

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2020 CHRT 9

Date: April 17, 2020

File No.: T2347/0619

Between:

Christian Nwabuikwu

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Jennifer Khurana

BACKGROUND

[1] Christian Nwabuikwu (the “complainant”) enrolled at the Royal Canadian Mounted Police (RCMP) cadet training program (the “Program”) located at Depot Division (“Depot”). The parties disagree about what happened while he was in the Program and why he did not complete it. The complainant, who self-identifies as Black and as a devout Christian, alleges that his instructors subjected him to discriminatory comments and harassment and ultimately terminated him on the grounds of race, colour, national or ethnic origin, and religion. The complainant also alleges that this discrimination is part of a broader systemic problem at Depot that disproportionately impacts visible minority cadets. The respondent denies these allegations and submits that the complainant’s performance in the Program was poor, which ultimately led to his termination.

[2] The parties agree that the scope of the systemic aspect of the complaint is limited to discrimination experienced by visible minority cadets enrolled in the Program at Depot. These allegations do not extend to visible minority Members within the RCMP as a whole.

ISSUES

[3] The parties have already exchanged documents as part of their disclosure obligations under the Tribunal’s Rules of Procedure (“Rules”). This ruling determines whether the respondent should disclose the remaining categories of documents requested in motions filed by the complainant and the Canadian Human Rights Commission (the “Commission”). The complainant seeks three categories of documents, and the Commission seeks seven separate categories of documents, set out below.

DECISION

[4] The motions are allowed in part. I have detailed my findings with respect to each category of document requested by the complainant and the Commission below.

PRINCIPLES OF DISCLOSURE AND PRODUCTION

[5] Parties must be given a full and ample opportunity to present their case (s. 50(1) of the *Canadian Human Rights Act* (the “Act”). This includes the right to the disclosure of all arguably relevant information held by the opposing party so each party knows the evidence they are up against and can prepare for the hearing. See *Egan v. Canada Revenue Agency*, 2019 CHRT 8 at para. 4. The Tribunal’s *Rules* require parties to disclose a copy of all documents in their possession that relate to a fact, issue or form of relief that is sought in the case, including those identified by other parties (Rule 6(1)(d) and (e)).

[6] The threshold for disclosure is arguable or possible relevance. While this threshold is not particularly high, a party seeking production of a document must still show that there is a rational connection between the document it seeks and the issues raised in the complaint. See, for example, *T.P. v. Canadian Armed Forces*, 2019 CHRT 19 at para. 11 (“*T.P.*”) *Turner v. CBSA*, 2018 CHRT 1 at para.30 (“*Turner*”). Requests for disclosure should not be speculative or amount to a fishing expedition. See *Egan v. Canada Revenue Agency*, 2017 CHRT 33 at paras. 31-32 (“*Egan*”) and *Turner* at para.30.

[7] The fact that documents are exchanged and disclosed does not mean that they will be admitted as evidence at the hearing. See *Turner* at para. 35 and *Egan* at para. 33. If a party takes issue with the proposed evidence, it can raise this at the hearing and can also make submissions on the weight that the decision-maker should give that evidence if it is admitted at the hearing.

[8] A party’s obligation to disclose is limited to documents that are “in the party’s possession”. Under section 6 of the *Rules*, the Tribunal cannot order a party to generate or create new documents for disclosure (see *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at para. 17).

REASONS

A. The Complainant's Motion

[9] The complainant seeks production of three categories of documents, set out below. The Commission agrees that the requested documents are arguably relevant to the issues in dispute.

[10] I have grouped my reasons for Requests 1 and 2 together as the complainant's basis for these two requests is very similar and the respondent has provided a joint response to these requests. They are as follows:

Request 1:

- **production of all documents related to Security Reports Request Forms submitted by Depot instructors to Departmental Security Branch, from 2015 to the present date, requesting swipe card usage logs for cadets attending training at the Depot;**
- **any records of negative feedback or recommendations for termination issued to the cadet who was subject of the Security Reports Request Form(s) subsequent to the disclosure of the swipe card usage logs; and**
- **headshot photographs of any cadet subjected to negative feedback or recommended for termination due to their failure to comply with the curfew.**

Request 2:

- **production of all feedback issued to cadets attending training at the Depot, from 2015 to the present date, for failure to comply with the curfew, regardless of whether the instructors obtained the cadet's swipe card usage log; and**
- **headshot photographs of any cadet for whom the instructors issued negative feedback or recommendation for termination due to the cadet's failure to comply with the curfew.**

Security Reports Request Forms and Feedback

[11] The complainant seeks access to these documents on the basis that they will establish whether the instructors treated other cadets similarly, both in accessing their swipe card usage logs and in issuing negative feedback or recommending termination for missing curfew. Requests 1 and 2 are similar, though Request 2 includes feedback used even where instructors did not seek a cadet's swipe usage log. The complainant also requests head shot photos of any cadets subjected to disciplinary action as a result of their failure to comply with the curfew.

[12] The respondent argues that the requests would require an onerous and far-reaching search for records that are not arguably relevant. The respondent states that it would be required to review thousands of individual cadet files and review each piece of feedback to see if it relates to a failure to comply with curfew. It submits that the fact that the Commission is seeking systemic remedies does not increase the respondent's obligation to disclose documents. The documents produced must still relate to the underlying complaint of discrimination.

[13] I find that the requested documents are arguably relevant to the issues raised by this complaint and order the material to be produced.

[14] The complainant alleges that he was treated more severely than his non-racialized colleagues in the Program, which the respondent denies. In my view, comparative evidence of how other cadets who missed curfew were treated is relevant to this claim and to the respondent's defence to these allegations. In its SOP the respondent denies that the complainant was singled out and states that others cadets receive follow-up if they fail to comply with curfew. Yet in its response to this motion, the respondent states that the curfew is a recommendation rather than a requirement, and that cadets are not normally given feedback for missing it. If the respondent maintains that the complainant was not singled out, but that cadets are not normally given feedback for missing curfew, it will need to provide a non-discriminatory reason why the complainant was treated one way for returning late to the dormitory as compared to others.

[15] Further, this not a situation where the complainant is going beyond the scope of the complaint in its disclosure requests, in contrast to some of the Tribunal cases relied on by the respondent.

[16] The Tribunal has found that it should be cautious about ordering searches where a party would be subjected to an onerous and far-reaching search for documents where this search would add substantial delay to the efficiency of the inquiry or where the documents are merely related to a “side issue rather than the main issues in dispute” (see *Brickner v. RCMP*, 2017 CHRT 28 at para. 8 and *Dominique (on behalf of the members of the Pekuakamiulnuatsch First Nation) v. Public Safety Canada*, 2019 CHRT 21 at para. 10.

[17] In *Dominique*, the Commission sought records relating to each of 200 First Nations communities across Canada. The Tribunal explained that invoking the expression “systemic” did not give a party *carte blanche* regarding disclosure, and that arguable relevance to the complaint was still a requirement for any disclosure.

[18] Beyond any systemic discrimination allegations or systemic remedies sought, I will have to determine whether the complainant’s own individual rights under the *Act* were violated by the respondent. This will include consideration of whether any systemic discrimination caused or contributed to the violation of the complainant’s rights.

[19] In my view the documents requested by the complainant go to the issues in dispute in this complaint regarding his alleged treatment. These are not “side issues”. Unlike in *Dominique*, the complainant is seeking to show that he was treated more harshly than his non visible-minority colleagues. The records specifically sought relate to cadets in the Program at Depot, and do not involve other programs or the RCMP more broadly.

[20] I also find the complainants’ requests specific and distinguishable from the nature of the requests made in *Dominique* or *Brickner*. The complainant’s requests are for a specific and limited time period. With respect to Request 1, the complainant is seeking disclosure of feedback only where cadets were the subject of the Security Report Request Form, which should involve a smaller subset of the total number of cadets in the Program each year.

[21] In ordering production, I am limiting the disclosure to records from 2015, the year before the complainant attended the program, until 2018, one year after he left. The respondent indicates that Security Reports Forms are used for a variety of reasons and that it will have to go through thousands of forms. To limit that search and consistent with the approach proposed by the complainant in Request 2, the respondent is only required to produce the requested documents for this more limited period.

[22] With respect to Request 2, not all cadets going through the program will have received feedback. The respondent is a large, sophisticated, institutional litigant and this is not a situation where multiple centres or programs, or the RCMP's entire records must be combed through to identify the relevant documents.

[23] In his reply, the complainant revised his Request 2 to reduce the time period of documents sought. The respondent is therefore ordered to produce the documents sought in Request 2 that cover the period from 2015, a year prior to his enrollment, until a year after he left the Program in 2018.

Photographs

[24] The respondent also objects to the production of the photos of cadets, in both Requests 1 and 2, arguing that their names would be redacted and that the photos would consequently be of little value to the process.

[25] I do not accept the respondent's argument. I do not see how the redaction of names negates the usefulness of photographs in determining whether cadets may have been treated differently on the basis of their perceived race or ethnicity. Names are not indicative of whether a cadet is a visible minority. To the extent that the photos exist and could reveal the race or ethnic background of a cadet, they are arguably relevant to demonstrate who received feedback and who did not.

[26] Accordingly, I order the photos sought in both of these Requests to be produced, for the same time period, namely from 2015 to 2018.

Request 3:

All internal documents relating to the complainant from August 2016 to present including those sent or received by Depot human resources personnel, staff, instructors or Members of management. This includes a request for all written communications between Cpl. Coulibaly and any of the above-referenced individuals, including the complainant, from August 2016 to date.

[27] There is no dispute between the parties with respect to this category of documents. The respondent has produced the complainant's entire cadet file, which should include the requested documents. In his reply, the complainant does not dispute that the entirety of this category has been or will be produced.

[28] The respondent is ordered to confirm that it has disclosed any outstanding documents requested and that this request is complete.

B. The Commission's disclosure requests

[29] The Commission requested seven categories of documents, some of which are grouped together. I have adopted the same naming conventions as the Commission, using letters (a) through (g) to refer to the categories of documents sought. The complainant agrees with all of the Commission's requests.

- a) Data relating to attrition (departure for any reason) rates at the Depot, disaggregated by rates for Black cadets, visible minority cadets, and non-visible minority cadets, for the last five years.**
- b) Data relating to failure rates (a subset of attrition) at the Depot, disaggregated by rates for Black cadets, visible minority cadets, and non-visible minority cadets, for the last five years.**

[30] The respondent states that it does not have the data requested by the Commission. While applicants can self-identify as visible minorities during the application process, the RCMP does not tie attrition rates, including failures, to this data. It does, however, track rates at which cadets resign and are terminated, and their reasons for their departure.

[31] In reply, the Commission notes that while the respondent states that it does not track attrition rates in the disaggregated format requested by the Commission, it is not clear whether it collects this data in another manner. It is also not clear whether the RCMP tracks this data for visible minority cadets versus non-visible minority cadets, but not with respect to Black cadets more specifically. Finally, the Commission notes that the RCMP confirms that it tracks the rates at which cadets resign and are terminated, but it is not clear if it tracks the rates at which visible minorities are terminated or resign as compared to non-visible minorities.

[32] The Commission also submits that this same data was produced by the RCMP in a previous Tribunal complaint that raised similar issues. It is not clear why the data existed at the time of that case, but no longer does, or when or why the respondent stopped tracking that data. See *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10 (CanLii) at paras 150-152 (“*Tahmourpour*”).

[33] In its reply, the Commission also clarifies that it is seeking data relating to attrition and resignation rates for Black, visible minority and non-visible minority cadets or data pertaining to the attrition rates of visible minority cadets as compared with non-visible minority cadets if no data is available for Black cadets specifically.

[34] I agree that data comparing the attrition and failure rates of visible minority and Black cadets with those of non-visible minority cadets may be useful to the Tribunal’s assessment of the complainant’s allegations that evaluation of his performance was impacted by the discriminatory attitudes of his instructors. The data is also arguably relevant to allegations about a pattern of systemic discrimination experienced by visible minority cadets at Depot.

[35] However, I cannot make an order to produce documents that do not exist. To the extent that the data sought exists, the respondent must disclose the documents in the requests from 2015 to the end of 2018, when the complaint was referred to the Tribunal. If these records do not exist, whether in disaggregated format or another manner, , it must confirm this in writing to the Tribunal and to the other parties.

- c) Any and all surveys, studies, reports, memoranda or analyses relating to:**
- i) the attitudes of non-visible minority RCMP Members towards visible minority and Black RCMP Members and/or cadets;**
 - ii) the experiences of visible minority and Black RCMP Members and/or cadets; and**
 - iii) recommendations for addressing discrimination experienced by visible minority and Black RCMP Members and/or cadets (including any and all studies that are more recent than the 1996 and 2006 studies referred to at paras. 56 and 248 of the Tahmourpour decision).**

[36] The respondent has confirmed that it has searched for the documents sought under (c)(i) and (ii) above. It does not have documents outside of those produced in *Tahmourpour* and publicly available Public Service Employee Surveys. The Commission is no longer pursuing these requests. I make no order with respect to requests (c)(i) and (ii).

[37] The respondent objects to the request in (c)(iii) on the grounds that such a search would be onerous, that it does not keep a database of recommendations for addressing discrimination, and that it cannot easily locate them. It disputes the relevance of the documents and argues that the request is an attempt to by the Commission to determine whether the RCMP implemented changes in response to a previous complaint before the Tribunal.

[38] I agree with the respondent that a search of any and all recommendations made for addressing discrimination would be time-consuming and potentially of limited value. However, this is not what the Commission has requested.

[39] I find the documents sought arguably relevant to the issues in dispute, and to any public interest remedies in the event of a finding of liability. Efforts made by the respondent to address discrimination and any official reports or recommendations to prevent such discriminatory attitudes or behaviours exhibited by Members (who could be instructors) may assist the Tribunal in its assessment of this complaint. The respondent is therefore ordered to produce any official reports, surveys, memoranda and analyses that refer to

recommendations made to address discrimination against visible minority and Black cadets and/or RCMP Members.

- d) Past complaints (whether made formally or informally) or any written communications by visible minority and Black cadets, relating to allegations of unfair treatment, discrimination and/or harassment experienced at the Depot, on the basis of race, national or ethnic origin, colour and/or religion, for the past five years (2014 to present). If the RCMP has information related to the outcome of those complaints, we request disclosure of that information as well. The personal information may be redacted;**

[40] The respondent has agreed to produce relevant documents related to formal complaints. I make no order with respect to this part of the request, but the respondent must confirm that it has completed the disclosure of this category of documents.

[41] In reply, the Commission asks to amend its initial request to address any informal complaints or written communications by visible minority and Black cadets that were received by the RCMP's Cadet Liaison Officer, relating to allegations of unfair treatment, discrimination, and/or harassment experienced at the Depot on the same grounds, from 2014 to the present. It also requests information on the outcome of those complaints. The personal information of the complainants may be redacted.

[42] The respondent has produced or will produce documents from Corporal Coulibaly, the Cadet Liaison Officer at Depot at Depot from 2014 to 2017 whose role was to hear the cadets' concerns, including ones related to discrimination and/or harassment. Cpl. Coulibaly may have additional documents related to informal complaints, including ones related to discrimination and/or harassment.

[43] I agree that if the Cadet Liaison Officer is the channel for receiving informal complaints from cadets that could relate to similar allegations of discriminatory treatment, these are arguably relevant and must be disclosed. The respondent is therefore required to confirm in writing that the records from the Cadet Liaison Officer related to complaints of discrimination and/or harassment that it agreed to disclose from 2014-2017 have been produced. It is also ordered to produce any additional records from Cpl Coulibaly's successor(s) who held the position of Cadet Liaison Officer from 2017 to the date this complaint was referred to the Tribunal in December 2018.

e) Data relating to the representation rates of visible minority and Black cadets at the Depot, as compared with non-visible minority cadets, for the past five year period;

[44] The respondent disputes the relevance of the data relating to the representation rates of visible minority and Black RCMP cadets as self-identification as a visible minority is not compulsory. Applicants are given an opportunity to self-identify at the application stage but they are not required to do so. The complaint, the respondent argues, is not about applying to the Program, but rather about the complainant's experiences while there. It also submits that the data will be of limited value as only about a fifth of applicants choose to self-identify and this data is not linked to attrition or failure. Cadets are not Members or employees of the RCMP and so they also cannot complete questionnaires as required under general employment equity legislation.

[45] I accept the Commission's submission that the representation rates of Black and/or visible minority cadets at the Depot can be relevant context for the Tribunal in assessing the complainant's and other racialized cadets' experiences while in the Program. I find the data sought arguably relevant. The respondent is therefore ordered to disclose this data for the period of 2014 to December 2018, when the complaint was referred to the Tribunal.

[46] The respondent can make argument about the weight I should give to these records if they are tendered and admitted as evidence at the hearing.

f) Data relating to the representation rates of visible minority and Black RCMP Members, as compared with non-visible minority Members, for the past five year period;

[47] The respondent objects to the request and argues that the representation rates of visible minority Members within the RCMP as a whole can be attributed to a number of factors, only one of which is possible discrimination at Depot. It also argues the data will not give an accurate picture of visible minority representation in the RCMP as Members are not required to self-identify when asked.

[48] I find the data sought arguably relevant and order it to be produced. The complainant alleges that he was terminated at least in part because of a prohibited ground and that his discriminatory treatment is not an isolated incident. If successfully completing

the Program at Depot is the required first step for anyone interested in a career as a Member of the RCMP, data about the representation rates of visible minority Members could be relevant to my assessment of the complainant's allegations and the respondent's defence.

[49] As for the respondent's arguments about the limited value of this data, it can make submissions on weight if these records are admitted into evidence at the hearing. The respondent is therefore ordered to disclose the data for the period of 2014 to December 2018, when the complaint was referred to the Tribunal.

g) All documents pertaining to the measures the RCMP has taken to implement the Tribunal's direction on systemic measures at paras 252-253 of the *Tahmourpour* decision, from the time of that decision to the present.

[50] In *Tahmourpour*, the Tribunal ordered the respondent to take action to prevent the discrimination experienced by the complainant from happening again. Although it left it to the parties to reach an agreement on the exact nature of the measures to be taken and a timetable for achieving them, at para. 253 of the decision, the Tribunal indicated that the measures were to include the following:

- i. A policy and set of procedures for dealing with harassment and discrimination at Depot that provide an immediate opportunity for cadets to raise their concerns, without fear of retaliation or negative consequences, to someone with the authority to make changes. A copy of the Policy and Procedures should be provided to each cadet, as part of the welcome kit, upon arrival at Depot.
- ii. A mandatory diversity/cultural sensitivity training program delivered to both cadets and all personnel at Depot that focuses on developing and promoting a culture of respect and tolerance for diversity within the RCMP. The issues raised in pages 59 - 64 of the Regular Members Survey, Report 3, September 1996, should be taken into account as well as any other relevant material. The suggestions for Diversity Training that are made in the Employment Systems Review by Lakshmi Ram and Associates (April 2006) should also be taken into account, specifically, the need for a training course targeted to address the internal diversity of the RCMP.
- iii. An Advisory Committee or a Multi-Culturalism officer at Depot who makes recommendations to the Commanding Officer at Depot with regard to the prevention of discrimination and the promotion of respect and tolerance for diversity at Depot. The Commanding Officer should respond in writing to

these recommendations and provide reasons if recommendations are rejected

(*Tahmourpour* at para.253).

[51] The Commission submits that the measures directed by the Tribunal in *Tahmourpour* were aimed at addressing the same type of alleged discriminatory incidents at issue in this complaint. It relies on the Tribunal's analysis in *Johnstone v. CBSA*, 2010 CHRT 20 in support of its position that the measures taken by the RCMP following *Tahmourpour* will be relevant to a claim for special damages. In *Johnstone*, the Tribunal ordered special compensation on the basis that the respondent had demonstrated a lack of effort and concern with respect to family status accommodation policies by disregarding an earlier decision the Tribunal had made which dealt with similar issues.

[52] The respondent objects to this request on the grounds that it would require a far-reaching and onerous search that covers 2008 to the present. There is no database to search for documents regarding steps taken by the RCMP to implement the Tribunal's order in *Tahmourpour* and numerous Members' emails and records would need to be reviewed. Such a far-reaching search would result in substantial delay in the production of documents with limited value. The respondent states that any measures that may have been taken following *Tahmourpour* could be stale and irrelevant as procedures and course materials change. It has produced or will produce course materials for the Program and facilitators along with policies and procedures addressing discrimination and harassment.

[53] I am not ordering the RCMP to comb through every email or record that may mention *Tahmourpour*, nor is that what the Commission is seeking. In my view, the policies, or any major initiatives or measures that have been put in place since the time of *Tahmourpour* are arguably relevant to the complaint, and potentially to any remedies ordered should the complaint be substantiated. The respondent is therefore ordered to produce the documents sought by the Commission. If the RCMP's training has evolved over time, it can address this at the hearing.

ORDER

[54] For the reasons set out above, the respondent shall produce the following to the parties within 45 calendar days of the date of this ruling:

1. all documents related to Security Reports Request Forms submitted by Depot instructors to Departmental Security Branch, from August 2015 to April 2018, requesting swipe card usage logs for cadets attending training at the Depot;
2. any records of negative feedback or recommendations for termination issued to the cadet who was subject of the Security Reports Request Form(s) from August 2015 to April 2018, subsequent to the disclosure of the swipe card usage logs;
3. headshot photographs of any cadet subjected to negative feedback or recommended for termination due to their failure to comply with the curfew from August 2015 to April 2018;
4. all feedback issued to cadets attending training at the Depot, from August 2015 to April 2018, for failure to comply with the curfew, regardless of whether the instructors obtained the cadet's swipe card usage log;
5. headshot photographs of any cadet for whom the instructors issued negative feedback or recommendation for termination due to the cadet's failure to comply with the curfew from August 2015 to April 2018;
6. if they exist, data relating to attrition (departure for any reason) rates at the Depot, disaggregated by rates for Black cadets, visible minority cadets, and non-visible minority cadets, from 2015 to the end of 2018. If they do not exist, the respondent must confirm this in writing by the same date.
7. if they exist, data relating to failure rates (a subset of attrition) at the Depot, disaggregated by rates for Black cadets, visible minority cadets, and non-visible minority cadets, from 2015 to the end of 2018. If they do not exist, the respondent must confirm this in writing by the same date.
8. any and all surveys, studies, reports, memoranda or analyses relating to recommendations for addressing discrimination experienced by visible minority and Black RCMP Members and/or cadets (including any and all studies that are more recent than the 1996 and 2006 studies referred to at paras. 56 and 248 of the *Tahmourpour* decision).
9. any records from the Cadet Liaison Officer related to complaints of discrimination and/or harassment not already disclosed from 2017 to the end of 2018;
10. data relating to the representation rates of visible minority and Black cadets at the Depot, as compared with non-visible minority cadets, from 2015 to the end of 2018;

11. data relating to the representation rates of visible minority and Black RCMP Members, as compared with non-visible minority Members, from 2015 to the end of 2018; and
12. any high-level procedure, policy or document that outlines official programs, training, committees and initiatives that the RCMP has implemented following the Tribunal's direction on systemic measures at paras 252-253 of the *Tahmourpour* decision, from the time of that decision to the end of 2018.

[55] The respondent is also required to confirm that it has produced all documents it agreed to produce and that are referenced in paragraphs 28, 40 and 43 above.

[56] The parties are directed to participate in a case management conference call following the disclosure set out above. The Registrar will contact the parties to schedule this call. The parties should be prepared to provide projected dates for the filing of any expert reports. The Tribunal will send an agenda when the date has been confirmed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
April 17, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2347/0619

Style of Cause: Christian Nwabuikwu v Royal Canadian Mounted Police

Ruling of the Tribunal Dated: April 17, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

Sherry Shir, for the Complainant

Sasha Hart and Simone Akyianu, for the Canadian Human Rights Commission

Lisa Riddle, for the Respondent