

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2018 CHRT 1

**Date:** January 4, 2018

**File No:** T1248/6007

**Between:**

**Levan Turner**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canada Border Services Agency**

**Respondent**

**Ruling**

**Member:** Edward P. Lustig

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## **I. Introduction**

[1] This case was originally referred to the Tribunal in 2007. I have recounted its procedural history in my earlier ruling (2017 CHRT 15). The present ruling addresses a motion brought by the Respondent for production of three general classes of documents:

- a) documents relating to the Complainant's attendance at the University of Toronto, and in particular, relating to his enrollment, course registration, and transcript of marks;
- b) documents relating to the Complainant's volunteer activities with the Metropolitan Toronto Police Auxiliary;
- c) documents relating to the Complainant's enrollment, course registration, and transcripts of marks at the Metropolitan Toronto Police College and C.O. Bick College, as well as certificates issued therefrom;

All three production requests cover the period running from 1987 to 1996.

## **II. Respondent's Submissions**

[2] The Respondent asserts that all of the documents sought are directly connected to express allegations made by the Complainant in his Statement of Particulars ("SOP") that he was better qualified and had more experience than all of the candidates that were hired in the relevant selection processes ("the Victoria Process" and "the Vancouver Process"; collectively, "the Selection Processes"). It claims that the documents speak to the extent and breadth of the Complainant's education and experience, which makes them arguably relevant. It also claims that the documents sought are generally relevant to the Complainant's credibility as a witness.

[3] To support its claim of arguable relevance, the Respondent relies upon two passages in the Complainant's SOP. In the first passage, the Complainant alleges that, in respect of the Victoria Process, "...[e]very single person hired by the Respondent...was less experienced and less qualified than the Complainant". In the second passage, the

Complainant alleges that, in respect of the Vancouver Process, "...[a]ll had less experience and fewer qualifications than the Complainant."

[4] The Respondent also relies upon the *curriculum vitae* that the Complainant submitted in each of the Selection Processes. Therein it is stated that the Complainant had undertaken studies at the University of Toronto ("U of T")—namely, a "4 year Geography program", that he had acquired "over 2000 hours of volunteer policing experience" with the Metropolitan Toronto Police Auxiliary ("Auxiliary"), that he had graduated from Metropolitan Toronto Police College ("Police College"), that he had graduated from a program entitled "Provincial Use of Force at C.O. Bick College," and that he had received sexual harassment training.

[5] The Respondent draws the Tribunal's attention to the Complainant's testimony during the 2008-2009 hearing of this Complaint before former Chairperson Sinclair. In direct examination, the Complainant had testified that he had "...one or two courses left..." to complete a geography degree at the U of T. In cross-examination, the Complainant had testified that in an interview for the Vancouver process, he had informed the selection board that he was "...one or two credits shy of completion" of a degree in "urban planning."

[6] The Respondent notes that the placement of successful candidates in the Selection Processes included consideration of the extent of a candidate's relevant education, and the depth, breadth scope or type of experience related to the position.

[7] In the Respondent's view, fairness requires that it be given an opportunity to explore and challenge the Complainant's allegations—his express pleadings—that he was more experienced and better qualified than every successful candidate. It is the Respondent's intent to put the Complainant to the strict proof of these particular allegations, which includes his providing documentary evidence of his education and any law enforcement related courses or volunteer experience that he may have. In this last regard, the Respondent notes that the pre-requisite experience criteria for the Selection Processes included experience in the enforcement of acts and regulations and experience in obtaining information in an investigative setting or pressure situation.

[8] With respect to the documents relating to the Complainant's attendance at the U of T, the Respondent notes that the extent of the Complainant's post-secondary education at this institution was internally relevant to the Selection Processes, as candidates were placed having regard to the extent to which they possessed the "Education" factor.

[9] In addition, the Respondent asserts that the U of T documents are relevant to the Complainant's credibility as a witness. In particular, the Respondent asserts that the Complainant's *curriculum vitae* is misleading because it suggests he completed a geography program, when he did not. The Respondent also points to an inconsistency during the 2008 hearing between the Complainant's testimony in chief that he was two *courses* short of completing the program, and his recounting in cross-examination that he was two *credits* shy of completing the program. Finally, the Respondent identifies credibility concerns stemming from the Complainant's testimony that he elected not to complete the four year degree program despite only needing one or two more credits or courses.

[10] As regards the documents relating to the Complainant's volunteer activities with the Auxiliary, the Respondent argues that the Complainant has conceded the arguable relevance thereof by producing some documents relating to these activities prior to the bringing of the motion—although the production in question seemingly represented a selective number of documents. The Respondent argues that it should be entitled to a broader and more expansive inquiry into the extent and breadth of the Complainant's Auxiliary experience. The documents are relevant to the pre-requisite experience criteria for the Selection Processes, and are arguably relevant to the Complainant's allegation that he was better qualified and more experienced than every candidate hired in the Selection Processes.

[11] Finally, in respect of the documents pertaining to the Complainant's attendance at Police College and C.O. Bick College, the Respondent argues they are relevant to the proof of the Complainant's education, and his allegation that he was better qualified and more experienced than any successful candidate. The Respondent reiterates that the criteria for the placement of successful candidates included the extent to which the

candidate possessed the requisite education, and the depth, breadth, scope or type of experience related to the position.

### **III. Complainant's Submissions**

[12] The Complainant opposes the motion for production. In his view, the documents sought are not relevant to the complaint, may not exist, and are unhelpful at the current stage of the proceedings for assessing the Complainant's credibility as a witness. The Complainant notes that the selection boards who initially assessed the Complainant's qualifications did not see fit to request the documentation that is now being requested by the Respondent, years after the filing of the complaint and two hearings by the Tribunal on its merits. In his view, the documents were not relevant to the selection processes then, and they are not relevant now to the question of whether the Complainant was as qualified as the candidates appointed to the position.

[13] The Complainant's contention that he was better qualified than the successful candidates was based on the experience he acquired working in a series of term appointments in the same position, for which he received positive performance appraisals. His claim of being better qualified was not based on his university studies in geography, or on his volunteer experience. The Complainant therefore asserts that the requested documents are not relevant to the extent and breadth of the Complainant's education and experience at issue in the Selection Processes. In his view, the Respondent's request is speculative and amounts to a fishing expedition.

[14] The Complainant refers to the selection board's notes for the Victoria Process, wherein it is indicated that the selection board members were aware that the Complainant volunteered with the Auxiliary. However there is no indication that the selection board asked for any supporting information in regard to his volunteer work for the Auxiliary, his training related to his volunteer positions, or his post-secondary education. The Respondent has not asserted that the selection board requested this information as part of the Complainant's assessment.

[15] The Complainant refers to the Vancouver Process, wherein there is no indication that, as a part of the assessment, the Respondent asked the Complainant for supporting documentation with respect to his volunteer experience, certificates, or post-secondary education.

[16] The Complainant confirms that prior to the bringing of the motion, he disclosed additional documents in his possession pertaining to his volunteer work.

[17] He argues that the selection boards who assessed the Complainant's competencies could have asked for supporting documentation in relation to his education and his volunteer activities. He finds it telling, and unsurprising, that none of the selection boards elected to request any of this information. Had they believed this information was relevant to assess the Complainant's competencies, they would have asked for it in the first place.

[18] Expanding on his contention that he was better qualified than successful candidates, the Complainant specifies that this claim is founded on his on-the-job experience, after being hired five times for term positions between 1998 and 2003. In that period, he had performed the full range of Customs Inspector duties, had taken training courses, and received positive performance reviews.

[19] The Complainant asserts that his *curriculum vitae* is transparent about the fact that he did not receive a degree from U of T in geography. He suggests that if the Respondent has an issue with the completeness of his *curriculum vitae*, this can be the subject of cross-examination.

[20] In respect of the documents relating to the Complainant's training at Police College and C.O. Bick College, the Complainant maintains that there is no indication that the selection board took any of this information into account in the assessment of Complainant's qualifications.

[21] Finally, in respect of the documents relating to the Complainant's experience working for the Auxiliary, the Complainant argues that the fact that none of the selection

boards asked for any confirmation of this experience demonstrates that it is irrelevant to the Complainant's pre-requisite experience criteria.

#### **IV. Reply Submissions**

[22] The Respondent maintains that relevancy of documents in litigation is defined in relation to the express pleadings themselves, rather than an interpretation thereof. The fact remains that the Complainant broadly pleaded that every candidate appointed was less experienced and less qualified, and the Respondent should be entitled to fully explore the Complainant's experience and qualifications.

[23] The Respondent notes that 9 years after the original hearing in this matter, when the Complainant disclosed certain documents pertaining to his volunteer activities with the Auxiliary, he stated in the covering letter that he may rely on this late disclosure. In so doing, the Complainant has made a *de facto* concession that this class of documents is relevant. Moreover, the Complainant himself led evidence in direct examination about his Auxiliary experience. The Respondent should be allowed full discovery of documents that relate to it. They are also relevant to the Complainant's credibility as a witness.

[24] The Respondent points to a notation made by one of the selection board members in the Victoria Process indicating that the Complainant had embellished facts in his interview; he had initially informed the board that he was a police officer and only later clarified that he was an Auxiliary volunteer.

[25] In the Respondent's view, the Complainant cannot credibly argue that the contents of the requested documents will take him by surprise or catch him off-guard; the Complainant already has knowledge of the documents' contents.

[26] The Respondent asserts that the timing of its document requests was not unreasonable given that the evidential record in the proceedings has been closed since the conclusion of the first hearing in 2008-2009 until the Tribunal's order for a *de novo* hearing on May 26, 2017.



## V. Legal Framework

[27] The starting point for discussion of pre-hearing disclosure and production obligations is s. 50(1) of the *Canadian Human Rights Act*, R.S.C., c. H-6 [the *CHRA*], which instructs the Member presiding over the inquiry to “...give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.”

[28] The Tribunal has held that in order for a party to have the opportunity to address evidence prejudicial to its case, the party requires full and ample disclosure of relevant information in the possession or care of the opposing party (*Palm v. I.L.W.U. Local 500 et al.*, 2012 CHRT 11, para. 9).

[29] The Tribunal’s Rules of Procedure address these objectives in rules 6(1)(d), 6(4) and 6(5):

6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,

[...]

d. a list of all documents in the party’s possession...that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

6(4) Where a party has identified a document under 6(1)(d), it shall provide a copy of the document to all other parties...

6(5) A party shall provide such additional disclosure and production as is necessary

a. where new facts, issues or forms of relief are raised by another party’s Statement of Particulars or Reply; or

b. where the party discovers that its compliance with 6(1)(d), or 6(4) is inaccurate or incomplete.

[30] Where a dispute arises as to whether a document is caught by rule 6, resort is had to the concept of arguable relevance: There has to be a rational connection between the

documents requested and the issues at stake. Furthermore, the request must not be speculative or amount to a fishing expedition. Finally, the description of the documents should not be too broad or general and should be identified with reasonable particularity (*Guay v. Canada*, 2004 CHRT 34, paras. 42-43).

[31] A determination of arguable relevance is not a particularly high standard. There must be some relevance, and the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute. The material must be probative and arguably relevant to an issue in the hearing. This is meant to prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming (*Guay, supra*, para. 44.)

[32] The Tribunal has required a party to show that disclosure of the document will be useful, is appropriate, is likely to contribute to advancing the debate and is based on an acceptable objective that he or she seeks to attain in the case, and that the document is related to the dispute (*C.E.P.U. v. Bell Canada* 2005 CHRT 34, para. 11).

[33] In *Gaucher v. Canada* 2005 CHRT 42, the Tribunal reiterated that the threshold for arguable relevance is low, observing that the tendency is now towards more, not less disclosure. However it also repeated the caveat that it is important that a disclosure request not amount to a fishing expedition (para 11). The Tribunal also specified therein that parties are not required to create documents for disclosure (para. 17).

[34] In *Warman v. Bahr*, 2006 CHRT 18, the Tribunal held that:

[7] The first step in determining whether a document is arguably relevant is to identify the facts that are in issue in the case. The question to be asked is this: what facts must be proved in order to establish or defend against the case before the Tribunal?

[...]

[9] The arguable relevance of material must be determined on a case-by-case basis, having regard to the issues raised in each case...

[35] A party's entitlement to arguably relevant documents does not mean that these documents will be admitted in evidence or that significant weight will be afforded to them (*T.E.A.M. v. Manitoba Telecom Services*, 2007 CHRT 28, para. 4)

## VI. Analysis

[36] Review of the above jurisprudence indicates that the assessment of the production request in the present motion turns on the actual issues that the Tribunal must determine: At their core lies the question of what facts must be proved to establish or defend against the case before the Tribunal.

[37] As indicated in my earlier ruling, the allegations at the heart of this inquiry are that the Respondent, in two job competitions (or Selection Processes), discriminated against the Complainant within the meaning of s. 7, on the basis of race, national or ethnic origin, age and the perceived disability of obesity.

[38] It would now seem well recognized that proving such allegations is contingent upon the Complainant establishing that:

- a) He possessed one or more characteristics protected from discrimination under the *CHRA*;
- b) He experienced an adverse impact with respect to the Selection Processes;
- c) One or more protected characteristics was a factor in the adverse impact.

(*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, para. 24)

[39] Ultimately, the above analysis requires the Tribunal to analyse the decision-making processes of the entities that conducted the Selection Processes: namely, the selection boards. In other words, if he possessed protected characteristics, was the Complainant adversely impacted by the actions and decisions of the selection boards, and if so were the protected characteristics a factor in the selection boards' actions and decisions?

[40] This analysis does not, strictly speaking, require an assessment by the Tribunal of the Complainant's experience and qualifications in absolute terms, nor even in relation to

the other candidates. The Tribunal is not sitting as a selection board, nor is it exercising appellate jurisdiction in respect of the decisions of such boards (see *Turner v. Canada (A.G.)*, 2017 FCA 2, para. 70). Rather, the Tribunal is required to assess the decision-making process of the selection board in order to determine whether the Complainant's protected characteristics or a combination thereof played a role in that decision making process.

[41] Viewed from this perspective, the arguably relevant documents would consist of those that the selection boards had before them, any documents recording additional information requests by the selection boards, and any supplemental documentation provided in response to such requests.

[42] But the Respondent does not claim that the records sought contain information that falls into any of these categories. Rather, the Respondent relies heavily upon assertions made by the Complainant in his Statement of Particulars that he was more qualified than any of the successful candidates in the Selection Processes.

[43] A textual analysis of the allegations contained in a party's Statement of Particulars is undoubtedly of invaluable assistance in identifying the issues in the case, and by extension the scope of production of arguably relevant documents. However, as the Tribunal's jurisprudence demonstrates, the presence of a rational connection between the documents sought and the issues raised by the parties is not always the sole determining factor of whether these documents must be produced.

[44] Tribunal Members have also asked themselves whether the document requests are being made for purposes that are speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming. Moreover, they have questioned whether disclosure of the document is useful, appropriate, likely to contribute to advancing the debate, and based on an acceptable objective that he or she seeks to attain in the case. Most recently, the Tribunal has observed that disclosure will not be ordered where the probative value of the evidence would not outweigh its prejudicial effect on the proceedings (*Brickner v. Canada* 2017 CHRT 28, para. 8).

[45] This is not to impute improper motives to the Respondent, nor to the Complainant, who apparently acquiesced to one of the Respondent's production requests and gave notice that he might rely on the produced documents at the hearing.

[46] Instead, it is simply to underscore the principle that the Tribunal, in its duty to keep the proceeding focussed on the key issues before it, is required in some circumstances to temper the parties' delineation of arguable relevance. The Tribunal does so with pragmatism, due deference to the right to be heard, and its own carefully considered view of what each party must prove in order to establish or defend against the case.

[47] Apart from the purpose of testing the Complainant's claim that he was more qualified than the successful candidates, the Respondent also argued that production of some of the requested documents would be arguably relevant to the Complainant's credibility. In particular, the Respondent has identified what it claims to be inconsistencies between the Complainant's educational qualifications as stated in his *curriculum vitae*, as opposed to testimony given by the Complainant in the original hearing of the Complaint in 2008. Similarly, the Respondent wishes production of documents in order to explore or expand upon an observation by one of the selection board members that the Complainant embellished facts in his interview.

[48] The Respondent is certainly entitled to test and challenge the Complainant's credibility at the upcoming hearing, in cross-examination and otherwise. Moreover, doing so might even be facilitated by the existence of sworn transcribed testimony from the original hearing. However if the need to test credibility were sufficient on its own to ground a production request in respect of every factual assertion by a witness, no matter how peripheral to the issues at hand, the inquiry before the Tribunal might well be inordinately lengthened. This is of particular concern in the Complaint at hand, which was originally referred for inquiry over 10 years ago. The fact that some of the documents sought might be in the custody of third parties, while not an insurmountable obstacle, certainly does not accelerate hearing preparedness.

[49] The Tribunal is concerned with the information the selection boards had in their possession, and any conclusions the board members drew about the Complainant's

qualifications and suitability, having regard to their communications and interactions with him. But the production of extraneous documents tending to demonstrate that the Complainant was something less than completely candid in the selection processes does not shed light on these areas. Nor does it assist the Tribunal in determining whether one or more of the Complainant's protected characteristics played a role in the outcome of the Selection Processes.

## **VII. Order**

[50] For all of the above reasons, the Respondent's motion is dismissed.

*Signed by*

Edward P. Lustig  
Tribunal Member

Ottawa, Ontario  
January 4, 2018

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T1248/6007

**Style of Cause:** Levan Turner v. Canada Border Services Agency

**Ruling of the Tribunal Dated:** January 4, 2018

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

David Yazbeck, for the Complainant

Graham Stark, for the Respondent