no authority to enforce the provisions of FOIA. Rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA's provisions in a court of law. Va. Code § 2.2-3713; *see* EDR Ruling No. 2009-2173 n.22; EDR Ruling No. 2006-1172. This ruling determines only that, as a matter of the grievance procedure, there is just cause for the agency to withhold the documents sought in Requests 22 and 23.

<sup>28</sup> *See* EDR Ruling No. 2009-2087.

<sup>29</sup> Va. Code § 2.2-3003(E).

<sup>30</sup> *Id.* at §§ 2.2-1202.1(5), 2.2-3003(G).