Issue: Compliance – Grievance Procedure (Documents); Ruling Date: April 16, 2009; Ruling #2008-2030; Agency: George Mason University; Outcome: Agency Not In Compliance.

*COMMONWEALTH of VIRGINIA*
***Department of Employment Dispute Resolution***

# RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of George Mason University
Ruling Number 2008-2030
April 16, 2009

In EDR Ruling Number 2008-1870, this Department ordered George Mason University (the University) to produce documents requested by the grievant without redactions. The University sought reconsideration of that ruling by letter dated June 12, 2008. After carefully reconsidering the University's evidence and arguments, we must hold to our original ruling, with the exception of allowing for the redaction of names in the relevant documents. Otherwise, the documents are relevant to the grievance, the grievant is the subject of the data that is contained in those documents, and under the specific facts and circumstances of this case, just cause does not exist for withholding the documents from the grievant.

Neither the original ruling nor this reconsideration were easy decisions. This Department shares and deeply appreciates the public policy concern for workplace safety that forms the basis of the University's position in this case. However, as discussed further below, the University provided insufficient evidence to show that the grievant's behavior ever compromised the safety of the workplace, or would do so in the future. Moreover, there is a significant public policy interest in the disclosure of personal information held by state agencies and institutions to *the individual who is the subject of that information*, as generally reflected in the requirements of statutes like Virginia's Freedom of Information Act (FOIA),[1] the Government Data Collection and Dissemination Practices Act ("Data Collection Act"),[2] and the State Grievance Procedure.[3] Given the broad policies and requirements for disclosure contained in those statutes,[4] the lack of

[1] Va. Code § 2.2-3705.1 (entitling individuals access to personnel records and personal information of which they are the subject). "The phrase *personnel record* is not separately defined in FOIA, but the exemption itself defines *personnel record* in part by being a record of an identifiable individual." Va. FOIA Council Adv. Op., AO-03-05, March 30, 2005 (citing Freedom of Information Advisory Opinions 23 (2004) and 04 (2001) (both citing 1991 Op. Atty. Gen. Va. 9; 1981-1982 Op. Atty. Gen. Va. 433); Freedom of Information Advisory Opinion 07 (2002) (citing 1985-1986 Op. Atty. Gen. Va. 333; 1983-1984 Op. atty. Gen. Va. 314)). Additionally, DHRM Policy 6.05, *Personnel Records Disclosure*, prohibits disclosure of certain personnel records to individuals "other than the subject of the records."

[2] Va. Code § 2.2-3806 (granting "data subjects" the right to inspect personal information about themselves).

[3] Va. Code § 2.2-3003(E) (requiring production of "all documents … relating to the actions grieved").

[4] These general provisions for disclosure of documents to the individual that is the subject of the record are compelling and persuasive. We must also bear in mind that the grievance procedure's document disclosure

evidence of a demonstrable safety risk, and for the additional reasons discussed further below, this Department cannot rule in this case, for purposes of the grievance procedure, that "just cause" exists for not producing the requested documents, with the names of the complainants redacted.

## FACTS

The following factual background is adopted from EDR Ruling Number 2008-1870:

> At the time he initiated his October 19, 2007 grievance, the grievant was a Safety Compliance Officer with GMU.[5] In his October 19th grievance, the grievant challenges a University reorganization that resulted in a new reporting relationship for him; the alleged prejudice exhibited against him by the newly appointed Director of Safety, Ms. Z; and alleged barriers put in place by Ms. Z that prevented him from competing for the position of Director of Safety. The grievant also challenges a University investigation into his behavior as a result of complaints lodged by his co-workers, and asserts that a member of University management told him that one of those complainants was Ms. Z.
>
> According to the University, it had received several complaints from employees regarding the grievant's alleged "unusual" behavior. As a result, the University police department interviewed the complainants and gathered information that was later entered into a computer program that, based on the information entered, assessed the level of threat the grievant posed to himself and others. The University refers to the investigation into the grievant's behavior as a "threat assessment." From this "threat assessment," a confidential threat assessment report was apparently generated, which the grievant now seeks.[6] More specifically, the grievant requests "a full written report from University Police of who they spoke with and their true findings" and "a written explanation as to why I was never interviewed."

In EDR Ruling Number 2008-1870, this Department determined that the University failed to establish "just cause" for withholding the threat assessment documents, which the University states includes notes of interviews with the complaining employees and the resulting threat assessment report itself. The University was ordered to provide the grievant a copy of the

---

provisions are nevertheless independent from FOIA, the Data Collection Act, and DHRM policies. The separate and free-standing grievance statutes on document disclosure allow for a consistent application of disclosure rules for grievances across all state agencies and institutions, with no disparate treatment of employee grievants simply because there is or is not a specific exemption to disclosure for their particular employing agency or institution. Thus, for example, a particular agency's discretion under FOIA to withhold a document under FOIA does not necessarily allow that agency to withhold a relevant document from a grievant under the grievance procedure.

[5] According to the agency, the grievant resigned from his position with GMU effective November 26, 2007.

[6] In this case, the grievant was not deemed an imminent threat to himself or others and as such, the University did not take any action against him as a result. However, the University has stated that although no action was taken against the grievant as a result of the investigation, this does not mean that the threat assessment generated deemed him to be a completely non-threatening to himself or others.

requested documents without redactions. The University now seeks reconsideration of that ruling based on the grounds asserted in its June 12, 2008 letter.

## DISCUSSION

The grievance statute provides 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."[7] 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.[8] "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."[9] 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.[10]

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."[11]

*The Threat Assessment Documents are Relevant*

In this case, EDR's original Ruling Number 2008-1870 determined that the requested documents were relevant, in other words, related to the actions grieved. The University's request for reconsideration presents no assertion to the contrary and this Department sees no reason to change that relevancy determination. The grievant has both specifically grieved issues regarding this investigation and the effect it allegedly had in the workplace. There is no question that the threat assessment documents are related to the actions grieved.

*Just Cause Analysis Does Not Support Nondisclosure of Documents*

In determining whether just cause exists for nondisclosure of a relevant document under the grievance procedure, and in the absence of a well established and applicable legal privilege,[12]

---

[7] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

[8] *E.g.*, EDR Ruling No. 2007-1420; EDR Ruling No. 2001-047. This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. *E.g.*, EDR Ruling No. 2007-1468; EDR Ruling No. 2001-047. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner. Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

[9] *Grievance Procedure Manual* § 9.

[10] *See, e.g.*, EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

[11] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

[12] Certain well established and applicable legal privileges recognized by courts in litigation will constitute just cause for nondisclosure under the grievance procedure without the need to balance competing interests. *See, e.g.*, EDR Ruling No. 2002-215 (discussing attorney-client privilege).

this Department will weigh the interests expressed by the party for nondisclosure of a relevant document against the requesting party's particular interests in obtaining the document, as well as the general presumption under the grievance statutes in favor of disclosure. Relevant documents must be provided unless the opposing party can demonstrate compelling reasons for nondisclosure that outweigh the general presumption of disclosure and any competing interests in favor of disclosure. As discussed further below, a weighing of the interests in this particular case does not support a finding of just cause for nondisclosure of the documents at issue.

Safety Concerns

The primary argument the University has raised is a concern regarding the safety of its employees. The University appears to argue that the threat assessment documents should not be provided to the grievant because of a concern that the grievant might retaliate against the complaining employees if they are identified. The safety of employees is an exceedingly important concern due substantial consideration.

Indeed, an actual threat to employee safety (or reasonable belief that a threat to workplace safety exists) could constitute just cause for an agency's nondisclosure of relevant documents requested by a grievant, when supported by the evidence.[13] Here, however, the University has provided insufficient evidence to support a finding that the grievant's behavior ever compromised, or ever would compromise, his own safety, or the safety of others inside or outside the workplace. The University asserts that its "legitimate concern for its employees' safety – as demonstrated by the employees' concerns regarding disclosure, the volume of complaints, or a particularly compelling complaint" should constitute just cause for nondisclosure. Upon asking the University for additional information, this Department was provided with descriptions of the grievant's alleged "creepy" behavior. While the volume and/or nature of complaints may certainly provide justification for undertaking a threat assessment, such factors do not demonstrate the existence of an actual risk of danger.

Significantly, the University's own threat assessment concluded that the grievant was not an imminent threat, and the University asserts that it took no adverse action against the grievant as a result. The agency has also stated that an evaluation of the grievant by a mental health professional to whom the grievant was referred by the agency determined that he was not dangerous. Moreover, the fact that, as the University asserts, every complainant "but one" expressed "vociferous concern" about the disclosure of these documents and potential retaliation from the grievant is insufficient, without more, to demonstrate that disclosure would pose an actual safety threat. In sum, due to the lack of sufficient evidence presented by the University to support a finding of a threat to employee safety, this Department cannot conclude that the University's expressed safety concern constitutes just cause for nondisclosure of the requested documents.

Chilling Effect

[13] It is important to note in such cases, however, that where documents are not provided to the employee and the agency has the burden of proof, the agency would not be able to rely upon those documents to support its case at hearing. *See* EDR Ruling No. 2004-634.

The University also asserts, apart from any actual safety threat, that just cause for nondisclosure exists because providing the requested threat assessment documents will cause a "chilling effect" on employee complaints of perceived threats, thus preventing the University from fully investigating such workplace complaints. The University states that at the outset, prior to the grievance being filed in this case, it had assured the complaining employees that their statements would be kept confidential, and that all but one of the complainants have expressed "vociferous concern" about disclosing the documents. The University argues that employees will be unwilling to come forward in the future if they knew their statements or any threat assessment reports reflecting their statements could be disclosed to the individual subjects of their complaints.

"Chilling effect" concerns alone, however, will rarely be sufficient to establish just cause for withholding relevant documents in a grievance. There is the possibility of a "chilling effect" in almost every grievance. If all "chilling effect" arguments were automatically given weighty consideration, the purpose of the grievance statutes -- that all documents relating to the actions grieved "shall be made available" -- would be thwarted, and the limited discovery permitted by the grievance statutes would be unduly blocked. Thus, this Department concludes that absent particularly compelling evidence or authority in a particular case, the potential for a "chilling effect" does not constitute just cause for nondisclosure of a relevant document in a grievance.

In support of its "chilling effect" position, the University cites Va. Code Section 40.1-51.2(b), which provides that the Commissioner of the Department of Labor and Industry (DOLI) shall hold in confidence the names of employees who submit a written complaint regarding hazardous conditions in the workplace. That statute is not directly applicable in this case as the employee complaints were submitted to the University, not to the DOLI Commissioner. Moreover, while at least one Virginia circuit court, in a civil context, has analyzed that statute to apply an "informer's privilege" to employee complaints to the DOLI Commissioner,[14] that court also indicated that such a privilege protecting the documents from disclosure is not absolute. "Where the disclosure of an informer's identity, or the contents of any communication with the informer, is relevant and material to the defense of an accused, or *is essential to a fair determination of a cause,* the privilege must give way."[15]

Further, in light of the document disclosure requirements in court litigation and in statutes such as FOIA, the Data Collection Act, and the State Grievance Procedure, blanket assurances of

[14] Bell v. General Masonry, Inc., 46 Va. Cir. 83, 84-85 (Cir. Ct. Fairfax 1998).

[15] *Id.* at 85 (citing Roviaro v. United States, 353 U.S. 53, 60-61 (1957)). In addition, given the constitutional due process requirements associated with terminations and other similar adverse actions under the state employee grievance procedure, this Department cannot adopt a blanket informer's privilege that would automatically prevent the disclosure of relevant and material documents. Constitutional due process requires an opportunity to confront and cross-examine adverse witnesses; discharged government employees must be provided the opportunity to cross-examine at hearing their accusers. *E.g.,* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); McNeil v. Butz, 480 F.2d 314, 321-25 (4th Cir. 1973) (following *Goldberg* and requiring that discharged government employees be provided the opportunity to cross-examine at hearing their "nameless accusers").

confidentiality should, as a practical matter, be given careful consideration by state agencies and institutions before they are made. For instance, exemptions and exclusions to statutory disclosure requirements are limited and often narrowly construed by the courts, especially in cases involving the general requirement that agencies and institutions disclose requested personal information to the individual who is the subject of that information.[16] The potential discoverability of documents through such statutes, not to mention through court litigation, undercuts any argument that disclosure in this case, for purposes of the grievance procedure, would create a "chilling effect" that would not otherwise exist with respect to employee complaints.

For example, under the Data Collection Act, even if prior assurances of confidentiality had been made, it appears likely that state agencies, institutions, and localities could be required to provide to a "data subject," including an employee, all "personal information" collected and held about that data subject, including names of complainants,[17] absent specific exemption categories apparently not applicable here.[18] As stated by one court, "[b]y enacting that Act, the General Assembly, *inter alia*, expressly indicated its intent to ensure that agencies of the Commonwealth not maintain secret personal information systems; that personal information collected only be utilized if accurate and current; that citizens be empowered to learn the purpose and the particulars of how personal information is collected by state government agencies about them; and that an uncomplicated procedure be mandated for citizens to correct, erase, or amend inaccurate, obsolete, or irrelevant information about themselves."[19]

For all the above reasons, the University's "chilling effect" argument fails to provide compelling reasons for nondisclosure within the context of this grievance.

No adverse employment action

The University asserts there has been "no adverse employment action" taken against the grievant as a result of the threat assessment, and therefore, presumably, his need for the threat assessment documents should be given little weight. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[20] Adverse employment actions include any

[16] *See* McChrystal v. Fairfax County Bd. of Supervisors, 67 Va. Cir. 171 (Cir. Ct. Fairfax 2005).
[17] *McChrystal*, 67 Va. Cir. at 186-87, 190 (holding that the "plain mandate" of the Data Collection Act required disclosure of documents to a county employee related to a workplace discrimination investigation into his behavior, including the identities of the complainants, despite any prior assurance of confidentiality to the complainants).
[18] For instance, one such exemption to the Data Collection Act pertains to personal information systems maintained by campus police departments at institutions of higher education, and that deal with "investigations and intelligence gathering relating to criminal activity." *See* Va. Code § 2.2-3802(7). The University has not asserted that any *criminal* investigation or intelligence gathering was undertaken in connection with the threat assessment documents in this case.
[19] *McChrystal*, 67 Va. Cir. at 183-184.
[20] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

agency actions that have an adverse effect on the terms, conditions, or benefits of one's employment.[21]

However, even when a grievance does not involve an "adverse employment action," the policy embodied in the grievance statutes is that all documents related to the actions grieved "shall be made available." That statutory provision is not limited to only those grievances alleging adverse employment actions. Indeed, even if this grievance does not qualify for hearing, the threat assessment documents are no less relevant and useful to the grievant in explaining his grievance concerns to the University during the management steps, whether by written submission or face-to-face, such as in the second step meeting. The requested documents directly relate to the grievant's claims.[22] Thus, given the importance of these documents to the grievant's claims and the strong policy expressed in the grievance statutes favoring disclosure of relevant documents, any absence of an adverse employment action carries little weight in the just cause analysis for this case.

*Redactions*

As discussed in EDR's original Ruling Number 2008-1870, the requested documents pertain to the grievant. Indeed, they are co-worker descriptions of his alleged conduct at work and the University's assessment of that alleged conduct, thus that Ruling held that the preservation of privacy afforded by the grievance statutes did not apply in this case. This finding was based on the analysis of EDR Ruling No. 2008-1884, in which this Department departed from previous precedent to allow for the discovery of nonparty names due to the nature of the documents at issue in that case.[23] However, the facts raised by this case require reconsideration and refinement of our initial analysis.[24]

The Code of Virginia and the *Grievance Procedure Manual* 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

---

[21] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[22] The University suggests that an employee cannot "bootstrap" a request for documents by filing a grievance. Because the requested documents are relevant and material to the grievance, and the grievance challenges an acknowledged investigation into the grievant's alleged threatening behavior, as well as alleged repercussions stemming from the complaint and investigation, this is not a case of "bootstrapping."

[23] In EDR Ruling No. 2008-1884, the grievant sought complainant documents to challenge what she described as a transfer and demotion due to unwarranted complaints about her performance. EDR held that she needed the documents because otherwise, she would be unable to call a complainant as a witness at the hearing or properly challenge the information provided in the document. That type of situation is distinguishable from a case in which a grievant's request for the medical records of nonparties is denied because of a greater, more compelling interest in protecting the health-related information of nonparties. *Cf.* DERC Ruling ID 2000-062 (allowing access to the medical records of nonparty patients, but redacting the patients' identifying information), *reconsidered*, EDR Ruling ID 2000-094 (upholding previous ruling).

[24] The University asserts that an order for the production of the documents without redacting the names of nonparties is inconsistent with past EDR rulings allowing for such redactions. However, as explained in EDR Ruling No. 2008-1884, this Department has departed from the past rulings cited by the University. As such, those earlier rulings cited by the University are no longer persuasive. The analysis below, however, further refines this Department's consideration in these situations following the issuance of Ruling No. 2008-1884.

opposing party."[25] They also provide 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."[26] Reading these provisions together should lead to the conclusion that relevant documents must be produced with names of nonparties redacted. However, the grievance statutes also allow the parties to "call witnesses to present testimony and be cross-examined."[27] As this Department recognized in EDR Ruling No. 2008-1884, "[w]ithout knowledge of the identity of an individual who may possess information relevant to the grievance, a grievant would be unable to call this person as a witness at the hearing or properly challenge the information provided in a relevant document."[28]

EDR must interpret the statutory framework of the grievance procedure to give meaningful effect to all its provisions, including those related to due process requirements. Thus, the tension between (i) protecting the privacy of nonparties whose names appear in relevant documents, and (ii) allowing parties to call such unnamed nonparties as witnesses must be resolved through a weighing of the interests presented in each case. Upon reconsideration, this Department will, similar to the balancing analysis utilized above, weigh the requesting party's particular interests in obtaining the unredacted document against the interests expressed by the party for redaction. The privacy of nonparties will be protected unless the party seeking full disclosure of the documents can demonstrate overriding reasons for such disclosure that outweigh the interests of protecting the privacy of nonparties and any competing interests in favor of redactions.

Looking to this case, while the documents at issue pertain primarily to the grievant, this Department, upon reconsideration, finds that because the documents likely contain the complainants' perceptions of the grievant's behavior, and possibly the impact of those perceptions on their sense of well-being at work, the documents, in some respects, pertain to the nonparty complainants as well. Therefore, while the documents are relevant and, absent just cause, must be provided, at some level, they also pertain to nonparty complainants, and thus will be provided in such a way as to preserve the complainants' privacy, barring overriding reasons for full, unredacted disclosure under due process principles.

Based on this Department's review of the grievance record and information gathered from the grievant, it appears that the primary reason the grievant sought the names of the complainants was to challenge the threat assessment itself and show upper University management that the grounds for the threat assessment and the complaints against him were spurious. However, given that the grievant will receive the documents that describe the nature of

---

[25] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[26] *Id.*
[27] Va. Code § 2.2-3004(F) (providing such a right in connection with a grievance hearing); *see also* § 2.2-3003(D) (allowing witnesses to be called at required face-to-face meeting between the grievant and management during the grievance process).
[28] EDR Ruling No. 2008-1884 (citing Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); McNeil v. Butz, 480 F.2d 314, 321-25 (4th Cir. 1973) (following *Goldberg* and requiring that discharged government employees be provided the opportunity to cross-examine at hearing their "nameless accusers").

the complaints and information gathered from the complainants about the grievant's reported conduct, it would appear the grievant will have sufficient information to challenge what he intended. It does not appear that the names are "essential to a fair determination"[29] of the issues raised in the grievance given the basis of the grievant's request for the disclosure of the names. While it cannot be said that the names would not assist the grievant's arguments regarding these issues, it does not appear that his need for the names is particularly compelling here, when he will receive the bulk of the investigation materials.[30]

Here, the grievance procedure's protection of the privacy interests of nonparties, the University's understandable interest in protecting the identities of employees who have reported workplace safety concerns, and the grievant's lack of a compelling interest in the discovery of the names in this particular case weigh in favor of redacting the names from the threat assessment documents. Therefore, in producing the documents at issue, the University may redact the names of the complainants, as well as any other non-relevant personal information, such as a complainant's social security number, telephone number, or home address. The University must not, however, redact the substantive portions of the documents, for example, those portions of the documents that describe the complaints, the grievant's alleged behavior, and the University's assessments of the complaints and the grievant.

## CONCLUSION

The requested documents are relevant, contain data about the grievant, and no specific evidence has been provided to support a finding that employee safety ever was or would be threatened. Indeed, there is specific evidence demonstrating the absence of an actual threat to employee safety. The University is therefore ordered to produce the threat assessment documents to the grievant in such a manner as to preserve the privacy of the complainants whose names appear therein, in accordance with this ruling, within **ten workdays of its receipt of this ruling**. This Department's rulings on matters of compliance are final and nonappealable.[31]

Claudia T. Farr
Director

[29] *Cf.* Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (discussing when the "fundamental requirements of fairness" require the disclosure of an informer's identity).
[30] It should be noted that a grievant's interest in discovering the names of complainants might be different if, for example, the grievant required the identity of complainant witnesses in order to defend against a disciplinary or other adverse action. *See, e.g.*, EDR Ruling No. 2008-1884.
[31] Va. Code §§ 2.2-1001(5), 2.2-3003(G).