

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 111

Date: October 15, 2024

File No.: HR-DP-2852-22

Between:

GH

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Security Intelligence Service

Respondent

Ruling

Member: Edward P. Lustig

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I. OVERVIEW

[1] The Respondent, the Canadian Security Intelligence Service (CSIS), in accordance with section 52(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA), has requested that the Tribunal amend the existing confidentiality order in this matter issued pursuant to *G.H. v. Canadian Security Intelligence Service*, 2023 CHRT 28 dated July 5, 2023, and to grant a confidentiality order for the hearing.

[2] The Complainant, GH, is a former CSIS employee who filed a complaint with the Canadian Human Rights Commission (the “Commission”) alleging that CSIS discriminated against her by providing a negative reference to a potential future employer, contrary to section 14.1 of the CHRA, following a settlement agreement between GH and CSIS from a previous complaint.

[3] CSIS denies that it has engaged in any form of discrimination and, in particular, denies that it ever provided a negative reference about GH to any potential future employer.

[4] CSIS submits that, consistent with section 38 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, it seeks to protect from disclosure, sensitive or potentially injurious information that, if disclosed to the public, could injure international relations, national defence or national security (“National Security Privilege” or “NSP” or “NSP information”). This includes information that would identify or tend to identify CSIS employees, such as their names, email and addresses, and any other information that is sensitive or potentially injurious to Canada’s national security that may arise in the course of these proceedings.

[5] GH has consented, on a without prejudice basis, to the terms of the requested amended confidentiality order and the confidentiality order for the hearing, as set forth in this decision (together referred to the “confidentiality orders”). The Commission has expressed that it has no concerns with the request.

II. DECISION

[6] The request for the confidentiality orders is granted for the reasons set out below.

III. LEGAL FRAMEWORK

[7] Although hearings before the Tribunal are presumptively public, section 52 of the CHRA provides the Tribunal with the discretion to take any necessary measures to ensure confidentiality where the granting of a confidentiality order is in the interests of justice. In particular, section 52(1)(a) of the CHRA allows the Tribunal to make any order necessary to protect confidential information if it is satisfied that public disclosure of the confidential information would result in real and substantial risk to matters involving public security.

[8] Section 38 of the *Canada Evidence Act* sets out a regime which prevents the disclosure of information or documents that contain what is defined as “sensitive” or “potentially injurious” information without the consent of the Attorney General of Canada (AGC) or a court order. In particular, this section requires parties to provide notice to the AGC before disclosing information which may be subject to NSP. The AGC then decides whether to authorize disclosure of the NSP information. Section 38 also grants jurisdiction to the Federal Court, on an application from the AGC or other party, to determine whether information over which the AGC has claimed NSP may be disclosed and in what form.

[9] The Tribunal has followed the Supreme Court of Canada’s decision in *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman Estate*] wherein the Court at para 38 set out a three-part test that must be satisfied in order to succeed in a motion seeking a limit on presumptive court openness. It must be established that: 1) court openness poses a serious risk to an important public interest; 2) the order sought is necessary to prevent this risk to the identified interest because reasonably alternative measures will not prevent the risk; and 3) as a matter of proportionality, the benefits of the order outweigh its negative effect.

IV. ANALYSIS

[10] The three-part test in *Sherman Estate* is met in this case. The confidentiality orders are needed because there is a substantial risk that NSP information could be disclosed during the proceeding. Disclosure of such information poses a serious risk to an important public interest as it impairs CSIS' ability to investigate threats to the security of Canada.

[11] Both parties in this case intend to call and rely on evidence from present and former employees of CSIS as witnesses. Publicly identifying current and former CSIS employees puts those individuals at risk. Disclosing the identities of CSIS employees can cause real and substantial risk to matters involving public security, as contemplated under section 52(1)(a) of the CHRA, and also raises a serious possibility that the life, liberty or security of a person will be endangered as set out in section 52(1)(d) of the CHRA. The Federal Court in *Cabada v Abdelrazik*, 2023 FC 1100 confirmed that the disclosure of employee information would be injurious to national security or international relations.

[12] Additionally, CSIS seeks to protect information if its disclosure could identify or tend to identify other categories of NSP information that could arise during the course of the hearing given GH's former position with CSIS including a) internal procedures and administrative methodologies and telecommunications systems; b) methods of operation and investigative techniques utilized by CSIS; c) relationships that CSIS maintains with foreign police, security and intelligence agencies, and information exchanged in confidence with such agencies; d) CSIS' interest in individuals, groups or issues, including the existence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations; and e) individuals who provided information to CSIS.

[13] Disclosing information related to any of the above categories could pose a real and substantial risk to public security and could limit the efficacy of CSIS' investigation techniques and operations.

[14] The confidentiality terms sought by CSIS in the proposed confidentiality orders are the least obstructive options available that achieve the objectives of protecting the confidential information from disclosure and Canada's national security interests, while balancing the public's interest in an open inquiry.

[15] The parties have agreed to the confidentiality orders that put measures in place with the goal of protecting NSP information without the parties invoking section 38 of the *Canada Evidence Act*. These measures allow the Tribunal and the parties to move the matter forward to the hearing scheduled for April of 2025 in a fair and efficient manner, while leaving open the possibility for the parties to invoke section 38 and the procedures in the Federal Court pursuant to section 58 of the CHRA, if needed.

[16] The confidentiality orders requested therefore comply with section 52 of the CHRA and satisfy the three-part *Sherman Estate* test. Consequently, the motion is allowed, and the confidentiality orders and the terms thereof as set out below are issued.

A. Existing Confidentiality Order Terms

- 1) Any sensitive or potentially injurious information within the meaning of s. 38 of the *Canada Evidence Act*, including information identifying the Complainant or any current or past CSIS employee (a “Confidential CSIS Employee”), is designated confidential information (“Confidential Information”) under s. 52 of the CHRA.
- 2) The Complainant will be identified only by the pseudonym “GH” in all documents and pleadings filed with the Tribunal, as well as all correspondence between parties and with the Tribunal, and in all Tribunal rulings and decisions, until a further order of the Tribunal.
- 3) The parties will have 30 days from the Tribunal’s order to refile their documents and pleadings with versions that use the pseudonym “GH”. These new documents will replace previous versions. The parties and the Tribunal should destroy any copies of Statements of Particulars, List of Witnesses and List of Documents that were filed prior to July 5, 2023.
- 4) Any documents containing Confidential Information must be redacted to remove the Confidential Information, and only redacted versions may be filed with the Tribunal.
- 5) The Respondent may identify any Confidential CSIS Employee in any document filed with the Tribunal solely and consistently by the same random initials or other pseudonyms and must include their position title.
- 6) The parties will have 30 days from the Tribunal’s order to refile their documents and pleadings with versions that use pseudonyms, if necessary. These new documents will replace the previous versions.
- 7) At the request of a party or the Commission, the full name of a Confidential CSIS Employee must be disclosed to the Commission and party where the position title

and other provided information alone are insufficient to identify who the employee is and their involvement in an issue. Such disclosure must occur either before the hearing, in direct communication between the parties or during an in-camera portion of the hearing. The Tribunal and the parties must keep the information in confidence and cannot publicize it nor include it with any documentation submitted to the Tribunal.

- 8) All parties must respect the confidentiality of the information by not referring to any Confidential Information publicly or in any public proceedings and by only referring to Confidential CSIS Employees by the random initial or other pseudonyms assigned to them.
- 9) This order does not in any way restrict or alter the provisions of the CHRA, including s. 58, or the provisions of the *Canada Evidence Act*.

B. Hearing Confidentiality Order Terms

- 1) Any sensitive or potentially injurious information within the meaning of s. 38 of the *Canada Evidence Act*, including information identifying the Complainant or any current or past CSIS employee (a “Confidential CSIS Employee”) is designated confidential information (“Confidential Information”) under s. 52 of the CHRA.
- 2) Any documents containing Confidential Information must be redacted to remove the Confidential Information, and only redacted versions may be filed with the Tribunal.
- 3) Confidential CSIS Employees shall only be referred to by the randomized numbers/letters assigned to them, and Confidential CSIS Employees shall not display their face in any public proceeding.
- 4) Confidential CSIS Employees shall appear at the hearing via Zoom, in-camera. Only the Tribunal member, necessary Tribunal staff, the Complainant, Complainant counsel and the Commission shall be present during the testimony of any Confidential CSIS Employee. A transcript of the testimony of each Confidential CSIS Employee will be generated for the public record following the conclusion of the hearing. In the event that any Confidential Information is in the transcript, it will be redacted. The parties will be provided with a copy of the transcript following the hearing and will be given 15 business days to identify any Confidential Information in the transcript prior to its release to the public.
- 5) The Complainant will be identified only by the pseudonym “GH” at all times during the hearing and in all Tribunal rulings and decisions.
- 6) All parties must respect the confidentiality of the Confidential Information by referring to Confidential Information only during in-camera sessions of the hearing and by only referring to Confidential CSIS Employees by the random initials or other pseudonyms assigned to them.

- 7) Before the release of any ruling or decision by the Tribunal in this matter, the Respondent and the Complainant's counsel will be provided with a draft copy. The Respondent will be given 15 business days to identify any Confidential Information for redaction prior to the release of the decision to the public or the other parties. The Complainant's counsel will then have 10 business days to provide her comments on the redactions for consideration by the Respondent. The Respondent shall then have five business days to propose a final redacted version of the ruling or decision to the Tribunal. If the Tribunal has any concerns about the redactions, it will advise the parties promptly. The parties shall not release, share or distribute the draft ruling or decision nor discuss the contents within. If Confidential Information is identified by the Respondent, the Complainant's counsel shall delete and/or destroy all copies of the pre-redactions draft ruling or decision.
- 8) This order does not in any way restrict or alter the provisions of the CHRA, including s. 58, or the provisions of the *Canada Evidence Act*.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 15, 2024

Canadian Human Rights Tribunal

Parties of Record

File No.: HR-DP-2852-22

Style of Cause: GH v. Canadian Security Intelligence Service

Ruling of the Tribunal Dated: October 15, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

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Calina Ritchie, for the Respondent