

Issue: Compliance - Grievance Procedure (documents); Ruling Date: September 10, 2013; Ruling No. 2014-3663; 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
Ruling Number 2014-3663
September 10, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management regarding alleged noncompliance with the grievance procedure by the Department of Motor Vehicles (the “agency”). The grievant also seeks reconsideration of EDR Ruling Number 2013-3642, in which the agency was ordered to produce certain documents responsive to requests submitted by the grievant.

FACTS

The procedural and substantive facts of this case are set forth in EDR’s two prior compliance rulings on these issues, EDR Ruling Number 2013-3626 and EDR Ruling Number 2013-3642, and are incorporated herein by reference. In essence, the grievant and the agency are engaged in an ongoing dispute regarding disclosure of documents. In EDR Ruling Number 2013-3642, EDR ordered the agency to produce certain documents responsive to the grievant’s requests.

After EDR Ruling Number 2013-3642 was issued, the agency provided the grievant with an estimate for the cost of document production in the amount of \$6,600.00 and requested payment of a deposit before disclosing any documents. On July 26, 2013, the grievant submitted a request for reconsideration to EDR, citing concern for the “efficiency and fairness of the grievance process” because of alleged inconsistencies between EDR Ruling Number 2013-3626 and EDR Ruling Number 2013-3642. The grievant also raises the following issues: (1) he seeks clarification as to what documents will actually be produced and asks that the agency itemize its estimated costs as they relate to each of his requests; (2) he requests information about the cost of redaction of such documents; and (3) he disputes the agency’s cost estimate of \$6,600.00.

DISCUSSION

Grievant’s Request for Reconsideration of EDR Ruling Number 2013-3642

The first compliance ruling on these matters, EDR Ruling Number 2013-3626, was issued on June 10, 2013. EDR Ruling Number 2013-3642, issued July 15, 2013, states the following:

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. 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. 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.¹

In his request for reconsideration, the grievant states that he "[disagrees] with the characterization" of EDR Ruling Number 2013-3626, citing concerns that "prior submitted documentation may have been overlooked" in EDR's interpretation of its prior order.

EDR has been granted the authority to "render all decisions related to procedural compliance," including on issues relating to the production of documents, and such decisions are final.² It was evident from the parties' conflicting characterizations of EDR Ruling Number 2013-3626 that there was some misunderstanding about its terms. This Office, therefore, clarified its intent in EDR Ruling Number 2013-3642. While the grievant may disagree with either or both of those rulings, EDR has considered his arguments and can find no basis to modify EDR Ruling Number 2013-3626 or EDR Ruling Number 2013-3642. The grievant's request for reconsideration is denied.

Documents to be Produced and Itemization of Costs

The grievant also requests that the agency provide the grievant with a list of "[w]hich documents responsive to which specific items of the grievant's request are being produced" and an itemized estimate of the costs of production as they correspond to each of his numbered requests. EDR does not interpret the grievance procedure to require the agency to provide a list of documents to be produced or an itemized cost estimate for specific requests. Should the agency wish to create a list of such documents or itemize the cost of production in furtherance of amicably resolving these issues, it may do so. However, providing a description of the calculations of the estimated costs would appear reasonable.

In addition, the grievant expresses concern with the agency's disclosure of documents because the grievance process "allows the Agency to make the determination" as to what documents are relevant to the grieved management actions, and states that he is "unwilling to rely upon the agency's unilateral determination regarding what documents are relevant." The grievance statutes state that, upon receipt of a request for documents, "*a party shall have a duty*

¹ EDR Ruling Number 2013-3642 (internal citations omitted).

² See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

to search its records” for relevant documents.³ It is, therefore, specifically the agency’s responsibility to assess the grievant’s document requests, determine what documents are relevant to the grieved management actions, and disclose such documents accordingly. It is not within the authority of this Office to evaluate the relevance of documents in a party’s possession unless and until there is an actual dispute regarding the relevance and/or production of specific documents. The grievant has not raised such a claim. Rather, he argues that when the agency discloses documents it may not comply with the grievance procedure. Should a dispute as to the relevance and/or production of specific documents arise in the future, it may be addressed by EDR in a compliance ruling.

Redaction

The grievant asks whether the documents produced will be redacted and what charges the agency will assess for redaction. According to the grievance procedure, “[d]ocuments pertaining to non-parties 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.”⁴ Consequently, the agency must redact all documents produced as necessary to protect certain information of non-parties.

The grievant further argues that the Virginia Freedom of Information Act (“FOIA”) does not grant the authority to charge for the costs of reviewing or redacting, and that as a result, the agency may not assess those costs as part of its current document production efforts.⁵ However, the FOIA Advisory Council, which issues advisory opinions regarding the interpretation of FOIA,⁶ disagrees with the reasoning in the case cited by the grievant and has stated unambiguously that “a public body may charge for staff time spent redacting portions of records as part of the actual cost of supplying the records.”⁷ Furthermore, while EDR may look to principles and approaches arising under FOIA as a relevant resource for evaluating the assessment of costs arising in the context of the grievance procedure, they do not represent “binding precedential authority” on this Office.⁸ For these reasons, EDR declines to adopt the rule that would prohibit a party from including the cost of redacting documents as a portion of its charges for the production of documents.

³ Va. Code § 2.2-3003(G) (emphasis added).

⁴ *Grievance Procedure Manual* § 8.2.

⁵ The grievant cites to a Circuit Court decision, *Albright v. Woodfin*, 68 Va. Cir. 115, 118 (Nelson 2005), in support of his contention.

⁶ Va. Code § 30-179.

⁷ Va. FOIA Council Adv. Op., AO-02-07 (March 14, 2007). In disputing the applicability of this advisory opinion, the grievant argues that “[i]t is well recognized in the Commonwealth that advisory opinions are disfavored by the court,” citing to *Ingram v. Commonwealth*, No. 2436-09-3, 2010 Va. App. LEXIS 254 (2010). While this case may accurately support the grievant’s statement, the *Ingram* court was not addressing advisory opinions similar to those of the FOIA Advisory Council, but rather the reluctance of courts themselves to issue advisory opinions on issues or cases that are moot. *Id.* at *4 – 6. Although the FOIA Advisory Council’s advisory opinions are not binding precedent on EDR’s interpretation of the grievance procedure, they can be appropriately referenced as persuasive analogous authority.

⁸ *See, e.g.*, EDR Ruling Nos. 2012-3149 through 2012-3163, 2012-3245 through 2012-3252, and 2012-3268 through 2012-3281; EDR Ruling Nos. 2010-2628, 2010-2629.

The cost of redaction has been considered as part of the agency's estimate of the total cost of production and will be discussed further below. We note, however, that redactions to documents requested by the grievant consist, in large part, of removal of personal and/or personnel information of non-parties who are currently grieving management actions that are very similar to those at issue here, and who have also requested similar documents as the grievant. The agency has suggested, multiple times, that the grievant may wish to obtain a waiver of confidentiality permitting the agency to produce documents that contain the private, confidential, and/or personal information of these nonparties. Fewer redactions could have most likely resulted in a lower overall cost of production.

Agency's Estimate of the Costs of Production

The *Grievance Procedure Manual* provides that any party requesting documents "may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents."⁹ In interpreting this section, EDR will look to other analogous laws and regulations for guidance if needed. Principles and approaches arising FOIA are, as discussed above, an immediately relevant resource. For instance, under FOIA, an agency may request payment of a deposit in advance before producing documents in certain cases.¹⁰ Such a practice would appear to be reasonably applicable and useable under the grievance process. However, EDR must also review whether the agency's estimated charges are reasonable under the facts of this case. Furthermore, it must be noted as an initial matter that the agency's proposed charge is presently an estimate only and is subject to modification after production is completed and the agency can calculate the actual time spent.

Email¹¹

The agency is producing all emails sent or received between August 1, 2011 and March 23, 2013 related to the management actions the grievant is challenging. It has identified twenty employees, consisting of co-workers and members of agency management, who may be in possession of responsive documents. Each employee searched his or her own email account, pursuant to instructions from agency counsel, for all emails that reference the issues surrounding the grieved management actions and that were sent or received during the twenty-month period in question. The employees were instructed to print all responsive emails and give them to the agency employee managing the document disclosure process. The agency estimates that the search will require a total of 62.5 hours, and has calculated costs based on each employee's

⁹ *Grievance Procedure Manual* § 8.2.

¹⁰ Va. Code § 2.2-3704.

¹¹ In a submission on Sept. 6, 2013, the grievant argues that the Virginia Information Technology Agency ("VITA") should be used to retrieve and produce the requested emails. The grievant states that VITA can produce the records more quickly and cost-effectively. The grievant offers no support for his argument that VITA can produce records in a more expeditious or cost-effective manner. Indeed, EDR's experience regarding these issues from past cases is that VITA costs can be much more expensive than when an agency gathers and produces the records on its own. At this stage of the document request, it does not appear that stopping the agency's collection effort and restarting with a different agency from the beginning is a reasonable or cost-effective approach.

hourly rate multiplied by the hours he or she spent on the search, for a total of \$2,551.30. Once collected, the employee managing the agency's document production effort has estimated that her review of the collected records will require 63.25 hours, calculated at her hourly rate of \$41.08 and totaling \$2,598.31. She will review all of the emails to be produced, determine whether they are relevant and/or privileged, and redact confidential personnel information as necessary. While the agency is not able to conclusively state the total number of emails to be produced at this time, approximately 5,000 pages of emails have been collected and/or reviewed thus far.

The grievance procedure provides that the agency may charge the grievant no more than the actual time spent on the document collection and production effort.¹² Furthermore, while an agency is certainly free to have any employee that it chooses perform tasks related to the search for and production of documents, it would be unreasonable to allow the agency to pass on to a requesting party the salary cost of a high level manager when an employee with a lesser salary would be equally qualified to perform the task.¹³ The FOIA Advisory Council has opined that, while it is typically unreasonable to seek payment at the rate of a higher-level employee's salary for tasks that can be performed by clerical or administrative staff, it may be reasonable to assess the actual cost for a high level manager to search his or her own email account, particularly when there is a "specific reason why the request must be handled by a higher-level person."¹⁴ The agency's desire to protect its current and former employees' privacy, including the grievant, was an important factor in its decision to ask employees to search their own email accounts. Given the approximate volume of documents to be searched and the confidentiality concerns raised by the documents requested in this case, we are persuaded by the guidance of the FOIA Advisory Council that charging the hourly rate of employees who actually searched their own email accounts is reasonable here.

Turning to the agency's estimate of the hours required to conduct the search, the number of emails to be reviewed for responsiveness over the length of time in question would, necessarily, require employees to review clearly irrelevant or otherwise nonresponsive documents far beyond the agency's current estimate of 5,000 pages. Based on the information presented by the agency and considering that some employees have not yet finished searching their email accounts, the 62.5 hours estimated does not appear unreasonable. At this time, therefore, we decline to modify the agency's estimated cost of \$2,551.30 as to the employees actually conducting the search, subject to further discussion below.¹⁵

With respect to the agency's choice of employee to review and redact the emails to be produced, we note that, in a less complex case, the agency's selection of a high level employee to conduct a review of the documents sought in this case might be unreasonable. This grievance, however, along with other grievances related to the same issues and filed by other grievants,

¹² *Grievance Procedure Manual* § 8.2.

¹³ See EDR Ruling No. 2011-2921.

¹⁴ Va. FOIA Council Adv. Op., AO-07-11 (Nov. 9, 2011); see Va. FOIA Council Adv. Op., AO-03-12 (Apr. 24, 2012).

¹⁵ This figure may require adjustment when the agency submits its final request for payment depending on the length of time ultimately required to conduct these searches.

presents a multiplicity of issues, particularly with respect to the production of documents. This grievance has already been the subject of compliance rulings relating to production of documents. Furthermore, the issues raised in this grievance are also currently the subject of several other administrative and judicial proceedings. Taking these factors into account, it is understandable that the agency would choose to have its review of documents conducted by an employee with a greater-than-average level of authority and expertise. In addition, the employee selected to conduct the review of documents (the "Reviewer") participated in an investigation and other agency activities that were related to the grieved issues, and consequently is familiar with those issues and with the types of documents that were requested by the grievant. For these reasons, EDR finds that the agency's selection of the Reviewer and her hourly rate of \$41.08 are reasonable.

Based on EDR's investigation into these matters, we have been unable to clearly understand the method by which the individual agency employees collected the potentially relevant scope of emails. We have also been unable to clearly understand the extent to which the time spent by the Reviewer on the back-end was split between review and redaction. However, we are left with an inescapable question of whether there was duplication of effort used to collect and determine the relevant scope of emails both on the front-end (by the individual employees' searches of their emails) and on the back-end by the Reviewer. As stated above, the agency's estimate for the collection of emails by the individual employees appears, at this time, reasonable. However, the agency should not be able to charge the grievant for an additional level of review of the emails by the Reviewer in an effort to collect the relevant scope of documents. Costs for the Reviewer to redact the emails are appropriate, as stated, but not the secondary relevancy review. Such an effort appears, based on the information provided to EDR, to be potentially duplicative and, therefore, unreasonable as a cost to pass on to the grievant.¹⁶

Based on this analysis, the agency may charge either the full amount of the individual employees' searches (currently estimated at \$2,551.30), or the full amount of the Reviewer's time (currently estimated at \$2,598.31), but not both as representing charges for the collection of the relevant emails. If the agency adopts the former as a calculation for the collection, the agency may additionally charge a portion of the Reviewer's time, representing the appropriate effort for redaction of the emails where applicable. EDR has not been provided sufficient information to determine a clearly reasonable estimate of the time it may take the Reviewer to redact the emails collected. In the absence of such information, we will select a maximum to estimate at this time of two days' work time, or 16 hours based on the Reviewer's hourly rate of \$41.08. As stated previously and below in this ruling, these amounts are estimates only for determination of an appropriate deposit at this time. The final amounts due could require adjustment, up or down, depending on the actual time required, subject to determinations of reasonableness.

¹⁶ Even if there is not truly a duplication of effort, we have not been persuaded by the information presented to EDR that the total time estimated for the agency's collection, review, and presumed eventual production of these emails is reasonable. As such, the adjustments made in this section are consistent with seeking an estimate based on a reasonable amount of time to collect and produce the documents in a reasonably expeditious manner.

Calendars

The grievant has also requested calendars for seven members of agency management between September 1, 2012 and March 23, 2013. The agency has estimated that employees in possession of responsive documents will each require approximately fifteen minutes to identify and print their calendars for that time period, totaling 1.75 hours and assessed at each employee's hourly rate, for a total of \$83.55. The Reviewer estimates that she will require approximately 13.5 hours to review and redact the calendars to be produced, assessed at her hourly rate of \$41.08 and totaling \$554.58.

For many of the same reasons as those discussed above, we find that the agency's calculation of the hourly rates of the employees who actually searched and printed their calendars, as well as its choice of employee to conduct a review of the documents, is reasonable. The estimated 13.5 hours of review will consist mainly of identifying and redacting personal and/or personnel information from the calendars in question, and we have reviewed no information that would suggest this estimate is unreasonable.¹⁷ Accordingly, we decline to modify the agency's total estimate of \$638.13 for the preparation and review of relevant calendars at this time. We note, however, that based on the information presented to EDR, the significance of the information contained in the calendars to the management actions at issue is unclear. However, there is currently no basis to modify the agency's cost estimate as to the production of calendars.

Other Responsive Documents

In addition to emails and calendars, the grievant has requested many other documents related to the issues raised in his grievances, specifically investigative files and notes, interviews of agency employees, video and audio recordings, and other documents used to support agency action taken against the grievant. The agency has estimated that the collection and review of these documents will require 20 hours to complete by the Reviewer, working at her hourly rate of \$41.08, for a total of \$821.60.

The agency claims that the estimated 20 hours will consist of tasks such as reviewing relevant documents and identifying those that are responsive to the grievant's requests, compiling those documents and preparing them for production, and redacting confidential information as necessary. However, the agency has also indicated that there is not a particularly large volume of documents to review in response to these requests. For example, the agency believes that many documents responsive to these requests are emails, and as a result they will be reviewed with emails responsive to the grievant's requests as discussed above. The agency has also indicated that the grievant has already been provided with many of the documents he seeks in these requests. Furthermore, some documents responsive to the grievant's requests have

¹⁷ Unlike the discussion above, there does not appear to be a duplication of effort between the individual employees who simply printed their calendars for the relevant period and the Reviewer's effort to then determine the relevant content of these calendars and make appropriate redactions.

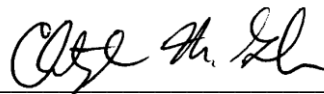
already been compiled, reviewed, and redacted in response to requests from other grievants. Based on the information submitted, we find that the agency's estimate that it will require 20 hours to collect and review documents responsive to the grievant's remaining requests is unreasonable. Accordingly, this portion of the agency's estimate is amended to a total of 5 hours at the reviewing employee's hourly rate of \$41.08, for a total of \$205.40.¹⁸

CONCLUSION

For the reasons set forth above, EDR declines to modify EDR Ruling Number 2013-3626 or EDR Ruling Number 2013-3642. The agency may provide the grievant with a list of documents to be produced or an itemized list of the costs of production prior to his payment of a deposit of a portion of such cost, but is not required to do so. However, providing a description of the calculations of the estimated costs would appear reasonable.

EDR declines to modify the agency's estimate of the cost of production of calendars. The agency must modify its estimate of the cost of production of the emails consistent with the discussion in this ruling. The agency's estimate of the cost of production of all other documents responsive to the grievant's requests is reduced to \$205.40. The agency must provide a revised total estimated cost to the grievant within five workdays of the date of this ruling.¹⁹ The grievant must provide payment of a deposit to the agency before it is required to produce documents, unless the parties reach some agreement otherwise. Absent such an agreement, the grievant must provide the agency with the requested deposit within five workdays of receipt of the agency's revised cost estimate to proceed with these document requests. If additional time is needed to obtain appropriate funds, EDR will entertain a request from the grievant within five workdays of receipt of this ruling. If no such extension is entered and the deposit is not provided within the given deadline, the document requests will be considered waived.

EDR's rulings on matters of compliance are final and nonappealable.²⁰



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¹⁸ To the extent that the actual costs of production may be greater or less than the amended estimate here, the agency's final statement of the costs of production can be adjusted accordingly.

¹⁹ Adjustment of the agency's final request for payment, if it is the subject of a compliance ruling, may be necessary if there is further duplication of effort by particular employees, charging of costs unrelated to the search for and production of documents responsive solely to the grievant's requests, or other unreasonable assessment of its costs.

²⁰ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).