**File Reference:** 2023-01 Boyce

# YUKON HUMAN RIGHTS PANEL OF ADJUDICATORS

Between:

**Shannon Boyce**

"Complainant"

And:

**The Yukon Human Rights Commission**

"Commission"

And:

**Government of Yukon, Department of Education**

"Respondent"

## DECISION

## (Application of the Commission for Production of Documents)

J. Hartling (Chief Adjudicator):

1. The Commission has brought an application that the Respondent:

   i) disclose documents regarding all known instances where a principal, vice principal, or superintendent was employed at the same Yukon school as a spouse or family member between 2015 and 2023; and

   ii) respond to the Notice to Admit attached at Tab 1.

2. The Notice to Admit contained ten instances of spouses employed simultaneously at the

same Yukon school where one spouse was either a principal or superintendent and the other a teacher. The particular schools were named. No dates were included.

**Background**

3. The Complainant was hired by the Yukon Department of Education as a Learning Assistance Teacher at Hidden Valley School, May 2018.

4. The Complainant's spouse was principal of this school at this time.

5. On April 14, 2020, the Department of Education requested the Complainant declare a Conflict of Interest pursuant to the Government of Yukon *General Administration Manual*, *Volume 3: Human Resources Policies*.

6. The Complainant filed a declaration on April 15, 2020.

7. On April 29, 2020, the Deputy Minister of Education recommended that the Complainant be transferred from Hidden Valley School to another school.

8. The Complainant was transferred to Selkirk Elementary School.

9. The Deputy Minister's decision was appealed. The Deputy Minister's decision was upheld.

**Positions**

10. The Commission is seeking both a disclosure of information regarding all known instances where a principal, vice principal, or superintendent was employed at the same Yukon school as a spouse or family member between 2015 and 2023, and a response (the Commission is seeking a response, not an agreement) to the Notice to Admit which was prepared by the Commission.

11. The Complainant agrees with the position of the Commission.

12. The Respondent's position is that the information sought is:

i) Not in its possession.

ii) That the information sought is privileged.

iii) That it cannot admit to the facts in the Notice to Admit because the information is privileged.

**Chief Adjudicator's Powers and Jurisdiction**

13. The Chief Adjudicator's power and jurisdiction is found at:

a. the Yukon Human Rights Panel of Adjudicators *Rules of Procedure*, s. 6.1.7.:

> at the request of a party, directing another party to provide documentary evidence, report or other statement, or to produce a witness when that person is reasonably within that party's control;

and at s. 6.1.10:

> requiring a party or other person to produce any document, information or thing, including using any data storage, processing or retrieval device system, to produce the information in any form;

b. the *Human Rights Act*, Yukon, s.23:

> The board of adjudication shall conduct its hearings in accordance with the principals of fundamental justice and may exercise all the powers of a board appointed under the Public Inquiries Act.

c. and the *Public Inquiries Act*, Yukon, s.4:

> Every board shall have the power, subject to reasonable notice, of summoning any person as a witness and of requiring them to give evidence on oath or affirmation and to produce any documents and things the board considers necessary;

and at s. 5(c):

> Every board shall have the same power as is vested in a court of civil cases,
>
> (c) to compel them (witnesses) to produce documents and things,

14. I find, as Chief Adjudicator, I have the power and jurisdiction to require the production of documents.

**Analysis**

*Relevance*

Test

15. In *Itty v Canadian Border Services Agency*, 2019 CHRT 31, at para 35,

> [35] The Tribunal has held that "…[t]he threshold for arguable relevance is low and the tendency is now towards more, not less disclosure..." (*Gaucher, supra*, at para. 11). However, a disclosure request must not be speculative or amount to a "fishing expedition" (*Guay v. Royal Canadian Mounted Police,* 2004 CHRT 34 (Guay), at para 43.

Is the information sought over broad or a fishing expedition?

16. The information sought by the Commission is not over broad.

17. The Commission: seeks information about instances over a specific amount of time, being 2015 to 2023; refers only to Yukon schools, of which it appears there are 17; and specifies a principal, vice principal, or superintendent being employed simultaneously as their spouse at the same school.

18. Reviewing the Notice to Admit, the only information sought is the names of the persons, their position in the school, and the name of the school. No further details, such as the dates of employment or degree of supervision, are being sought.

19. No details of the reasoning applied by the Respondent in permitting a spouse to teach at the same school as their partner is being requested.

20. The information requested is relevant. It goes to show a course of conduct followed by the Respondent from which the Respondent digressed in this instance. This could establish a prima facie case of discrimination.

21. In *Itty v Canadian Border Services Agency*, paragraph 5,

> (5) the Tribunal has held in cases pertaining to age discrimination that documents used to assess the merit of all persons against whom a complainant was rated are "... clearly relate" (*Gaucher, supra,* at para. 22, quoting *Morris v. Canada (Canadian Armed Forces)* [2001] C.H.R.D. No.41 (*Morris*), at para. 129, affirmed 2005 FCA 154. Although *Morris*, *supra*, involved age discrimination, the same is true for the discrimination the Complainant alleges. These types of documents are usually used to establish a prima facie case of discrimination (*Gaucher, ibid*). (*Itty*, *supra*)

22. It is relevant that the Complainant have evidence of how others in similar situations were treated.

23. In this application it is known that the Complainant was transferred to another school based on marital status. That is prima facie unfavourable treatment.

24. It is the basis of the complaint that the Complainant was treated unfavourably as compared to others in a similar position who were permitted to continue employment in the same school.

25. The Respondent argues that: "Disclosing the private martial information of employees the way requested by the Applicant does not 'demonstrate' anything that is relevant to the hearing

of the complaint." The information requested may not provide the depth of information the Respondent argues is necessary, for example, extenuating circumstances.

26. But that is all the Commission is seeking. However, this application is not to consider the facts for the hearing, only the application to produce information. How counsel for the Commission chooses to use, or not use, the information is in the Commission's purview.

*Possession*

27. According to the GAM policy, s.2.3.11:

> Public Servants are not permitted to directly supervise a spouse of family member unless there are extenuating circumstances for which the Public Service Commissioner, in consultation with the deputy minister, approves an exemption.

And at 2.3.12:

> Public servants have a duty to disclose conflicts of interest involving a family member. The disclosure requirement does not apply where the employer hires an employee couple to the same school.

28. The GAM policy is somewhat confusing as it states that no disclosure is required if couples are at the same school. Does this mean no disclosure is required at all if couples work at the same school or that disclosure is required only if there is a supervisory aspect? For purposes of this application, considering the two sections as a whole, I find that disclosure is required if there is a supervisory aspect.

29. Employees must disclose conflicts of interest to the Respondent.

30. As such, the Respondent is in possession of the information sought.

*Inconvenience*

31. The Respondent argues that: "In order to comply with the requested order, Yukon would

have to go on a fishing expedition through the file of every employee that worked in a Yukon school between 2015 and 2023, a period of 8 years. Doing so would be a very time and labour intensive exercise…."

32. The courts have found that inconvenience of producing documents does not outweigh the utility of the documents in the tribunal hearing. All relevant documents — and the test of relevance is low — are to be produced.

33. In *Gaucher v. Canadian Armed Forces,* 2005 CHRT 42, at paragraph 25:

> (25) The Canadian Forces argue that the inconvenience associated with the production of the Merit Board files outweighs the utility of the documents in the tribunal hearing process. Again, I disagree. The importance of providing all parties with full disclosure has been underscored by numerous courts and tribunals (See for example: *Ontario (Human rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (Ont.C.A) and *Neusch v. Ontario (Ministry of Transportation)* [2002] O.H.R.B.I.D No.11).
>
> (26) Furthermore, in her Affidavit, the Canadian Forces' witness stated that it would take approximately two to three months to produce the personnel records for the approximately 500 individuals who ranked ahead of Ms. Gaucher on the Merit Lists. However, in cross-examination she admitted that it would take less time to produce the Merit Board files for the eighty-three individuals who were promoted between 1991 and 1996. Therefore, a request to produce these records would not, in my view, be unduly burdensome.

34. In the present application it is unknown as to the number of files or time required to review them.

35. Notwithstanding that, the information is relevant and necessary to ascertain if the Complainant was treated differently from others and therefore unfavourably. It is necessary to show the Respondent's course of conduct if there is one.

**Privilege**

36. The information sought is the family status of 3rd party persons. I have found this information is in the possession of the Respondent.

37. The request is specific. It seeks information for only those employees who are spouses or family members, in Yukon schools (of which there are 17) for the years 2008 to 2015.

38. The Respondent argues that this information is subject to privilege as confidential communications.

39. The *Access to Information and Protection of Privacy Act*, SY 2018, c.9, at sections 6, 7, and 25, states that:

> 6. The purposes of this Act are:
>
> (a) to protect the privacy of individuals by controlling and limiting the collection, use and disclosure of personal information by public bodies;
>
> 7. This Act does not
>
> (d) affect or limit the power of a court, an adjudicator or an officer of the Legislative Assembly to, in accordance with their authority to do so, compel a witness to testify or compel the production of documents.
>
> 25. A public body may disclose the personal information of an individual that it collects under Division 3 only if
>
> (h) the disclosure
>
> (xiii) is complying with
>
> (A) a subpoena, warrant or order issued or made by a court, an adjudicator or another person or body with jurisdiction to compel the production of records…

40. In *Itty*, at paragraph 28, the Tribunal said:

> [28] b. The Respondent had previously disclosed the entire contents of the D-II Assessment Reports for the Complainant's classmates, with the exception of the

names, which were redacted on the basis that their names are personal information within the meaning of section 3 of the *Privacy Act*. The Respondent had redacted the names because subsection 8(1) of the *Privacy Act* requires that personal information under the control of government institutions not be disclosed without the consent of the individual to whom it relates.

c. Although subsection 8(2)(b) of the *Privacy Act* permits a governmental authority to disclose personal information if a body like the Tribunal orders it to do so, the Federal Court has held that this exemption should not be construed liberally (*Canada (Minister of Public Safety and Emergency Preparedness v. Kahlon*, 2005 FC 1000 (*Kahlon*), at para 36. "Rather, personal information which has no apparent relevance to the [underlying issue(s)] ought not to be readily disclosed."

41. The information obtained must be relevant and the Act permitting it must not be construed liberally.

42. The information sought in their application is specific and relevant. As such, the Act is not being construed liberally.

43. The information sought does not go beyond information that is reasonably necessary to carry out the purpose for which it is sought.

*Wigmore Test*

44. The Wigmore test as to whether or not communications are privileged requires that:

(1) the communications must originate in a confidence that they will not be disclosed;

(2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and

(4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

45. *R. V. Gruenke*, [1991] 3 S.C.R. 263, states that:

> This test is consistent with a principled approach to the question which properly takes into account the particular circumstances of each case. The criteria are not carved in stone and only provide a general framework within which policy considerations and requirements of fact-finding can be weighed and balance on the basis of their relative importance in the particular case before the court. *R. v. Gruenke*; File No.21410; 1991: May 10; 1991: October 24.

46. I accept that the first and second criteria have been met by the Respondent. The information communicated to the Respondent by an employee would have been communicated pursuant to a positive obligation contained in the GAM Policy with the expectation that the information would be confidential.

47. I find that the third condition is partially met. The relationship between public servants and the Government of Yukon should be fostered to maintain the reporting of potential conflicts of interest.

48. However, disclosing marital status is a fact that ordinarily need not be sedulously protected. It is a fact that, ordinarily, is quite publicly known. I find that it doesn't require that it be sedulously protected.

49. I find that the fourth criteria is not met. It is relevant evidence and the test for relevancy is low, not over broad, and, in this matter, necessary to show a course of conduct by the Respondent. Any injury that would inure to the relation of Government of Yukon employees and the government itself by the disclosure would not be greater that the benefit gained for the correct disposal of litigation.

**Conclusion**

50. I find that the information is relevant, not overbroad, and is in the possession of the Respondent.

51. I find that it is privileged information but can be ordered to be disclosed.

52. I find that the information sought does not meet the Wigmore test and therefore must be disclosed.

53. This will meet the requirement of section 15.1 of the Panel's *Rules* wherein:

> Every party shall deliver to the other parties a list of every document in its possession that is relevant to any issues of the complaint…

And section 15.2:

> Each party shall deliver to the other parities a copy of every document in its list of documents over which privilege is not claimed.

54. It is ordered that the Respondent disclose documents that are known instances where a principal, vice principal, or superintendent was employed at the same school as a spouse or family member between 2015 and 2023.

55. The Respondent has responded to the Notice to Admit by stating it cannot admit to the facts set out in the Notice to Admit because the foundational documents are subject to privilege as confidential communication.

56. My findings of privilege apply to the Notice to Admit.

57. I cannot order the Respondent to agree to the Notice to Admit.

58. The Respondent can consider the findings in this application and consider its position as it relates to the Notice to Admit.

59. It may be that a separate application may be brought by the Commission at a later date as to whether the Respondent responded to the Notice to Admit and if not, if any repercussions that can be ordered.

Whitehorse, Yukon, October 11, 2023

**Judith Hartling, Chief Adjudicator**
**Yukon Human Rights Panel of Adjudicators**