

**YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS**

Between

**Jarrett Parker**

“Complainant”

And:

**The Yukon Human Rights Commission**

“Commission”

And

**Government of Yukon, Department of Health and Social Services,  
Social Services Division**

“Respondent”

**DECISION  
(Application for production)**

Appearances

Counsel for the Complainant:

Self-represented

Counsel for the Commission:

V. Nelson

Counsel for the Respondent:

K. Wenckebach and I.H. Fraser

V. Larochelle (Chief Adjudicator):

1. This is an application by the Respondent Government of Yukon seeking production of a recording or transcript of the interviews of the Complainant, conducted by the Yukon Human Rights Commission during the course of its investigation (the “Requested

Materials”).

2. At a case management conference held on December 16, 2020, I granted the Respondent’s application with reasons to follow. These are my reasons.

Context

3. The interviews of the Complainant were conducted by the Commission on April 29 and June 20, 2019.

4. At the outset of the interview, the Commission’s investigator read a script to the Complainant. It was common ground that the Complainant was advised that the interview may, in some circumstances, be tendered as evidence before the Panel.

5. It was unclear, however, whether the script read to Mr. Parker contained the language put forward by counsel for the Respondent, in her reply dated October 15, 2020, to the effect that:

*“The information gathered during an interview is confidential to the person who made the complaint and the individuals who are responding to the complaint (the parties).” (emphasis added.)*

6. At the hearing of this application, counsel for the Commission submitted that she believed that this language was only developed in July 2019, and that it was not read out to the Complainant during his particular interviews held earlier that year.

7. The script read to the Complainant would have been much shorter, and essentially explained to the Complainant that the interview could be used at the hearing of this matter if he was unavailable.

8. While the rules of evidence are somewhat relaxed in the context of an application such as this one, this does not dispense the parties from the need to lay down proper evidentiary foundations for their submissions, particularly when a factual dispute arises.

9. Fortunately, the result I have come to in this application does not depend on whether the script read to the Complainant contains the contested language, as will become clear below.

10. Sometime between June 20, 2019 and June 29, 2020, the Commission, at the invitation of the Respondent, referred the complaint made by Mr. Parker to the Yukon Human Rights Panel of Adjudicators (the "Panel") without completing its investigation.

11. This is known as a direct referral. At the hearing, the Commission conceded that it was not required to agree to a direct referral.

12. In the normal course of an investigation, the Commission would interview potential witnesses from the Respondent in order to obtain a complete picture of the complaint and inform its decision-making process.

13. Where a matter is referred to the Panel following a complete investigation, the Respondent is provided with a report which contains transcripts of all interviews conducted by the Commission's investigator, subject to some redactions for irrelevant matters and hesitation markers.

14. In this case, because the matter was referred directly to the Panel, no such transcripts were provided to the Respondent.

15. This led the Respondent, on September 17, 2020, to apply for production of the interview recording or transcript pursuant to Rules 6.1, 15, and 19 of the Panel's rules.

Position of the Respondent

16. The Respondent's position is that documents which are relevant must be disclosed unless a claim of privilege is made over the documents.

17. In this case, since the Requested Materials are relevant and no privilege is claimed, they must be produced to the Respondent.

Position of the Commission

18. The Commission opposes the Respondent's application.

19. The Commission concedes that the Requested Materials are arguably relevant, although not particularly relevant.

20. The Commission further does not claim that any form of privilege attaches to the Requested Materials.

21. Rather, the Commission takes the position that the Requested Materials should not be disclosed for reasons of procedural fairness because the Commission only interviewed the Complainant but not the Respondent nor any of its employees.

22. In addition, the Commission takes the position that the Requested Materials should not be disclosed on grounds of public policy. Disclosing such interviews would have a chilling effect on the reporting of human rights violations by individuals and would lead to less candid interviews.



23. The Commission relies on *Tubbs v. L.I.U.N.A., Local 183*, 2006 CarswellOnt 8851, 2006 HRTO 3, 55 C.H.R.R. D/455 (“*Tubbs*”) for these twin propositions.

#### Position of the Complainant

24. The Complainant took the position that the interview was confidential, and that it would be unfair to disclose it given that the Respondent’s employees were never interviewed.

#### Analysis

25. The Rules of the Panel, the rules of natural justice, and case-law all agree on the principles that animate production in proceedings such as these: a party must disclose all relevant evidence in their possession, subject to any claims of privilege or confidentiality.

26. The Complainant argued that the Requested Materials were confidential, but whichever script was used in the interview makes it clear that the contents of the interview would not be held in strict confidence, thus I would not accede to this submission.

27. At the hearing of this application, the Commission conceded that relevance was not in issue and that no privilege attached to the documents. Instead, the Commission put forward two propositions of law in its submission that would justify non-disclosure of the Requested Materials, even if they are relevant and not subject to any form of privilege.

28. Firstly, public policy considerations weigh against production of the Requested Materials as this would create a chilling effect on individuals coming forward with complaints or information relevant to complaints. Secondly, it is procedurally unfair to

disclose the Requested Materials because the Commission only interviewed the Complainant but none of the Respondent's employees.

29. Dealing with the first of these, I have not been provided with any legal authority to the effect that relevant and non-privileged information can be withheld on general public policy grounds. While public interest immunity or confidentiality may encompass public policy considerations, the Commission did not rely on these claims in the present matter.

30. It is unclear whether the principles put forward by the Commission – if they exist – interact with the doctrines of public interest immunity or confidentiality, or whether they are separate legal concepts. *Tubbs*, for example, concerned a claim of confidentiality.

31. *Tubbs* is therefore of little to no relevance for purposes of this application.

32. At any rate, the fact is that there is nothing on the record before me that would substantiate the public policy considerations invoked by the Commission, nor to demonstrate that these concerns are sufficient to refuse disclosure. I do not foreclose the possibility that this argument may be made successfully at a later date, in a different context, and with a more fulsome evidentiary record. It simply finds no footing in the facts of this case as they have been presented to me.

33. With respect to refusing production on the grounds of unfairness to the disclosing party, I have also not been provided with any authority for this proposition. Strictly speaking, disclosure is, by its very nature, detrimental to the disclosing party's case.

34. In my opinion, the outer bounds of what must be produced to an opposing party are determined by what is relevant or arguably relevant, and not by whether disclosure

would be unfair to one of the parties.

35. While I appreciate that the Commission did not interview any employees of the Respondent by reason of the direct referral which led to the termination of its investigation, this was a decision made by the Commission itself, at the suggestion of the Respondent.

36. In other words, it does not appear that there is some inherent and unfair procedural flaw at the investigative stage or otherwise, which production would amplify. Had that been the case, my conclusion with respect to the appropriateness of production might very well have been different.

37. Finally, I note that the Rules of the Panel provide some flexibility by allowing parties to adequately discover each other prior to the hearing in order to ensure fair and expeditious proceedings.

38. If the Complainant or Commission require additional information which the Respondent refuses to provide, they are always at liberty to come back before me to apply to obtain such information.

### Conclusion

39. I order the Commission to prepare an original transcript of the interviews by January 15, 2021.

40. The Commission will also prepare a redacted version of the transcript by January 15, 2021, removing any portions that are not relevant to the Complaint.

41. Mr. Parker will be provided with both the redacted and original transcript on

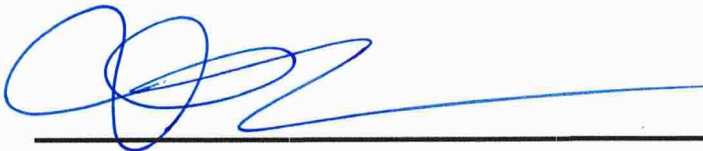
January 15, 2021, for review.

42. If Mr. Parker takes issue with the redactions, he may apply for direction from me.

43. If Mr. Parker does not disagree with the redactions, the redacted transcript shall be produced to the Respondent by January 29, 2021.

44. If the Respondent takes issue with the redactions, it may apply for direction from me.

Whitehorse, Yukon, January 15, 2021



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**Vincent Larochelle, Chief Adjudicator**  
**Yukon Human Rights Panel of Adjudicators**