Issue: Compliance/documents and information related to a grievance; Ruling Date: May 26, 2004; Ruling #2004-628; Agency: Virginia Department of Health; Outcome: agency must conduct a reasonable search to obtain documentation required to be produced in accordance with this ruling.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2004-628
May 26, 2003

By letter dated February 20, 2004, the grievant requests a compliance ruling from this Department. The grievant claims that the Virginia Department of Health (VDH or the agency) has failed to provide him with documents and information related to his February 6, 2004 grievance.

FACTS

The grievant is employed as an Environmental Health Supervisor with VDH. On January 8, 2004, the grievant received a Group II Written Notice and ten workday suspension without pay for an alleged violation of the state's workplace harassment policy. The grievant challenged the Group II Written Notice and suspension by initiating a grievance on February 6, 2004. Simultaneously with the initiation of his grievance, the grievant requested that the agency provide him with "any and all documents received, generated, or considered (preserved in any form) during the investigation of a workplace harassment complaint that led you to issue me a Group II written notice with ten (10) days suspension without pay." The following is a list of documents specifically requested and management's response to each item:

1. The original complaint document.

   (The agency replied: "No written complaint exists.")

2. Transcripts.

   (The agency stated: "No transcripts exist.")

3. Statements.

   (The agency replied: "No written statements exist.")

4. Interview Notes (by all Interviewers, and from all Persons Interviewed in any manner for any reason associated with this issue and investigation)

(In response, the agency stated the following: "Handwritten interview notes are confidential agency working documents; however, the substantive content of the interviews is included in the enclosed Draft Summary of Investigation, which is being provided to you in redacted form to protect the privacy of individuals who are not personally involved in this grievance.")

5. Correspondence and Notes.

   (The agency stated: "See No. 4, above. Further correspondence and notes consisting of the District's communication with you regarding this matter are enclosed.")

6. Phone/Voicemail Messages.

   (The agency replied: "No documentation exists.")

7. E-mails.

   (In response, the agency stated: "E-mails between myself, the Deputy Commissioner for Administration, and the Office of Human Resources are withheld as they are confidential agency working documents. E-mail correspondence between you and me concerning this workplace harassment complaint is enclosed.")

8. Memoranda and Letters.

   (The agency stated: "See Nos. 4 and 5 above.")

On February 11, 2004, the grievant sent a notice of noncompliance to the agency head for the agency's failure to provide him with any of the requested documents. Subsequently, by letter dated February 13, 2004, the health district director responded to the document request as stated above. The agency head responded to the grievant's notice of noncompliance on February 17, 2004. By letter dated February 20, 2004, the grievant seeks a compliance ruling from this Department for VDH's alleged failure to provide him with all documents requested relevant to his grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[1] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party

[1] *See Grievance Procedure Manual* § 6.1, pages 16-17.

claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.[2] If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department. Should this Department find that the party has violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may render a decision against the noncomplying party unless that party can establish just cause for its noncompliance.[3]

The grievance statute also provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[4] This Department's 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."[5] Examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege. Additionally, it should be noted that an exemption from mandatory production under the Freedom of Information Act (FOIA) does not necessarily equate to "just cause" under the grievance procedure.[6]

The grievance 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."[7] Documents, as defined by the Rules of the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[8] However, a party is not required to create a document if the document does not exist.[9] To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

Exclusion of grievant's name from documents produced

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[2] *See Grievance Procedure Manual* §6.3, page 17. In a case where the agency is purportedly out of compliance, the notification of non-compliance is directed to the agency head.
[3] *Id*.
[4] Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2, page 21
[5] *Grievance Procedure Manual* § 9, page 24.
[9] Compare, Frankel v. SEC, 460 F. 2d 813, 818 (2d Cir. 1972) (a denial of documents under FOIA does not prevent a party from seeking documents under the discovery provisions of the Federal Rules of Civil Procedure).
[7] *Grievance Procedure Manual,* § 8.2, page 21.
[8] Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).
[9] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

In response to the grievant's request for "[i]nterview notes from all interviewers and from all persons interviewed in any manner," the agency produced a Draft Summary of Investigation in redacted form. The Draft Summary of Investigation specifically excludes the grievant's name.

The purpose of allowing an agency to redact documents is to preserve the privacy of *nonparties* and/or individuals not personally involved in the grievance. As such, there was no basis for redacting the grievant's name from the Draft Summary of Investigation. During this Department's investigation, the agency stated that it would produce the Draft Summary of Investigation with the grievant's name included upon receipt of this ruling. As such, if it has not already done so, the agency shall produce the Draft Summary of Investigation including the grievant's name within five (5) workdays of receipt of this ruling.

Confidential agency working documents

The agency asserts that "just cause" exists for withholding materials pertaining to the investigation into the grievant's actions and his ultimate discipline. Specifically, the agency objects to providing all documents and information requested in items 4, 5, 7 and 8 on the basis that they are "confidential agency working documents." When asked what it meant by "confidential agency working documents," the agency replied that "confidential agency working documents" includes communications that took place between management and human resources on how to proceed with the investigation of the grievant's behavior and what disciplinary measures were appropriate. According to the agency, documents detailing these communications (e.g., e-mails and other memoranda) do not have to be produced because they are protected from disclosure by the agency's "deliberative process privilege."[10] Additionally, the agency asserts that the handwritten interview notes do not have to be produced as they are "work product" and exempt from disclosure under various provisions of FOIA. The applicability of these laws and principles is discussed below.

Deliberative Process Privilege

The common law "deliberative process privilege" has been defined by the courts as a privilege that protects the "decision-making processes of government agencies."[11] Documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are generally protected by the privilege.[12] The use of the term "governmental decisions," however, does not extend the privilege to protect documents generated in every instance

[10] In support of its contention, the agency cites Greene v. Thalhimer's Department Store, 93 F.R.D. 657; 1982 U.S. Dist. LEXIS 11341 (E.D. Va. 1982).
[11] Ethyl Corporation v. United States Environmental Protection Agency, 25 F.3d 1241; 1994 U.S. App. LEXIS 12720 (4th Cir. 1994), *citing* NLRB v. Sears Roebuck & Co. 421 U.S. 132, 95 S.Ct. 1504 (1975).
[12] *Id.*

in which a government agency makes a decision.[13] Indeed, the deliberative process privilege is to be narrowly construed and "does not protect a document which is merely peripheral to actual policy formation"[14] or purely factual information contained in a document.[15] Thus, the privilege allows a governmental agency to withhold the production of a document only when the document bears "on the formulation or exercise of agency policy-oriented judgment."[16] Documents that do not "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy" are generally not afforded the privilege.[17] Likewise, documents that apply existing policy to a certain set of facts or that explain that application in specific factual situations are not afforded the privilege.[18]

Additionally, in cases where the privilege has been upheld, there generally exists a nexus between the requested documents and a policy, the making of which is the fundamental purpose or unique core function of the privilege-invoking agency.[19] This nexus between a requested document and a policy, the promulgation or administration of which the agency is uniquely charged, is commensurate with the rationale underlying the deliberative process privilege, which is to promote candor and efficiency in the formulation and exercise of policy-oriented judgment.[20]

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[13] Petroleum Information Corp. v. United States Dept. of the Interior, 976 F.2d 1429, 1436 (D.C. Cir. 1992) ("even the most mundane material could be said to reflect the exercise of agency discretion in some sense, for example, by indicating the typeface an official favors). *See also* Playboy Enterprises v. United States Department of Justice, 677 F.2d 931, 935 (holding that a fact report was not within the privilege in part because it was "not intertwined with the policy-making process").

[14] Ethyl Corporation v. United States Environmental Protection Agency, 25 F.3d 1241, 1248; 1994 U.S. App. LEXIS 12720, 20-21 (4th Cir. 1994).

[15] *See* City of Virginia Beach v. United States Department of Commerce, 805 F. Supp. 1323 E.D. Va. 1992) *citing* Charlotte-Mecklenburg Hospital Authority v. Perry, 571 F.2d 195 (4th Cir. 1978).

[16] *See* Ethyl Corporation v. United States Environmental Protection Agency, 25 F.3d 1241, 1248; 1994 U.S. App. LEXIS 12720, 20-21 (4th Cir. 1994).

[17] *See* Coastal States Corporation v. Department of Energy, 617 F.2d 854; 199 U.S. App. D.C. 272 (D.C. Cir. 1980).

[18] *Id.* at 868 (memoranda from agency's regional legal counsel to agency's auditor regarding unpublished interpretations of agency regulations was denied the protection of the deliberative process privilege.)

[19] *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) allowing application of the privilege to shield from discovery memoranda explaining the reasons why the National Labor Relations Board, statutorily charged with oversight of the federal labor laws, should file a complaint and begin litigation against a retailer for alleged violations of those laws); Quarles v. Dept. of Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (applying the privilege to cost-estimate documents related to port selection on the part of Navy decision-makers); Stiftung v. Zeiss, 40 F.R.D. 318, 324-26 (D. D.C. 1966) (holding the privilege applicable to documents from the Attorney General's office related to litigation decisions, the court explaining, that the "Attorney General is charged with the duty of rendering all legal services essential to the operations of the Executive Branch" and "also carries the burden of litigation to which the United States or any of its agencies is a party").

[20] *See*, e.g., Ethyl Corporation v. United States Environmental Protection Agency, 25 F.3d at 1248-49 ("to fall within the deliberate process privilege, materials must bear on the formulation or exercise of agency policy-oriented judgment. The deliberative process privilege, we underscore, is essentially concerned with protecting the process by which policy is formulated . . . When material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable." (internal quotes and cites omitted)); Petroleum Information

In the present case, the agency has denied the grievant documents detailing communications between agency management and human resources regarding the investigative steps and disciplinary action to take under state and agency personnel policy and practices. These documents bear no relation to the "core function" governmental policies that VDH is uniquely charged with creating or administering, those pertaining directly to health.[21] Rather, the issues to which the requested documents pertain are general personnel matters that are applicable to any governmental - or nongovernmental - organization, and would appear to address simply the application of existing personnel policy to the facts of this case. Such communications would not appear to be protected by the common law deliberative process privilege and thus must be provided if relevant to the February 4, 2004 grievance.[22]

Freedom of Information Act (FOIA)

Under the Freedom of Information Act (FOIA), all public records shall be available for inspection and copying upon request unless otherwise specifically provided by law or unless an exemption is properly invoked.[23] The agency asserts that because its handwritten interview notes fall under various FOIA exemptions, "just cause" exists for not producing them under the grievance statute.

However, FOIA does not create a privilege, and thus would not prevent a court from issuing a subpoena for documents that may be exempt from public inspection under the Act.[24] Analogously, a FOIA exemption alone does not prevent a party to a grievance from accessing documents relevant to the grievance.

And, while the agency cites FOIA's exemption for "[l]egal memoranda and other work product compiled specifically for use in litigation or for use in an active

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Corp. v. United States Dept. of the Interior, 976 F.2d 1429, 1437-38 (D.C. Cir. 1992) (refusing to apply the privilege to computer records pertaining to public lands in part due to the lack of a policy nexus).

[21] An immunization policy would constitute a "core function" governmental policy for the Department of Health, because it relates directly to "health," whereas the application of personnel policy, such as a sexual harassment policy, does not.

[22] In support of its position that the documents may be withheld, the agency asserts that the "executive privilege shields from disclosure 'intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'." Greene v. Thalhimer's Department Store, 93 F.R.D. 657; 1982 U.S. Dist. LEXIS 11341 (E.D. Va., 1982). However, as the *Greene* case points out, the executive privilege is governed by two important limitations: (1) "the privilege does not protect communications or reports made after completion of the deliberative process;" and (2) "the privilege does not prohibit disclosure of factual materials." Moreover, as stated previously, to claim the deliberative process privilege, the decision being made must bear on the formulation of policy and not be mere application of the facts to already existing policy.

[23] *See* Va. Code § 2.2-3700(B) and § 2.2-3704(A).

[24] *See* Frankel v. SEC, 460 F. 2d 813, 818 (2d Cir. 1972) (a denial of documents under FOIA does not prevent a party from seeking documents under the discovery provisions of the Federal Rules of Civil Procedure).

administrative investigation,"[25] an exemption that mirrors the common law "work product privilege," the handwritten interview notes prepared by the health district director were not prepared by an attorney and thus are not work product.[26]

Additionally, the agency cites the FOIA at §2.2-3705(A)(31), which exempts from production and public inspection "[i]nvestigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act."[27] While it appears that this FOIA exemption could apply to the information sought if requested pursuant to FOIA, as stated previously, information potentially exempt from disclosure under FOIA has no bearing on the disclosure of information under the grievance procedure. Other than the fact that this information would appear to be potentially exempt if requested under the FOIA, the agency has not articulated any independent principle or "just cause" for withholding such information from the individual it has charged with unlawful discrimination.

In sum, the agency has failed to show "just cause" for it refusal to provide the documents described in items 4, 5, 7 and 8 of the grievant's request. Thus, if the agency possesses any remaining relevant documentation requested by the grievant, it must provide those documents in a manner that preserves the personal privacy of third parties.

The agency must conduct a reasonable search to obtain documentation required to be produced in accordance with this ruling. Any documentation provided to the grievant must be redacted, where appropriate, to protect the legitimate privacy interests of third parties and shall be produced within five (5) workdays of receipt of this ruling. Moreover, the agency shall produce within five (5) workdays of receipt of this ruling the Draft Summary of Investigation without the grievant's name redacted. Additionally, as a general rule, an agency may charge a grievant its actual cost to retrieve and duplicate requested documents.

If the grievant is dissatisfied with management's response to his request – its production of documents, any further written response to this request, and/or its cost assessment -- he may raise the issue again at the qualification phase of the grievance. Further, the issue may be raised again, if need be, at a prehearing conference with the hearing officer. Absent just cause, the agency's failure to provide the grievant with any of the requested documents could result in adverse inferences drawn against the agency during the qualification and/or hearing stages. For example, if documents are withheld absent just cause, and those documents could resolve a disputed material fact pertaining

[25] Va. Code § 2.2-3705(A)(8).
[26] Work product refers to notes, working papers, memoranda or similar materials *prepared by an attorney* in anticipation of litigation. Black's Law Dictionary (Sixth Edition 1991)(emphasis added). *See also* United States v. Under Seal (In re Grand Jury Proceedings), 102 F.3d 748**;** 1996 U.S. App. LEXIS 33362 (4th Cir. 1996) (documents prepared during the course of an investigation by a non-attorney employee on behalf of the employer are not protected from disclosure under the work product privilege).
[27] Va. Code § 2.2-3705(A)(31).

to the grievance, this Director at the qualification stage or a hearing officer at the hearing stage could resolve the factual dispute in the grievant's favor. This Department's rulings on matters of compliance are final and nonappealable.[28]

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Claudia T. Farr
Director

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[28] Va. Code § 2.2-3003(G).