Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 12
Date: March 21, 2023
File No.: HR-DP-2845-22

Between:

Frank Kim

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Athanasios Hadjis

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I. OVERVIEW

[1] Frank Kim (the Complainant) is an offender in custody at the La Macaza facility operated by the Respondent, Correctional Service Canada (“CSC” or the Respondent). He alleges in his human rights complaint that the Respondent retaliated against him because he had previously filed two other human rights complaints with the Canadian Human Rights Commission (“Commission”), which were settled. He claims that a psychologist working for the Respondent filed a report at his parole hearing that raised his risk level/assessment scoring by drawing adverse inferences from the fact that he had made the prior human rights complaints. The Parole Board of Canada (“PBC”) denied his parole application.

[2] The parties filed their Statements of Particulars, but the Complainant claims that the Respondent’s disclosure is incomplete. He requests an order that the Respondent produce six sets of documents.

II. DECISION

[3] The requests are granted in part.

III. CRITERIA FOR DISCLOSURE

[4] In *Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28 (CanLII) at paras. 4-10, the Canadian Human Rights Tribunal (“Tribunal”) set out the criteria for disclosure. According to s. 50(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“*CHRA*”), parties before the Tribunal must be given a full and ample opportunity to present their case. This requires, among other things, that opposing parties disclose arguably relevant information in their possession or care prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of information allows each party to know the case it is up against and, therefore, adequately prepare for the hearing.

[5] In deciding whether the information ought to be disclosed, the Tribunal must consider whether the information at issue is arguably relevant. This is not a particularly high threshold.

If there is a rational connection between a document and the facts, issues or forms of relief identified by the parties in the matter, the information should be disclosed.

[6] However, the request for disclosure must not be speculative or amount to a “fishing expedition.” The documents requested should be identified with reasonable particularity. The Tribunal may deny the disclosure of evidence where its probative value would not outweigh its prejudicial effect on the proceedings. The Tribunal should be cautious to order searches where a party would need to make an onerous and far-reaching search for documents, especially where it would risk adding a substantial delay to the inquiry or where the documents merely relate to a side issue rather than the main issues in dispute.

[7] The disclosure of arguably relevant information does not mean that it will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process. Moreover, given that a party’s obligation to disclose is limited to documents that are “in the party’s possession,” the Tribunal cannot order a party to generate or create new documents for disclosure.

IV. ITEMS BEING REQUESTED

[8] With these principles in mind, I address each disclosure request below.

(i) The Complainant’s CSC Case Management files between November 7, 2014, and the present, unredacted of any material relating to the Complainant’s filing with, or use of the process of, the Commission

[9] Despite the reference to the Commission in this request, the Respondent apparently understands it to be a request for all its case management files relating to the Complainant, which it claims total 3640 pages. For this reason alone, the Respondent objects to this request as being excessively onerous.

[10] In his response to the Respondent’s submissions, the Complainant does not specifically counter the Respondent’s understanding about what the request encompasses. He submits that the claimed volume of documents is exaggerated and mentions that he has a pending access to information request for his entire file.

[11] There is no doubt that the Complainant's prior human rights complaints are relevant to this case. The current complaint is made pursuant to s. 14.1 of the *CHRA*, which states that it is a discriminatory practice for a person against whom a complaint has been filed under Part III of the *CHRA*, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim. Thus, a s. 14.1 complaint can only be about retaliation for having filed a *CHRA* human rights complaint with the Commission.

[12] The human rights complaints in question are identified as Commission complaints 20141166 and 20170936 ("the former complaints"). They were filed in 2014 and 2017. The Complainant claims that the psychologist alluded to the former complaints in making her higher risk assessment in her report before the PBC. The information regarding the former complaints is thus arguably relevant. However, I do not see how any other of his case management files would be arguably relevant. While it is true, as the Complainant notes, that the Tribunal must consider all circumstances to determine whether a subtle scent of discrimination exists, extending the scope of his disclosure request beyond matters directly connected to the former complaints amounts to a fishing expedition.

[13] Accordingly, the Complainant's request under this item is granted in part only with respect to documents that mention, refer to or directly relate to the former complaints.

(ii) Any record of correspondence between the Commission and the Complainant or any discussion about the Complainant's Commission complaints between November 7, 2014, and August 13, 2018, that are present in any CSC files including his Case Management files

[14] These documents are probably encompassed in the previous request to the extent that they are in the Respondent's possession. As the Respondent points out, the Complainant would have received any correspondence addressed to him from the Commission. The Respondent also claims that any copies of the correspondence between the Commission and the Complainant it received had already been included in its List of Documents and thus already disclosed.

[15] However, the Respondent also submits that any correspondence with the Commission about the former complaints is not relevant. I have already determined that material involving the former complaints is arguably relevant. Providing that information to the Complainant does not constitute a fishing expedition as the Respondent suggests.

[16] The Complainant's request is granted with respect to any documents that were not already disclosed.

(iii) Relevant emails sent or received by CSC staff including those emails involving discussion about the Complainant's Commission complaints

[17] The Respondent agreed to disclose these documents. It states in its reply to the motion that it is reviewing those emails for any privileged information and will be sending them to the Complainant shortly. I observe again that there may be some overlap between these documents and those in the first two requests.

(iv) The PBC decision granting offender Takahashi release on day parole in July or August of 2016

[18] In his Statement of Particulars, the Complainant compares his situation to that of another offender ("Takahashi") who was granted parole by the PBC. That PBC decision was apparently reported in the national media. The Complainant claims that he asked the Respondent several times for a copy of the decision with any irrelevant personal information redacted but to no avail.

[19] The Respondent states that it cannot provide him with documents concerning other offenders nor is it responsible for releasing documents in the PBC's possession. It also maintains that even though the Takahashi decision is irrelevant, the Complainant could request a copy directly from the PBC, which he did in fact do in November 2021 and is seemingly still awaiting a response.

[20] It appears that this PBC decision is a matter of public record. According to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 143 and 144 ("*CCRA*"), the

PBC is required to maintain records of its proceedings and provide access to its registry to persons who demonstrate interest in a case. As a result, the Complainant can, and apparently has, made such a request.

[21] While rulings by decision-making bodies are usually considered authorities and are not included in the documentary disclosure process, the Complainant seemingly intends to use the Takahashi decision in a different context as evidence in his case. Therefore, I accept that it is arguably relevant. Although the Complainant has apparently sought a copy from the PBC, it appears he has yet to receive it. If the Respondent is in possession of the Takahashi decision, it should provide a copy to the Complainant. The Complainant's request is granted.

(v) A copy of the Complainant's Dangerous Offender hearing and trial transcripts and exhibits that the Respondent received

[22] The Complainant notes that the psychologist's report referred to a Dangerous Offender assessment of him that was made in 1999. The Respondent repeatedly told him that it had never received a copy of the assessment. Around 2016, the Complainant learned that the PBC had a copy of the assessment, prompting him to file grievances against the Respondent for failing to ensure that information about him is as accurate and up to date as possible, in accordance with s. 24(1) of the *CCRA*. The grievances were denied.

[23] However, through correspondence that the Complainant received from the Respondent in November 2022, he learned that, as early as 2002 or 2003, it possessed transcripts of the Dangerous Offender hearing. He submits that the Respondent has been engaged in acts of deception about what it has received and is in its possession and that it must provide the requested information to be transparent.

[24] The Respondent denies having ever said that it did not possess these documents. The Respondent claims that it merely told him that they are not relevant.

[25] The Complainant has not established the relevance of these documents to the issue of the present complaint—whether he was retaliated against for having filed human rights complaints with the Commission in 2014 and 2017. The request for this item is denied.

(vi) A copy of the manuals containing the criteria and instructions for the following psychological and risk assessment tools and any other literature from the developer of these tools:

- **STABLE-2007**
- **STATIC-99**
- **PCL-R**

[26] The Complainant states that the psychologist used these tools to assess him. He questions whether she applied these tools properly and submits that her scoring was not consistent with that of another psychologist who had previously assessed him. The Complainant maintains that the copies must be given to him since the Respondent intends to have the psychologist testify at the hearing.

[27] The Respondent submits that disclosing the manuals would be in breach of s. 50 the *Code of Ethics of Psychologists*, CQLR, c. C-26, r. 212, which states that psychologists must not compromise the methodological and metrological validity of a test by revealing the protocol to the client or a third party who is not a psychologist. The Complainant challenges this assertion by pointing out that a copy of the PCL manual was released to him at his 2000 Dangerous Offender hearing, but he no longer has it.

[28] However, whether or not the regulation would be breached by this disclosure, I find that this information is not relevant to the issues of this case. The question before the Tribunal is not to reassess the clinical merits of the second psychologist's report and whether her scoring was consistent with the first psychologist's. These are matters to be raised before the PBC. The issue, as set out in the present complaint, is whether any adverse inference drawn in the second psychologist's report from the Complainant having filed the former complaints constitutes retaliation for making those complaints, in breach of s. 14.1 of the *CHRA*.

[29] The Complainant's request for this item is denied.

V. ORDER

[30] The Tribunal orders the Respondent to disclose the following items by April 21, 2023:

1. A copy of any documents in the Complainant's CSC Case Management files between November 7, 2014, and the present that mention, refer to or directly relate to Commission complaints 20141166 and 20170936 (the former complaints), including any record of correspondence between the Commission and the Complainant, as well as any emails sent or received by CSC staff involving discussion about the former complaints. The Respondent may redact any personal information about persons other than the Complainant. The Respondent may withhold any documents over which it claims privilege, but they must be identified in a list stating the basis for the privilege claim, in accordance with Rule 20(1) of the Tribunal's *Rules of Procedure*.

2. A copy of the Takahashi decision, if the Respondent possesses it.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
March 21, 2023

Canadian Human Rights Tribunal

Parties of Record

File No.: HR-DP-2845-22

Style of Cause: Frank Kim v. Correctional Service Canada

Ruling of the Tribunal Dated: March 21, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Frank Kim, Self-represented

Camille Rochon and Erin Morgan, for the Respondent