

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2014 CHRT 23

**Date:** August 18, 2014

**File No.:** T1852/8212

**Between:**

**Brian William Carter**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Attorney General of Canada**

**Respondent**

**Ruling**

**Member:** Olga Luftig

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## **I. Background**

[1] On July 31, 2012, pursuant to subsection 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c H-6, as amended (“*Act*” or “*Human Rights Act*”), the Canadian Human Rights Commission (“*Commission*”) asked the Canadian Human Rights Tribunal’s Acting Chairperson to institute an inquiry into the complaint of Brian William Carter (“*Complainant*”) against Fisheries and Oceans Canada as respondent (“*DFO*”).

[2] The grounds of the Complaint are that DFO discriminated against the Complainant because it failed and/or refused to accommodate his disability; treated him in an adverse, differential manner by engaging in a discriminatory policy or practice, and thereby denied him an employment opportunity, contrary to sections 7 and 10 of the *Act*.

[3] On February 6, 2014, the Tribunal issued a Ruling ordering that the Attorney General of Canada (“*AGC*”) be substituted for DFO as the Respondent, and that the Respondent in the style of cause read: “The Attorney General of Canada (representing the Department of Fisheries and Oceans and the Public Service Commission of Canada).”

[4] The Commission was participating in the hearing and filed its Statement of Particulars (“*SOP*”). On June 20, 2014, the Commission advised that it was no longer participating in the hearing.

[5] The Complainant has made a Motion for an Order for confidentiality concerning certain documents (“*Confidentiality Motion*” or “*Motion*”). The Respondent and the Commission filed Responses to the Motion.

### **A. Appendix 2 of Complainant’s Statement of Particulars**

[6] Appendix 2 of the Complainant’s SOP is headed “MEDICAL-IN-CONFIDENCE”, and under that heading, the title “Appendix 2 – Medical Documents”. There follows a list of documents comprising 24 pages. The Complainant claimed privilege for these documents which he submits are related to his medical condition (“the Appendix 2 Documents”).

## II. The Confidentiality Motion

[7] The Complainant's Motion for Confidentiality Order seeks the following orders:

1. the Appendix 2 Documents shall be disclosed only to counsel and paralegals for the Parties;
2. the Appendix 2 Documents shall not be copied and shall not be transferred in any way whatsoever, including by fax and email, by any Party or individual to any other Party or individual;
3. if a Party's counsel seeks additional disclosure of the Appendix 2 documents to anyone else, counsel must take all the steps from a) to f) below beforehand:
  - a. seek the Tribunal's prior permission;
  - b. give the Complainant prior notice;
  - c. provide the name of the person the party proposes to view any such document;
  - d. justify why that person needs to view the document;
  - e. restrict the additional disclosure to that person to viewing only;
  - f. obtain a signed undertaking from the proposed additional viewer acknowledging that the existence and contents of the document are strictly confidential and must not be disclosed or discussed with anyone else unless the Tribunal specifically authorizes such further disclosure or discussion;
4. all counsel must safeguard the Appendix 2 Documents as confidential and store them in authorized storage arrangements in accordance with Government of Canada security regulations;
5. at the end of the inquiry, all counsel must certify to the Tribunal and the Complainant that the Appendix 2 Documents have been destroyed in accordance with Government of Canada security regulations, or alternatively, return them to the Complainant;
6. all information pertaining to the Complainant which the Respondent has already obtained under the Privacy Act, R.S.C. 1985, C-P21 ("Privacy Act") is to be subject to any order the Tribunal makes pursuant to this Confidentiality Motion;
7. deviations from any order the Tribunal makes pursuant to this Motion which have already occurred are to be reported to the Tribunal and the Complainant so that the risks arising from the deviations can be assessed and addressed.

[8] The Complainant relies on the following grounds:

1. the highly personal, very sensitive and confidential nature of the Appendix 2 Documents;
2. disclosure of the Appendix 2 Documents into the public domain would be highly prejudicial to the Complainant's reputation and health; that is why he claimed privilege for those documents;
3. the order the Complainant seeks complies with Rule 152 of the *Rules of the Federal Courts of Canada*, SOR/98-106 ("*Federal Courts Rules*");
4. *Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome*, 2013 CHRT 19, paras. 40 and 45 ("*Palm #3*");
5. the following cases, which contain one or more the confidentiality provisions he seeks: *Harjinder Kaur Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6, para. 37 ("*Rai*"); *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para 48 ("*Guay*"); *Montreuil v. Canadian Forces*, 2005 CHRT 45, para 12 ("*Montreuil*"); *PSAC v. Canadian Museum of Civilization*, 2004 CHRT 38, paras 19, 20 & 21 ("*Canadian Museum*"); *Day v. DND and Robert Hortie*, 2003 CHRT 3, paras. 3 & 4 ("*Day*"); *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, para 35 ("*Gaucher*");
6. although the Respondent is governed by the *Privacy Act*, the gap in that Act lessens its confidentiality protections and is further evidence of the need for the confidentiality order the Complainant seeks;
7. the Respondent counsel's search for documents to disclose has been so wide that it constitutes a "fishing expedition", and is contrary to the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*, c.11 (U.K.), Schedule B, Part 1 ("*Charter*") in that it constitutes an unreasonable search.

### III. Fundamental Issue

[9] The ultimate issue in this Motion is whether the Tribunal should grant the Complainant's Confidentiality Motion.

[10] The Ruling will address other matters the parties have raised:

- whether the Appendix 2 Documents are privileged;
- whether the Appendix 2 Documents are confidential;

- whether the Tribunal has jurisdiction to control and monitor the Pre-Disclosure Search/Process;
- the role of the *Privacy Act* in the inquiry;
- if the Tribunal does make a confidentiality order, the terms that should be in it.

#### IV. Law and Tribunal Rules of Procedure

[11] Section 52 of the *Human Rights Act* states:

**52.** (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

- a. there is a real and substantial risk that matters involving public security will be disclosed;
- b. there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
- c. there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or
- d. there is a serious possibility that the life, liberty or security of a person will be endangered.

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

#### A. Tribunal Rules of Procedure

[12] Rule 6(1) of The Tribunal Rules of Procedure (03-05-04) (“Tribunal Rules”) requires parties to a complaint to provide each other with a Statement of Particulars (“SOP”) containing, among other things,

d. a list of all documents the party possesses for which no privilege is claimed, 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 Rule 6;

e. a list of all documents the party possesses for which privilege is claimed, 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;

f. a list identifying all witnesses the party intends to call, other than expert witnesses, together with a summary of the anticipated testimony of each witness.

[13] Rule 6(4) provides that when a party has identified a document for which no privilege is claimed, it shall provide a copy of the document to all the other parties.

[14] Rule 6(5) essentially provides that disclosure is an ongoing obligation and that a party must rectify any inaccurate or incomplete compliance with Rule 6.

## **B. Brief Analysis of Rule 6 (1), d., e., and f**

[15] To comply with Rules 6(1) d., e., and f, parties may be obliged to do all or some of the following:

- search through all their documents for those which they think may relate to the complaint;
- select and decide which of the documents that they find are in fact related to a fact, issue or form of relief sought by the complaint and identified by other parties (i.e. decide if any such document is “arguably relevant” to the complaint – this phrase is discussed further, below);
- decide which of those documents are not privileged and can be immediately disclosed to the other party;
- decide which are privileged and why;
- search for witnesses, likely speak with them, and decide which witnesses the party intends to call, other than expert witnesses;
- draft a summary of the anticipated testimony of each witness the party intends to call (“will-say”).



[16] Compliance with Rule 6 involves not only searching for documents and witnesses, but also deciding which documents to use and disclose; which witnesses to call and disclose; and which documents and witnesses not to use, and therefore, not disclose. The Rule engenders not only a search, but also a decision-making and strategy process, in preparation for the litigation that constitutes an inquiry.

[17] For the above reasons, in this Ruling, I will call the process arising from Rule 6 the “Pre-Disclosure Search/Process”.

## **V. Issue: The standard for documentary disclosure pursuant to Rule 6**

[18] In complying with Rule 6 above, parties must decide, among other things, which documents they must disclose and which documents to list as privileged.

### **A. Commission’s Position**

[19] The Complainant has put in issue the health condition which he states is a disability under the *Act*.

[20] Given that the Complainant waived his right to claim an award for pain and suffering, arguably relevant disclosure should be limited to only the medical information about the disability which required accommodation during the job competition referred to in the Complaint.

### **B. Complainant’s Position**

[21] The second and third paragraphs of the Complainant’s Motion for Confidentiality state:

- the Complainant “acknowledges that all Parties and the Tribunal must be necessarily privy to the Complainant’s personal medical information in sufficient detail...to determine” whether he had a disability under the *Act* and its consequences regarding function and accommodation in a DFO job competition;
- the medical information the Complainant holds is “arguably relevant” to his Complaint;

- in the last paragraph, page 1 of the Motion for Confidentiality, the Complainant further states that he views the medical information for which he claimed privilege (i.e., the Appendix 2 Documents) "...as arguably relevant".

### **C. Respondent's Position**

[22] The Respondent states that to respond to the Complaint "...on behalf of the PSC and DFO..." it "...must gather and review all documents within the federal government's control which may be arguably relevant to the complaint. Relevant documents include those which may contain information regarding the Complainant's disability and any related medical conditions;" (Response to Motion, para. 30).

### **D. Analysis: The standard for documentary disclosure pursuant to Rule 6**

[23] Subsection 50(1) of the *Act* requires that all parties to an inquiry be given a full and ample opportunity to present their case.

"Therefore, for fairness reasons and in the search for truth, it is in the public interest to ensure that all arguably relevant evidence is disclosed between the parties appearing before the Tribunal" (*Rai, supra*, para.28).

[24] As set out in *Rai, supra*, and *Gaucher, supra*, the accepted standard for the disclosure of evidence, including documents, pursuant to Rule 6, is that the evidence be arguably relevant.

[25] For a document to be arguably relevant, there needs to be "...a rational connection between a document and the facts, issues, or forms of relief identified by the parties..." (*Rai, supra*, at para.28, citing *Guay, supra* at para.42, and *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28, at para.4).

"The threshold for arguable relevance is low and the tendency is now towards more, not less disclosure." (*Gaucher, supra*, para. 11)

[26] Applying the above principles to this Complaint, first, all the parties agree that the Complainant has put his health in issue by stating that he has a disability within the meaning of the *Act*.

[27] All the parties also agree that the standard for documentary disclosure under Rule 6, Tribunal Rules, is that a document be “arguably relevant”.

[28] There is no dispute among the parties that the Appendix 2 Documents are arguably relevant.

[29] I have not seen the texts of the Appendix 2 Documents. However, for each document, Appendix 2 lists its date, a brief description of its contents, its author and to whom it was sent. Paragraph 6 of the Complainant’s SOP enunciates what he thinks the Appendix 2 Documents will establish regarding the medical condition he claims as a disability.

[30] I find that the Appendix 2 Documents may be arguably relevant to facts, issues and forms of relief the Complainant has claimed.

## **VI. Issue: Privilege**

[31] The Complainant has claimed privilege for the Appendix 2 Documents. Neither his SOP nor his Motion materials specify what type of privilege he claims.

[32] Section 50(4) of the *Act* states:

*“Limitation in relation to evidence – The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.”*

[33] Subsection 50(4) therefore renders inadmissible at the Tribunal information which is privileged at law.

[34] Even though the Appendix 2 Documents are arguably relevant, it must be determined whether the Complainant’s claim of privilege over them prevents their disclosure.

### **A. Analysis: Privilege**

[35] I note the following:

1. in the Complainant’s SOP, at paragraph 6, he states that the Appendix 2 Documents for which he has claimed privilege prove that he “...had a disability,

indicate the severity of the disability (initially and about the time accommodation was requested)....” and then “requests that the Tribunal protect these documents from disclosure in accordance with the *Canadian Human Rights Act*”. This is followed by footnote number 2, which recites section 52 of the *Act, supra*;

2. in the Complainant’s Motion for Confidentiality Order, he states he is “...still willing to disclosure [sic] the already identified privileged medical information” [i.e. Appendix 2 Documents – my note].

[36] The Complainant’s claim of privilege communicated his position that the Appendix 2 Documents should remain confidential, notwithstanding his acknowledgment that they were arguably relevant.

[37] The Complainant himself has offered to disclose the Appendix 2 Documents, subject to this condition: that the Tribunal place confidentiality protection around the disclosure of these documents, pursuant to section 52 of the *Act*.

[38] Consequently, I conclude that he has given a conditional waiver of privilege.

[39] This Ruling is about pre-hearing disclosure of evidence, not its admissibility at the hearing. Since the Complainant has conditionally waived his claim of privilege, it is not necessary, for the purposes of this Motion, to determine whether the Appendix 2 Documents are in fact privileged at law.

## **VII. Issue: Confidentiality**

### **A. Commission’s Position**

- The Medical Information is delicate and sensitive and justifies a confidentiality order over it.
- The confidentiality orders in *Leslie Palm v. International Longshore and Warehouse Union, Local 500 et al*, 2013 CHRT 1 (“*Palm #2*”) and *Palm #3* can be the basis of an order balancing the need for the confidentiality of the Appendix 2 Documents with the need for their disclosure to the Respondent to prepare its case.
- The Commission submits specific terms for the proposed confidentiality order.

## B. The Respondent's Position

[40] The Respondent's reasons for its position that the Tribunal has no grounds to grant a confidentiality order on the Complainant's terms are set out below.

- The Appendix 2 Documents are not inherently confidential simply because they contain medical information.
- The Complainant has "tacitly" waived his right to confidentiality of the Medical Information because he has placed his health in issue.
- The test for confidentiality is that materials must be confidential both objectively and subjectively, as set out in *Apotex Inc. v. Wellcome Foundation Ltd.* [1993] F.C.J. No. 1117 ("*Apotex*") and *AB Hassle v. Canada (Minister of National Health and Welfare)* [1998] F.C.J. No.497 ("*AB Hassle*").
- The subjective opinion of a complainant that such an order is warranted is not sufficient. The Motion does not reveal an objective need for confidentiality.
- Some information about the nature of the Complainant's health condition is already in the Tribunal's records. The Respondent already has some of the documents in Appendix 2, because those documents have always been in the control of the federal government departments to which the Complainant submitted them.
- Part of the order the Complainant seeks would prevent the Respondent from consulting with any federal government employee about documents within the Respondent's control and also prevent the Respondent from using such documents to consult with third parties such as experts and other potential witnesses.
- The Respondent submits that if the Tribunal does grant a confidentiality order governing the Appendix 2 Documents, the order should only apply to those documents "when they are handed over to the other parties during the course of the disclosure process provided by Rule 6(4) of the Tribunal Rules of Procedure". [Respondent's underlining]
- If the Tribunal finds that the Appendix 2 Documents are confidential, the Respondent agrees with most of the Commission's specified terms.

## C. Analysis: Confidentiality

[41] In the cases the Respondent cites as supporting its submission that there must be both a subjective and objective test for material to be found confidential, the interests

involved are commercial property, such as patents and proprietary interests in intellectual property. The contemplated harm if these are disclosed is commercial, monetary harm.

[42] It is reasonable that in civil Court cases involving commercial and property rights, the Courts will apply different standards to assess if those rights require confidentiality protection than the standards applicable to human rights cases. This is particularly so at the administrative tribunal level, where the constituting legislation – the *Human Rights Act* – contains those standards.

[43] It is the standard for confidentiality in section 52 of the *Human Rights Act, supra*, which applies to this Motion.

[44] Even where sensitive personal information is deemed to be arguably relevant for the purposes of disclosure, section 52 of the *Act* gives the Tribunal the authority to protect such information, provided the criteria in subsection 52(1)c) or 52(1)d) are met.

[45] The Complainant did not waive confidentiality, either tacitly or explicitly. He waived privilege, as set out above, but on the condition that the Appendix 2 Documents be kept confidential pursuant to section 52 of the *Act*.

[46] Although the Complainant no longer works in the DFO, he does work in a federal government department. I conclude from assessment of the Appendix 2 Documents, as set out above, that they contain personal medical information which is private and sensitive. If it were in the public domain, without confidentiality protections, it is reasonable to conclude that it could cause the Complainant harm at work, negatively impact him professionally, and negatively impact his personal life. Putting the Appendix 2 Documents in the public domain would therefore cause him undue hardship.

[47] It is not necessary that every detail of the Complainant's relevant medical condition, and medical details not related to that condition be in the public domain in order for the conduct and result of this inquiry to remain accessible and understandable to the public.

[48] As well, the fact that the Respondent or its clients or other federal departments possess some of the Appendix 2 Documents does not derogate from their personal, sensitive, private and confidential nature.

[49] As the Tribunal stated in *Rai, supra*, "...where the Tribunal has ordered the disclosure of medical records, it has usually put conditions on the disclosure to protect the privacy and confidentiality of the information" (*Rai*, para. 30).

[50] I am satisfied that for all of the above reasons, in accordance with subsection 52(1)(c) of the *Act*, that if the Appendix 2 Documents were made public during the inquiry or as a result of the inquiry being conducted in public, there is a real and substantial risk that the disclosure of those documents containing the Complainant's personal medical information would cause undue hardship to him, such that the need to prevent that disclosure other than on the conditions in the order below outweighs the societal interest that they be disclosed to the public.

[51] As the Appendix 2 Documents contain information that may be arguably relevant for the purposes of disclosure, the other parties are entitled to see them in order to have the full and ample opportunity to present their cases mandated by section 50(1) of the *Act*.

[52] In requiring the Complainant to disclose the Appendix 2 Documents to the other parties, such disclosure will be subject to and in accordance with the conditions in this Ruling which are designed to protect their confidentiality.

[53] In *Palm #3, supra*, the Tribunal expanded the confidentiality order in *Palm #2, supra*, by permitting the complainant's medical records to be viewed by a respondent's president and the two individual respondents, to the extent required for counsel to obtain informed instructions and provide advice.

[54] At this stage of this inquiry, it is not productive to order that a party bring a motion or have to request further directions from the Tribunal when the time comes for counsel to discuss the Appendix 2 Documents with instructing clients. That time will surely come, and as in *Palm #3, supra*, the Tribunal can deal with that inevitable process in this Ruling. The same applies to medical experts who Respondent counsel or the Complainant may consult. The Decision below reflects this finding.

#### **D. Related Medical Information**

[55] In paragraph 30 of the Respondent's Response to Motion, the Respondent submits that in order to respond to the Complaint, the AG must "...gather and review all documents within the federal government's control which may be arguably relevant to the complaint. Relevant documents include those which may contain information regarding the Complainant's disability and *any related medical conditions*;" [my italics].

[56] In the interests of protecting the confidentiality of the Complainant's medical information during this inquiry in accordance with section 52(1)(c) of the *Act*, if there is arguably relevant medical information regarding the Complainant's disability and any related medical conditions other than in the Appendix 2 Documents ("Related Medical Information") which the Respondent or any other party will disclose, this Ruling and the orders in it shall apply, *mutatis mutandis*, to the Related Medical Information.

#### **E. Electronic Transmission of Documents**

[57] The transmission of and communications about the Appendix 2 Documents and any Related Medical Information between the Respondent and its clients and other federal government departments involved in this Complaint, and between the Commission and those same entities are communications between federal institutions within the Government of Canada. They are internal communications of the Government of Canada which are governed by and subject to the *Privacy Act*.

[58] There are also government security regulations, procedures, and protocols which govern and are required for electronic transmissions, including email, from and to the entities above, including the Respondent and the Commission – for example, encryption, passwords, designations of "Protected A" and "Protected B", confidentiality designations and other protocols.

[59] To prohibit the Respondent and Commission from using electronic transmissions in the present-day working environment when its use is ubiquitous and when security protection is available and required would be an unreasonable impediment to the



Respondent's ability to prepare its defence, and for the Commission to do any work it considers necessary to assist in the inquiry.

[60] Nevertheless, the confidentiality of the Appendix 2 Documents and any Related Medical Information are to be respected in all electronic communications (and other communications) among the above entities, and between the Respondent, and the Commission, and between them and permitted third parties by ensuring that all required protocols and security regulations and procedures are used in all electronic transmissions regarding the Appendix 2 Documents and any Related Medical Information.

[61] However, facsimile transmissions of the Appendix 2 Documents and any Related Medical Information are permitted only if:

- a. they are transmitted from a facsimile application in a computer to a facsimile in a computer;
- b. all applicable security regulations, procedures and protocols governing the Respondent or the Commission, as applicable, are used in such facsimile transmission;
- c. it is written on the cover page that the documents are governed by the *Privacy Act* and are the subject of a Tribunal order for confidentiality.

[62] The requirements above for facsimile transmissions recognize that if facsimile transmissions are sent to a stand-alone facsimile machine, unless the designated recipient is right there to retrieve it, the facsimile can be picked up by anyone in the recipient department or office.

### **VIII. Issue: Section 52 Confidentiality Order and the *Privacy Act***

[63] In the Complainant's Reply to the Respondent's and Commission's Responses to Motion, he submits that there is a gap in the *Privacy Act*, specifically, that it "...contains few specific confidentiality measures or process that must be followed", and that the Tribunal should keep this in mind in any confidentiality order.

[64] The Complainant attached three documents from the Office of Canada's Privacy Commissioner to support these submissions. These documents are:

- *Factum of the Intervener, Privacy Commissioner of Canada (“Factum”) in Bernard v. Attorney General of Canada and PIPSC and various Interveners*, SCC File No. 34819 (“*Bernard*”);
- *Guidance Document: Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals, February, 2010 (“PCC Guidance”)*; and
- *Remarks of Chantal Bernier, Assistant Privacy Commissioner of Canada at the First Forum on Court Technology, September 22, 2010 (“ACC Remarks”)*.

[65] I have read these attachments. The gaps I surmised from the documents are:

- an individual who feels a government institution has breached the *Privacy Act* by improperly collecting, using or disclosing his personal information has no recourse to a court;
- the *Privacy Act* contains no regime for monetary compensation for damages arising from any such breach or monetary penalties for any such breach;
- the *Privacy Act* does not govern federal public sector unions;
- some administrative tribunals have clear policies restricting disclosure of personal information in their decisions published online, and some do not. For those that do not, there is a risk that an individual’s sensitive and personal information which may be irrelevant to the purpose of publishing the decision is nevertheless easily accessible to the public.

[66] The Respondent’s and Commission’s Responses to Motion did not address the *Privacy Act*.

#### **A. Analysis: Section 52 Confidentiality Order and the *Privacy Act***

[67] This Tribunal does not have the jurisdiction to remedy breaches of the *Privacy Act*. Section 29 of the *Privacy Act* provides the procedure to file a complaint for a breach.

[68] Any confidentiality order the Tribunal makes must be based on whether the circumstances of the particular situation fall within the requirements of section 52 of the *Human Rights Act*. To address any perceived gaps in the *Privacy Act*, a Tribunal confidentiality order must still meet section 52 requirements for confidentiality.

[69] The submissions of the Privacy Commissioner that the *Privacy Act* contains no judicial recourse or monetary compensation for breaches of its provisions for the collection,

use and disclosure of personal information are not relevant to the requirements of section 52 of the *Human Rights Act*, nor can the Tribunal provide a remedy.

[70] No federal public sector union is a party to this Complaint.

[71] The privacy issue around online publication of decisions is not presently relevant to this Motion. This Ruling will not be published online until the issue of anonymization of the Complaint is decided. That issue arose previously, and it was decided that the Commission could address it at the end of the hearing. Although the Commission is no longer appearing at the hearing, anonymization remains a live issue.

### **B. Analysis: Rule 152, Federal Courts Rules**

[72] Generally, Federal Court Rules do not bind the Tribunal unless they are incorporated by reference into the Tribunal Rules. The only Tribunal Rule which incorporates a Federal Court Rule by reference is Tribunal Rule 9(7), which incorporates section 57 of the *Federal Courts Act*, R.S.C., 1985, c.F-7 ("*Federal Courts Act*") and form 69 of the *Federal Court Rules*. Therefore, Federal Court Rule 152 does not bind the Tribunal.

[73] However, if the Tribunal decides that any part of Federal Court Rule 152 is reasonable to include in this Ruling, because it is independently authorized under section 52 of the *Human Rights Act*, and in the circumstances, then the Ruling will do so.

### **C. Analysis: The Charter**

[74] The Complainant submits that in conducting its Pre-Disclosure Search Process, the Respondent has gone on a "fishing expedition" which also amounts to an unreasonable search, contrary to section 8 of the *Charter*. That section states:

"Everyone has the right to be secure against unreasonable search or seizure."

[75] The Respondent is the AGC. I assume for the purpose of this Ruling that the Respondent has had notice of the Complainant's *Charter* submission, in compliance with Rule 9(7) of the Tribunal Rules.

[76] The Complainant has provided no other submission and no case law on this issue. The Respondent and Commission did not address the issue.

[77] There is no evidence to substantiate the Complainant's *Charter* submission. I am unable to conclude that the Pre-Disclosure Search/Process constitutes a breach of the Complainant's section 8 *Charter* rights.

#### **IX. Analysis: The Request for a Retroactive Remedy**

[78] One of the remedies the Complainant requested was that any previously occurring deviations from any order arising from this Motion be reported to him and the Tribunal in order to assess and address the risks arising from them.

[79] Respondent counsel has stated in its Motion materials and during the February 27, 2014 CMCC that it obtained some of the Appendix 2 Documents during its Pre-Disclosure Search/Process with its federal government department clients. The clients possessed many of the Appendix 2 Documents because the Complainant had submitted those documents to them during time periods ostensibly relevant to the Complaint.

[80] Respondent counsel also stated in its Motion materials and during the above-mentioned CMCC that once the Tribunal ordered the Pre-Disclosure Search/Process temporarily frozen, Respondent counsel complied with all orders.

[81] Although the Tribunal was obliged in this Motion to look at some matters retrospectively, it cannot make an order to formally retrospectively inquire into or assess whether a prior "deviation" from the order below has occurred. Doing so would infringe on litigation privilege, which concept will be discussed in more detail below. It would mean intruding on the Respondent's "zone of privacy" in preparing its case. The Respondent cannot be forced to offer that information. Therefore, the Tribunal cannot make a finding on any such pre-existing deviation or craft a remedy.

## **X. Tribunal's Jurisdiction to Control and Monitor the Pre-Disclosure Search/Process**

[82] This Ruling arises from the Complainant's Motion for Confidentiality.

[83] Additionally, the Complainant is concerned that in conducting its Pre-Disclosure Search/Process, the Respondent has gone on an uncontrolled "fishing expedition" for the Complainant's medical information, including the Appendix 2 Documents. He feels this significantly jeopardizes its confidentiality by permitting an untold number of unidentified individuals in federal government departments, including unidentified individuals in the departments who are the Respondent's clients in this Complaint, to access, handle, use and disseminate this information and the fact that Respondent is searching for it, to others, without restriction, because adequate safeguards are not in place.

### **A. February 27, 2014 Case Management Conference Call**

[84] The February 27, 2014 Case Management Conference Call ("CMCC") was held to discuss the Complainant's continuing concerns.

[85] During that CMCC, the Complainant said that he had heard from two individuals in the government department or departments which the Respondent represents in this Complaint that these individuals either knew about or had "heard" that people were looking for information about the Complainant. He also said that he might not be able to prove this. He did not provide these individuals' names. This allegation is not in the Motion materials.

[86] The Respondent and the Commission made no submissions on this allegation during the CMCC.

[87] There is insufficient evidence before me to conclude that this allegation is established.

[88] It was conveyed to the Complainant that the *Privacy Act* governs his medical information, including the Appendix 2 Documents, and also those federal government departments who hold it, including during the Pre-Disclosure Search Process. Any

individuals who may have communicated the above information to the Complainant breached the *Privacy Act* by doing so. I will discuss the *Privacy Act* in more detail below.

[89] The Complainant nevertheless wished to have the Tribunal order that anyone who a party communicates with during the Pre-Disclosure Search/Process about the Appendix 2 Documents and the Complainant's medical condition be controlled, identified to the other parties and be restricted in what they do with that medical information in order to protect the Complainant's medical information during the Pre-Disclosure Search/Process.

## **B. Respondent's Position**

- The Tribunal lacks jurisdiction over documents that are in the possession or control of the federal government "before their disclosure to the other parties pursuant to Rule 6(4), even if they contain medical information."
- Section 52 of the *Act* authorizes the Tribunal to "make any order it considers necessary to ensure the confidentiality of the inquiry" [Respondent's underlining]. Documents under a party's control only become part of the inquiry when they are disclosed to the other parties or filed in evidence "before the Tribunal". Therefore, section 52 does not give the Tribunal jurisdiction to order confidentiality for documents that are "not disclosed to the other parties or filed as evidence." Specifically, the Tribunal lacks the jurisdiction to "...restrict the manner in which the Attorney General collects, review, and/or relies upon documents that are currently within the federal government's control."
- An order so restricting the Respondent would breach its litigation privilege.

## **C. Analysis: Tribunal's Jurisdiction to control and monitor the Pre-Disclosure Search/Process**

### **a. Analysis: The Pre-Disclosure Search/Process and the Privacy Act**

[90] The Respondent, the DFO, the PSC, the DND, and VAC (also called Department of Veterans' Affairs) and the Commission are all "government institutions" within the meaning of section 3 of the *Privacy Act*<sup>1</sup>, which therefore applies to them.

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<sup>1</sup> *The Privacy Act*, R.S.C., 1985, c. P-21 ("*Privacy Act*")

The relevant portion of **Section 3** that defines "**government institution**" states that the phrase means

[91] Within the meaning of section 3 of the *Privacy Act*, the Complainant is an “identifiable individual” and the Appendix 2 Documents constitute “personal information”.<sup>2</sup>

[92] Also within the meaning of section 3 of the *Privacy Act*, this inquiry is a “decision making process that directly affects” the Complainant.<sup>3</sup> The parties therefore wish to use the Appendix 2 Documents for an “administrative purpose”, as defined in section 3.<sup>4</sup>

[93] I find that the Appendix 2 Documents and their transmission from the applicable government departments to the Respondent during the Pre-Disclosure Search/Process, and vice-versa, are governed by the *Privacy Act*, as are the Respondent and the departments which it represents in this inquiry, as well as the Commission. I also conclude that the Appendix 2 Documents and all requests for and handling of them cannot be dealt with during the Pre-Disclosure Search/Process except in accordance with the *Privacy Act*.

[94] Therefore, any individual federal government employee or representative of any federal government department involved in the Pre-Disclosure Search/Process cannot disclose the personal information of any individual, including the Complainant, except in accordance with the *Privacy Act*, and anyone who fails to do so is in breach of the *Privacy Act*.

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(a) any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and...”

<sup>2</sup> **Section 3** further provides, in part, that “**personal information**” “means information about an identifiable individual that is recorded in any form, including, without restricting the generality of the foregoing,...

(b) information relating to the education or the medical, criminal or employment history of the individual...; (f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;

(g) the view or opinions of another individual about the individual;

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;”

<sup>3</sup> **Section 3** provides that “**administrative purpose**”, in relation to the use of personal information about an individual, means the use of that information in a decision making process that directly affects that individual;”.

<sup>4</sup> *Ibid.*

[95] Breaches of the *Privacy Act* can result in stand-alone liability, and are subject to investigation by the Privacy Commissioner, pursuant to section 29.<sup>5</sup>

[96] If the Respondent conducts any further Pre-Disclosure Search/Process in any federal government department governed by the *Privacy Act*, for the purpose of seeking out Related Medical Information and any witnesses with respect thereto, I direct that Respondent counsel and paralegal shall inform each and every individual with whom Respondent counsel and paralegal communicate that:

- a. the *Privacy Act* governs the information sought, and its disclosure, use, dissemination, storage and handling; and
- b. that the information sought is confidential and subject to this Ruling; and
- c. that such individual is not to discuss or otherwise communicate in any way whatsoever about the information with any other individual, except in accordance with the *Privacy Act*, including, without limitation, that there has been a request for such information;
- d. that there is liability that accrues under the *Privacy Act* to the individual and/or federal government department for any breach thereof, including, without limitation, any breach of sections 7 and 8.<sup>6</sup>

**b. Analysis: The Pre-Disclosure Search/Process and Litigation Privilege**

[97] The Tribunal does not have an unlimited power to monitor, control and regulate all preparatory actions taken by a party in relation to the inquiry.

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<sup>5</sup> **Section 29** is the vehicle by which an individual requests the Privacy Commissioner to investigate whether "...personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8"

<sup>6</sup> Section 7, titled "Use of personal information" "Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or (b) for a purpose for which the information may be disclosed to the institution under subsection 8(2)."

Section 8 titled "Disclosure of personal information". "Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section. The portions of subsection 8(2) which are relevant to this Ruling are: (2) "Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed...

(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;..."



[98] This is because the Respondent (i.e., the AGC and its client departments in this Complaint) and the Complainant are both entitled to the benefits of “litigation privilege”.

[99] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (“*Blank SCC*”) involved the *Access to Information Act*, R.S.C. 1985, c. A-1 and litigation privilege. The Supreme Court of Canada found litigation privilege to be a separate and distinct concept.

[100] The Court defined litigation privilege as a branch of solicitor/client privilege (*Blank, supra*, at para.28, and repeated at para.40 that:

“Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.”

[101] The Court stated at para.34:

“The purpose of the litigation privilege, I repeat, is to create a “zone of privacy” in relation to pending or apprehended litigation.”

[102] Unrepresented parties are also entitled to litigation privilege.

[103] Requiring a party to reveal its preparations and strategy to its adversary in a litigation, including to whom that party speaks, the manner in which it compiles its documents and decides on its documents and witnesses would breach that party’s litigation privilege.

[104] Further, any unfettered attempts to monitor, control and regulate a party’s pre-hearing preparation would impinge on subsection 50(4) of the *Human Rights Act, supra*.

[105] As well, subsection 50(1) of the *Act* requires that all parties to an inquiry shall be given “...a full and ample opportunity... to appear at the inquiry, present evidence and make representations”. Intrusive attempts to monitor, control and regulate a party’s pre-hearing preparation are not only breaches of litigation privilege, they are contrary to 50(1).

[106] This Tribunal must balance a party’s right to the confidentiality of sensitive personal information which may be relevant to the case, with the other parties’ rights to be able to fully prepare its case, in accordance with subsection 50(1) of the *Act*, and protected by litigation privilege.

[107] For all of the reasons set out above, the Pre-Disclosure Search/Process is protected by litigation privilege, and pursuant to it, the Respondent and counsel are not required to disclose the identity of any individual to whom Respondent counsel speaks during the Pre-Disclosure Search/Process, or the topic of discussion.

## **XI. Temporary Freeze Terminated**

[108] This Ruling will terminate the temporary freeze on the Pre-Disclosure Search/Process which was ordered during the February 27, 2014 CMCC and which was continued during the April 3, 2014 CMCC.

[109] A CMCC is scheduled for August 19, 2014. If the parties wish to do so, any further disclosure and motions and timelines related thereto can then be discussed.

[110] It should be noted that the within Ruling deals only with the issue of disclosure of the Appendix 2 Documents and any Related Medical Information, and not the admissibility or confidentiality of these documents at a hearing.

## **XII. Decision**

1. Subject to and in accordance with the terms of this Decision, the Complainant shall disclose the Appendix 2 Documents to counsel for the Respondent and the Commission within five (5) business days of the release of this Ruling to the Parties. The Complainant may deliver one (1) hard paper copy thereof to each of the Respondent and the Commission if that is how he chooses to effect the disclosure.
2. Each document listed in the Appendix 2 Documents shall be marked "Confidential".
3. The Appendix 2 Documents shall be filed and stored separately by counsel, in envelopes marked "Confidential".
4. If the Respondent and the Commission send or communicate about the Appendix 2 Documents by electronic transmissions, including, without limitation, by email, to each other, or to the permitted individuals in paragraph 7 below, counsel shall ensure that:

- a. all such transmissions are protected for confidentiality by the use of all security regulations, procedures and protocols required by the Attorney General, the Department of Justice and the Commission; and
  - b. if encryption and password access is not required for such transmissions, then counsel shall ensure that such transmissions are subject to encryption and passwords; and
  - c. all such transmissions shall be designated as confidential; and
  - d. there is noted on the electronic transmission that the Appendix 2 Documents and any communication about them are governed by the *Privacy Act* and by this Confidentiality Order; and
  - e. the recipient of the electronic transmission is not to disseminate the Appendix 2 Documents to anyone else.
5. Facsimile transmissions of the Appendix 2 Documents are permitted only if:
- a. they are transmitted from a facsimile application in a computer to another computer;
  - b. all such facsimile transmissions are protected for confidentiality in accordance with paragraphs 4(a) through (e) above.
6. The Commission and the Respondent shall preserve the confidential nature of the documents and store them in compliance with regulations and directives stipulated for confidential information and confidential documents by the Government of Canada.
7. The Appendix 2 Documents shall not be used for any purpose outside of this inquiry.
8. The Appendix 2 Documents shall be viewed only by counsel and paralegal for the Respondent and the Commission, and shall not be disclosed to any other individuals without the Tribunal's prior permission and notice to the Complainant, except that this paragraph 8 shall not apply to:
- a. an instructing individual or individuals from counsels' clients to the extent required for counsel to obtain informed instructions and provide advice, provided that counsels instruct and ensure that each such individual does not discuss the Appendix 2 Documents with anyone other than counsel or in any way disseminate the Appendix 2 documents or their contents to anyone;
  - b. litigation support staff supervised by counsels, provided that counsels instruct and ensure that each such support staff does not discuss the Appendix 2 Documents with anyone other than counsel or in any way disseminate the Appendix 2 documents or their contents to anyone;

- c. medical experts retained by the Parties for the purpose of this inquiry only; and any such medical expert shall not use the Appendix 2 Documents for any other purpose outside of this inquiry; before any such medical expert receives the Appendix 2 Documents he shall execute a confidentiality agreement with the party which retains him.
9. In accordance with the Respondent's undertaking in paragraph 39 of its Response to Motion, if the Respondent intends to rely on any of the documents in the Appendix 2 Documents as exhibits at the hearing, the Respondent shall advise the Complainant within a reasonable timeframe before the hearing.
10. If the Respondent conducts any further Pre-Disclosure Search/Process in any federal government department governed by the *Privacy Act*, for the purpose of seeking out Related Medical Information and any witnesses with respect thereto, or with respect to the Appendix 2 Documents, Respondent counsel or paralegal shall inform, preferably in writing, each and every individual with whom they communicate, that:
  - a. the *Privacy Act* governs the information sought, and its disclosure, use dissemination, storage and handling; and
  - b. the information sought is confidential and subject to this Ruling; and
  - c. that such individual is not to discuss or otherwise communicate in any way whatsoever about the information with any other individual, except in accordance with the *Privacy Act*, including, without limitation, that there has been a request for such information; and
  - d. that there is liability that accrues under the *Privacy Act* to the individual and/or federal government department for any breach thereof, including, without limitation, any breach of sections 7 and 8.
11. Photocopies of the Appendix 2 Documents are limited to one copy each for counsel and paralegal, and one copy for litigation support staff, to a limit of four copies for each of the Respondent and Commission. The photocopies are to be stored in accordance with paragraphs 2, 3 and 6, and are to be destroyed at the end of the inquiry.
12. This Ruling and the orders therein apply *mutatis mutandis* to any Related Medical Information.
13. The temporary freeze on the Pre-Disclosure Search/Process put in place on February 27, 2014 and continued on April 3, 2014, is terminated, effective on the date the Tribunal releases this Ruling to the Parties.

[111] If any of the parties require further directions regarding the disclosed Appendix 2 Documents, they may request directions from the Tribunal.

*Signed by*

Olga Luftig  
Tribunal Member

Ottawa, Ontario  
August 18, 2014