Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Agnaou v Public Prosecution Service of Canada et al, 2018 PSDPT 2

File No.: T-2017-01

Issued at: Ottawa, Ontario
November 13, 2018

In the Matter of an Application by the Public Sector Integrity Commissioner to the Public Servants Disclosure Protection Tribunal Canada

BETWEEN:

YACINE AGNAOU
Complainant

-and-

THE PUBLIC SECTOR INTEGRITY COMMISSIONER OF CANADA

-and-

PUBLIC PROSECUTION SERVICE OF CANADA
Employer

-and-

ANDRÉ A. MORIN, BRIAN SAUNDERS, GEORGES DOLHAI AND DENIS DESHARNAIS
Individual Respondents

INTERLOCUTORY DECISION ON A MOTION FOR ADDITIONAL DISCLOSURE

I. Introduction

[1] The Tribunal must render a decision on a motion filed by the complainant, Yacine Agnaou, requesting disclosure by the respondents of documents not listed in their statements of particulars. Me Agnaou's motion is based on section 17 and paragraphs 20(1)(c) and (e) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170 [the Rules]. These provisions are fully reproduced in the appendix.

[2] Essentially, Me Agnaou alleges that the list of documents filed by the respondents, the Public Prosecution Service of Canada and Brian Saunders, Georges Dolhai and Denis Desharnais (collectively the PPSC), is, on its face, incomplete and does not meet the requirement of subparagraph 20(1)(c)(iii) of the Rules.

[3] He also alleges that respondent André A. Morin did not file a list of documents with his statement of particulars, which does not satisfy subparagraph 20(1)(c)(iii) of the Rules and, if Me Morin no longer has the documents, he must at least comply with the obligations arising from paragraph 20(1)(e) of the Rules.

[4] In his motion, Me Agnaou therefore requests the disclosure of documents that fall into one of the following four categories of communications:

> (1) Documents relating to PPSC internal communications between the PPSC, the Canada Revenue Agency (CRA) and Justice Canada in connection with the decision not to prosecute in File A;

(2) Documents relating to PPSC internal communications in connection with the exercise of Me Agnaou's priority entitlement (in particular in connection with the June 26, 2009, agreement);

(3) Documents relating to communications between the PPSC and the Public Service Commission (PSC) in connection with Me Agnaou's priority entitlement; and

(4) Documents relating to PPSC internal communications with the PSC and Justice Canada in connection with the reclassification of the two impugned positions.

[5] The other parties are asking the Tribunal to deny the motion. They confirm having disclosed all relevant documents and essentially reply that Me Agnaou's motion does not meet the requirements of section 20 of the Rules and those developed in the case law with respect to disclosure. They collectively submit that Me Agnaou's motion does not make it possible to identify the documents disclosure of which is being sought, or whether they exist, and that it is vague, unclear and speculative and amounts to a [TRANSLATION] "fishing expedition". They add that the documents in one of the categories of communications are not relevant to the case. Their respective positions are outlined below.

[6] For the reasons that follow, the Tribunal dismisses Me Agnaou's motion. In short, the Tribunal has not been satisfied that the documents are relevant and identified with reasonable particularity, as required by section 20 of the Rules.

II. Positions of the parties

A. *The complainant, Me Agnaou*

[7] Me Agnaou submits, for each of the categories of communications he is seeking disclosure, that it appears from the statements of particulars of the parties and the evidence filed that there [TRANSLATION] "necessarily must have been many communications" in connection with the subject, yet the evidence produced by the respondents does not include any.

[8] With respect to the first category of communications, Me Agnaou submits that these communications are relevant in order to complement his evidence [TRANSLATION] "that he made a 'disclosure' under sections 12 and 13 of the Act; and, second, to challenge the evidence that the respondents might wish to adduce in this regard in order to make the case that such a 'disclosure' never occurred".

[9] Me Agnaou argues that the other three categories of communications are relevant to complement his evidence [TRANSLATION] "that there was a 'reprisal' against him under the Act and that this reprisal was linked to the 'disclosure'; and to challenge the evidence that the respondents might wish to produce in this regard to make the case that such a 'reprisal' never occurred and had it occurred, that it was not linked to the 'disclosure'".

[10] Me Agnaou argues that the effective application of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act], requires full and honest disclosure. In this regard, he adds that (1) Parliament's objective underlying subparagraph 20(1)(c)(iii) of the Rules is to [TRANSLATION] "force the public bodies involved in the situations selected through the screening process conferred on the [Office of the Public Sector Integrity Commissioner of Canada] by the Act and that therefore [deserve] to be referred to the Tribunal to, in good faith and with the

utmost transparency, disclose all documents that could be relevant to a hearing before the Tribunal"; and that (2) this obligation to disclose is akin to the obligation in the criminal context established in *R v Stinchcombe*, [1991] 3 SCR 326, and that failure to disclose would require equally high penalties as the penalties provided for in the criminal context.

[11] Me Agnaou submits that the respondents must, in short, inform him whether they have or once had in their possession evidence falling under one of the four categories mentioned above. Lastly, he is asking the Tribunal to order the respondents to disclose the evidence that falls into one of the abovementioned categories and that is not included in the evidence filed thus far and to comply with paragraphs 20(1)(c) and (e) of the Rules, assuming that the exhibits falling into either of the four categories are [TRANSLATION] "relevant documents".

B. *Response from the Public Sector Integrity Commissioner (the Commissioner)*

[12] The Commissioner noted a few principles, namely (1) that he does not represent the complainant before this Tribunal, but the public interest (*El-Helou v Courts Administration Service* (No 4), 2011 PSDPT 4 at para 48 [*El -Helou*]); (2) that the Tribunal's proceedings are adjudicative but do not fall under criminal law; (3) that subsection 21.6(1) of the Act provides full and ample opportunity for the parties to make submissions, and to take advantage of this opportunity, the parties must be granted disclosure of potentially relevant information; (4) the processes under the Act are similar to those provided for under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], and the principles of disclosure applicable before the Canadian

Human Rights Commission also apply to this Tribunal (*Agnaou v Canada (Attorney General)*, 2015 FCA 29 at para 62 [*Agnaou*]).

[13] In relation to the categories of the communications requested, the Commissioner submits that the documents in the first category are not relevant since it is not necessary to show that a wrongdoing was committed in order to determine whether the complainant made a protected disclosure under the Act. The issue of wrongdoing is not before the Tribunal.

[14] With respect to the documents in the other categories, the Commissioner is of the opinion that the complainant has not established that there are other documents, other than those already in his possession, that the complainant's motion is speculative and vague, and that the complainant will have the opportunity to cross-examine the witnesses of the opposing parties concerning those communications.

C. *Response from André A. Morin*

[15] Me Morin submits that he has no relevant document in his possession that has not previously been disclosed to the complainant. Furthermore, the respondent notes that as the proceeding is being brought against him in his capacity as a PPSC official, he generally does not have access to all PPSC documents.

D. *Response from the PPSC*

[16] The respondents the PPSC note that all relevant documents in their possession were disclosed to the complainant. They add that the complainant's motion is a [TRANSLATION] "fishing expedition" and that it is speculative.

[17] Moreover, according to the respondents, the documents relating to the decision not to prosecute in File A are irrelevant. They argue that those documents relate to the issue of whether or not the decision not to prosecute was a wrongdoing, a matter that was disposed of by the Federal Court and the Federal Court of Appeal (*Agnaou*, above) and of which the Tribunal has not been seized.

[18] In their reply, the respondents added to their statement of particulars the list of documents in the Federal Court docket (T-2064-15) to which they had referred, in order to comply with subparagraph 20(1)(c)(iii) of the Rules.

III. Analysis

[19] As the Commissioner rightly pointed out, subsection 21.6(1) of the Act provides full and ample opportunity for any party to participate at any proceedings before the Tribunal, and taking advantage of that opportunity depends on, among other things, the assurance that the relevant information is disclosed to the parties prior to the hearing of the case. It is important to take advantage of this opportunity, as it allows each party to know the evidence they have to rebute and, therefore, adequately prepare for the hearing (*Turner v Canada Border Services Agency*, 2018 CHRT 9 [*Turner*]).

[20] Me Agnaou's motion relate to the process of disclosure of relevant documents under section 20 of the Rules, which sets out what must be included in the statement of particulars that a party must file under section 19 of the same Rules.

[21] Regarding documents that are relevant to a matter at issue and that are in the party's power, possession or control, paragraph 20(1)(c) of the Rules provides that the statement of particulars must contain (i) those documents that the party intends to produce in the proceedings; (ii) a list and description of the documents for which the party claims privilege; and (iii) a list and description of the documents that are not otherwise referred to in subparagraphs (i) and (ii).

[22] In addition, regarding documents that are relevant to a matter at issue and that are no longer in the party's power, possession or control, paragraph 20(1)(e) of the Rules provides that the statement of particulars must contain (i) a list and description of the documents; and (ii) for each document listed, a description of how the party lost power, possession or control of it and, to the best of the party's knowledge, its current location.

[23] Me Agnaou alleges that the other parties failed to disclose relevant documents in their statements of particulars.

[24] Firstly, the Supreme Court of Canada has determined that the disclosure standard in *Stinchcombe* does not apply in an administrative context (*May v Ferndale Institution*, 2005 SCC 82). The Tribunal has confirmed that "the proceedings before this Tribunal, though adjudicative in nature, are not in the criminal law realm" (*El-Helou* at para 54). The Tribunal will not,

therefore, interpret the disclosure requirement under section 20 of the Rules in light of the disclosure requirements developed in criminal matters.

[25] Secondly, it is important to note that disclosure between parties is not a new process, and it seems appropriate for the Tribunal to draw on the case law developed in other jurisdictions in order to decide the present motion. In this regard, the Federal Court of Appeal pointed out that the process adopted by Parliament to deal with reprisal complaints "is similar to the one provided for in the CHRA" (*Agnaou* at para 62). It therefore seems particularly appropriate for the Tribunal to draw on the jurisprudence developed in relation to the CHRA.

[26] Thus, the requested disclosure (1) must be relevant to the matter at issue, which is specifically provided for in the text of section 20 of the Rules; and (2) must not be speculative or amount to a fishing expedition, and the requested documents must therefore be described in a sufficiently precise manner (*Turner* at para 25).

[27] Me Agnaou's requests unfortunately do not meet these requirements.

[28] The first test, relevance, is a notion that has been examined multiple times. In paragraph 794 of *Précis de la preuve,* 6th edition, Montréal, Wilson & Lafleur, 2005, Léo Ducharme, states that [TRANSLATION] "in general, it can be said that it is enough for a fact to have a logical connection to the subject-matter of the litigation and the ancillary issues it raises to satisfy the relevance test". With respect to subsection 223(2) of the *Federal Courts Rules*, SOR/98-106, in which the criteria to determine which documents are required to be produced by

a party is relevance, as in section 20 of the Rules, the Federal Court states that "[a] document is relevant if it either directly or indirectly advances a party's case or damages that of its adversary or may fairly lead to a 'train of inquiry' that may have either of these two consequences" (*Khadr v Canada*, 2010 FC 564 at para 9).

[29] In *Cloutier v The Queen*, [1979] 2 SCR 709, the Supreme Court defined the term "relevant" as follows:

> The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (1) relevant and (2) not excluded by any rule of law or practice.
>
> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter (Cross, *On Evidence*, 4th ed., at p. 16).
>
> [Emphasis added]

[30] At this stage, the burden on the person requesting the document should not be onerous, but there must be a rational connection or nexus between the requested documents and the matter at issue (see also *Turner* at para 25).

[31] Now that the concept of relevance has been defined, it is difficult for the Tribunal to apply it in this case since Me Agnaou did not describe the documents of which he is seeking

disclosure. Instead, he described categories of documents, which is an obstacle that I will address subsequently.

[32] That being said, the Tribunal is nevertheless in a position to determine that the first category of communications requested by the complainant, that is, those tied to documents that relate to the decision not to prosecute in File A, is not relevant to this dispute to the extent that the communications in that category purport to establish that the respondents have committed wrongdoing, and this issue is not before the Tribunal.

[33] According to the Notice of Application from the Office of the Public Sector Integrity Commissioner of Canada to the Tribunal, the Tribunal is responsible, among other things, for determining whether a reprisal has been taken against the complainant. To do so, the Tribunal must determine, based on the evidence before it, (1) whether a protected disclosure, as defined in the Act, was made by the complainant; (2) whether measures, as defined by the Act, were taken against him; and (3) whether there is a connection between the protected disclosure and those measures, constituting a reprisal as defined in the Act.

[34] However, in the context of this decision, the Tribunal does not have to rule on whether or not the alleged act was in fact wrongdoing in order to protect public servants who believe in good faith that a wrongdoing has been committed (*Agnaou* at para 72). Documents related to this aspect are therefore not relevant in this case.

[35] As for the second criterion, the Tribunal notes that Me Agnaou's application has the appearance of a fishing expedition. Indeed, Me Agnaou neither describes nor lists the documents he is seeking to be disclosed; he limits himself to setting out categories of documents and does not give any details to suggest that these documents exist. Me Agnaou proposes that it can be [TRANSLATION] "inferred" from the exhibits that other undisclosed communications [TRANSLATION] "must" exist.

[36] The Federal Court of Appeal dealt with "fishing expeditions" in *Grand River Enterprises Six Nations Ltd v Canada*, 2011 FCA 121, albeit in the context of a pre-trial examination. There, it reiterated the description it had made a few years earlier in *Eli Lilly Canada Inc v Novopharm Ltd*, 2008 FCA 287, which states as follows: "To say that a document might conceivably lead to other documents, which, although not in themselves relevant, might then conceivably lead to useable information, is not enough. It is precisely the type of fishing expedition which the jurisprudence of this Court consistently refused to sanction."

[37] In *Eli Lilly Canada*, *supra*, the prothonotary had stated that the onus was on Novopharm to establish that the documents existed and were in the possession, power or control of Lilly, were relevant and had not been listed in Lilly's affidavits of documents or served in response to a request for production that the parties should have made pursuant to an earlier scheduling order.

[38] Lastly, in the decision in *Contour Optik Inc v Viva Canada Inc*, 2005 FC 1687, which was also an appeal from a prothonotary's decision on a motion for further disclosure,

de Montigny J. referred to a party's obligation to establish the existence of requested documents, stating as follows at paragraph 40:

> The Defendants would like this Court to relieve the Plaintiffs of any confidentiality obligation they may have with respect to all documents and information related to any lawsuit in Canada, the United States or any other country involving either the Re-issued '714 Patent, the U.S. Re-issued '545 Patent or any other patent dealing with magnetic eyewear. This would clearly run afoul of the implied undertaking rule, not only because of the extent of the disclosure requested, but also because the very existence of the documents referred to is at best speculative and their usefulness and relevance has not been satisfactorily demonstrated.

[39] Thus, the requested documents must be identified with sufficient precision so as not to amount to a fishing expedition (*Canada (Attorney General) v Chad*, 2018 FC 556 at para 97; *Allen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 486 at para 59; *Horizon Pharma PLC v The Minister of Health and the Attorney General of Canada*, 2015 CarswellNat 12287 at para 29; *Technique d'usinage Sinlab inc v Biocad medical inc*, 2012 FC 122 at para 17; *Harkat (Re)*, 2009 FC 340 at para 21).

[40] In this case, Me Agnaou does not describe or identify the documents of which he is seeking disclosure; he merely refers to categories of communications. The Tribunal cannot therefore grant his motion and order disclosure (*Turner* at para 25).

[41] For these reasons, the motion is dismissed.

DATED at Ottawa this 13th day of November 2018.

SIGNED on behalf of the Tribunal by the Chairperson.

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The Honourable Martine St-Louis

APPENDIX

***Public Servants Disclosure Protection Act* (SC 2005, c 46)**	***Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles* (LC 2005, ch 46)**
Rights of parties	**Droits des parties**
21.6 (1) Every party must be given a full and ample opportunity to participate at any proceedings before the Tribunal — including, but not limited to, by appearing at any hearing, by presenting evidence and by making representations — and to be assisted or represented by counsel, or by any person, for that purpose.	**21.6 (1)** Dans le cadre de toute procédure, il est donné aux parties la possibilité pleine et entière d'y prendre part et de se faire représenter à cette fin par un conseiller juridique ou par toute autre personne, et notamment de comparaître et de présenter des éléments de preuve ainsi que leurs observations.
***Public Servants Disclosure Protection Tribunal Rules of Procedure* (SOR/2011-170)**	***Règles de pratique du Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles* (DORS/2011-170)**
Notice of motion	**Avis de requête**
17 A written motion is made by filing a notice of motion that	**17** Les requêtes écrites sont présentées au moyen du dépôt d'un avis de requête qui, à la fois :
(a) sets out the relief requested by the party and the grounds for the motion; and	**a)** indique le redressement demandé par la partie et les motifs invoqués à l'appui de la requête;
(b) indicates which other parties, if any, have consented to the relief requested.	**b)** précise, le cas échéant, lesquelles des autres parties consentent au redressement demandé.
Statement for each application	**Exposé pour chaque demande**
19 A party must file a statement of particulars for each of the following applications made by the Commissioner:	**19** Toute partie dépose un exposé des précisions à l'égard de chacune des demandes du commissaire suivantes :
(a) an application for a determination of whether or not a reprisal was taken against the complainant and for an order respecting a remedy under paragraph 20.4(1)(a) or (b) of	**a)** la demande visant à décider si des représailles ont été exercées à l'égard du plaignant et visant à ordonner la prise de mesures de réparation en vertu des alinéas

the Act; and

(b) if the Tribunal has determined that a reprisal was taken against the complainant, an application for an order respecting disciplinary action under paragraph 20.4(1)(b) of the Act.

20.4(1)a) ou b) de la Loi;

b) si le Tribunal a décidé que des représailles ont été exercées à l'égard du plaignant, la demande visant à ordonner la prise de sanctions disciplinaires en vertu de l'alinéa 20.4(1)b) de la Loi.

All parties

20 (1) A statement of particulars must contain the following information and documents:

(a) the party's position regarding the legal issues raised in the application and regarding the remedy or disciplinary action sought, as the case may be;

(b) the material facts that the party intends to prove in the proceedings;

(c) regarding documents that are relevant to a matter at issue in the proceedings and that are in the party's power, possession or control,

(i) those documents that the party intends to produce in the proceedings,

(ii) a list and description of the documents for which the party claims privilege, and

(iii) a list and description of the documents that are not otherwise referred to in subparagraphs (i) and (ii);

(d) for each document listed under subparagraph (c)(ii), the grounds for the privilege claimed;

(e) regarding documents that are relevant to a matter at issue in the proceedings and that are no longer in the party's power, possession or

Toute partie

20 (1) L'exposé des précisions contient les renseignements et documents suivants :

a) la position d'une partie sur les questions de droit que soulève la demande et, selon le cas, sur les mesures de réparation ou les sanctions disciplinaires demandées;

b) les faits importants qu'elle a l'intention de prouver durant l'instruction de l'affaire;

c) à l'égard des documents qui sont pertinents aux questions en litige dans l'affaire et qui sont en sa possession, sous son autorité ou sous sa garde :

(i) les documents qu'elle a l'intention de produire durant l'instruction de l'affaire,

(ii) une liste et une description des documents à l'égard desquels elle revendique un privilège de non-divulgation,

(iii) une liste et une description de tout autre document non visé aux sous-alinéas (i) et (ii);

d) pour chaque document mentionné à la liste prévue au sous-alinéa c)(ii), un exposé des motifs de la revendication;

e) à l'égard des documents qui sont pertinents aux questions en litige dans l'affaire mais qui ne sont plus en sa possession, sous son autorité

control,

(i) a list and description of the documents, and

(ii) for each document listed, a description of how the party lost power, possession or control of it and, to the best of the party's knowledge, its current location;

(f) the names of the witnesses, other than expert witnesses, that the party intends to call; and

(g) if the party intends to call an expert witness, a summary of the issues that will be the subject of the witnesses' testimony.

ou sous sa garde :

(i) une liste et une description de ces documents,

(ii) pour chacun de ces documents, un énoncé expliquant comment il a cessé d'être en sa possession, sous son autorité ou sous sa garde et indiquant, au mieux de ses connaissances, où il se trouve actuellement;

f) les noms des témoins, à l'exception des témoins experts, qu'elle a l'intention de produire;

g) si elle a l'intention de produire un témoin expert, un exposé des questions qui seront abordées par ce témoin.