

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

PUBLIC SERVICE ALLIANCE OF CANADA (LOCAL 70396)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN MUSEUM OF CIVILIZATION CORPORATION

Respondent

RULING ON DOCUMENT DISCLOSURE

MEMBER: J. Grant Sinclair 2004 CHRT 38
2004/12/14

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I. FACTS

[1] The Complainant, Public Service Alliance of Canada (Local 70396) has filed a complaint with the Canadian Human Rights Commission, dated March 6, 2000, alleging that the Respondent, Canadian Museum of Civilization Corporation has contravened ss.10 and 11 of the *Canadian Human Rights Act* by applying a gender biased job evaluation plan to its employees in the Complainant bargaining unit.

[2] In its disclosure request, the Complainant asked the Museum for the point factors weightings and the sub-factor weighting scale used in the job evaluation plan to calculate the point value of a particular job and determine the job classification. These in turn are used to set the pay level for the job.

[3] The Complainant also requested production of the Computer Program that generates the point scores and classification levels from the data fed into it by Museum Human Resources staff. As I understand the Complainant's request, the Computer Program is necessary to validate or test the validity of the job point scores and job classifications. The Museum uses the Computer Program to avoid any human error that could result in manually calculating a job score and classification.

[4] The Museum accepts that the point factor ratings and sub-factor weighting scale are relevant to the complaint and necessary for the Complainant to support its case. But it has serious concerns that if it discloses the point factor weightings and sub-factor weighting scale, the Complainant could use this information for purposes collateral to the complaint to the prejudice of the Museum.

[5] The Museum filed a Notice of Motion with the Tribunal dated August 18, 2004 for an order restricting who can receive this information, how it can be used and requiring individual undertakings be given relating to disclosure. The Museum also resists producing the Computer Program because of a licensing agreement between itself and

Watson Wyatt & Company, owner of the Computer Program. The agreement prohibits the Museum from copying the program or giving it to a third party and production could violate the Museum's contractual obligations. Further, the Museum says, the calculations done by the Computer Program can be done by other readily available software programs or manually.

[6] The concerns of the Museum are set out in the affidavit of Rhéal Bouvier, Manager, Human Resources Staffing, Programmes and Policies for the Museum, which affidavit was filed at the hearing of the Motion. According to Mr. Bouvier, after the complaint was filed with the Commission, the parties established a Job Evaluation System Review Committee to attempt to design a new job evaluation plan.

[7] On this Committee were Mr. Bouvier, Maggie Arbour-Doucet, Denise Corbett, both members of the Complainant bargaining unit, Robert Lamoureux, Classification and Equal Pay Officer employed by PSAC, four PIPSC representatives and three non-unionized members of the Museum.

[8] At that time, Mr. Lamoureux's responsibilities included job evaluation, classification and pay equity issues for Complainant Local 70396. He continued to work with the Local until May 2004 when his responsibilities were taken over by Bonnie Carroll, also a Classification and Equal Pay Officer employed by the Complainant, who had these responsibilities from 1988-1997.

[9] The Committee held a meeting on November 1, 2004. At the meeting, Mr. Bouvier was asked by Mr. Lamoureux if the Museum would provide committee members with the point factor weightings. He responded by requesting assurance from Mr. Lamoureux that if disclosed, the information be kept confidential. Mr. Lamoureux would not give such an assurance and also said that such information would likely get out. According to Mr. Bouvier, Ms. Arbour-Doucet and Ms. Corbett nodded their heads in agreement with this position.

[10] Mr. Bouvier also deposed that in subsequent conversations, Mr. Lamoureux told him that he could not assure the confidentiality of the information if disclosed, and he would give the information to any bargaining unit member who asked.

[11] Ms. Carroll, in her affidavit on behalf of the Complainant, agreed with Mr. Lamoureux's position and believed that this information should be shared with employees whose jobs were evaluated by the plan so they could understand how their job scores were determined. Further, Ms. Carroll stated that this information should be used by the Complainant, as the certified bargaining agent, for collective bargaining purposes.

II. ANALYSIS

[12] All parties agree that the "implied undertaking rule", applies to any documents or information disclosed by the Museum. The rationale for this rule is that a party to litigation should have the full right of disclosure and inspection of relevant information, including that which is confidential, as is necessary to dispose fairly of the case. However, a party cannot use this right of disclosure for any purpose collateral to the litigation. If there is a real risk of such use despite the undertaking, additional restrictions can be imposed on how the disclosed information can be used. (See *Zellers Inc. v. Venta Investments Ltd.* [1998] O.J. No. 2118, (O.C.J.); *Reichmann v. Toronto Life Publishing Co.* [1990], 44 C.P.C. (2d) 206, 207-210 (H.C.J.); *Alberta (Treasury Branches) v. Leahy* [2000] A.J. No. 993, pp. 54-55 (Q.B.).

[13] The Museum argues that the implied undertaking rule is not sufficient to protect the confidentiality of the disclosed information, information that it says has always been confidential and has never been disclosed to the Complainant. The risk of its collateral use, the Museum argues, is found in the statements of Mr. Lamoureux, and Ms. Carroll and the apparently nodding agreement of Ms. Corbett and Ms. Arbour-Doucet.

[14] But these persons did not express an intent to breach an undertaking. Rather they expressed an unwillingness to give an undertaking at that time. This is not evidence suggesting that they would not honor any undertaking if they gave it.

[15] As for the Complainant, its position is that the implied undertaking rule is sufficient to protect confidentiality. I do not agree. Unlimited disclosure within the Complainant bargaining unit is incompatible with confidentiality notwithstanding the implied undertaking rule.

[16] For the Complainant to be given a full and ample opportunity to present its case the disclosure need only be shared with counsel, the instructing member/members of the Complainant bargaining unit and any consultants retained by the Complainant for advice and/or expert opinion. Disclosure should be limited to these persons only. And with the exception of counsel, who are subject to professional obligations and rules of conduct, these persons should be required to give written undertakings with respect to non-disclosure of the documents. In my opinion, this would satisfy both the concerns of the Museum and the needs of the Complainant.

[17] The Commission is satisfied with the terms of the order sought by the Museum, except the terms relating to the Computer Program.

[18] The Complainant asks for production of the Computer Program. The Commission agrees that it should be provided. This is somewhat problematic. Although the Tribunal can order disclosure by the Museum as an incident of ensuring a fair hearing under the *Act*, such an order could affect the proprietary interest of Watson Wyatt & Company. Fairness requires that Watson Wyatt & Company be given notice of the request and the opportunity to make submissions to the Tribunal as to under what terms, if any, the Computer Program should be produced.

III. ORDER

[19] Until and unless otherwise ordered, the point factor weightings and the sub-factor weighting scale, as defined in the Notice of Motion ("documents") shall be disclosed to the Commission and/or the Complainant, in non-electronic format, only on the following terms:

- a) The Complainant and the Commission shall not use the documents or the information contained therein for any purposes other than those of this proceeding;
- b) The Commission shall not disclose or communicate in any manner whatsoever the documents or the information contained therein to anyone other than its legal counsel, legal services branch staff, the Chief Commissioner, the Secretary General or any consultants retained for the purpose of providing it with advice and/or expert opinion evidence, and with the exception of legal counsel only, subject to them providing written undertakings to be bound by the terms of this Order;
- c) The Complainant shall not disclose or communicate in any manner whatsoever the documents or the information contained therein to anyone, other than its legal counsel and their staff, the instructing member or members of the Complainant bargaining unit, and or any consultants retained for the purpose of providing it with advice and/or expert opinion

evidence, and with the exception of legal counsel only, subject to them providing written undertakings to be bound by the terms of this Order; and

- d) The Complainant and the Commission shall not make any additional copies of the documents and shall return to the Respondent the original copy thereof provided by the Respondent within one week of the close of the hearing of the complaint;
- e) The Complainant, the Commission and all other persons providing a written undertaking to be bound by the terms of this Order shall not scan the documents or in any way whatsoever convert the documents into electronic format; and
- f) The Complainant, the Commission and any other person or persons providing a written undertaking to be bound by the terms of this Order may enter the information contained in the documents into a computer program for the purpose of the within proceeding provided that:
 - i) All reasonable and necessary precautions are taken to ensure that that computer program, and all information files related thereto containing any information contained in the documents ("Information Files"), are maintained and stored in a secure manner so as to ensure that no person other than one who has provided a written undertaking to be bound by the terms of this Order will have access to the computer program and/or the Information Files;
 - ii) All Information Files are permanently deleted from all computer storage media, including, but not limited to, all hard drives, computer disks, CD-ROMs and USB mass storage devices, within one week of the close of the hearing of the complaint; and
 - iii) All reasonable and necessary precautions are taken to ensure that all printed copies of the Information Files, including any portion thereof, all printed copies of any and all calculations performed the computer program using information contained in the Information Files, and any and all notes made in relation thereto, in electronic or other format, shall be maintained and stored in a secure manner so as to ensure that no person other than one who has provided a written undertaking to be bound by the terms of this Order will have access to them.

[20] The form of the written undertaking shall be agreed upon by counsel for the parties within seven days of this Order and, failing agreement, shall be prescribed by the Tribunal.

[21] This Order applies only to disclosure of the documents for the purpose of hearing preparation. It does not speak to any issues of confidentiality of the documents should the documents be put into evidence at the hearing of the complaint.

Signed
by _____
J. Grant Sinclair

OTTAWA, Ontario

December 14, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T915/3504
STYLE OF CAUSE:	Public Service Alliance of Canada (Local 70396) v. Canadian Museum of Civilization Corporation
DATE AND PLACE OF HEARING:	November 8, 2004 Ottawa, Ontario
RULING OF THE TRIBUNAL DATED:	December 14, 2004
APPEARANCES:	
Andrew Raven	For the Complainant
Patrick O'Rourke Ceilidh Snider	For the Canadian Human Rights Commission
David Sherriff-Scott	For the Respondent