



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/054  
/UNAT/1680  
Order No.: 030 (NBI/2013)  
Date: 6 February 2013  
Original: English

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**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

HUNT-MATTHES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON CONFIDENTIALITY AND  
PRIVILEGE STATUS OF  
DOCUMENTS**

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**Counsel for the Applicant:**

Nigel Lindup

**Counsel for the Respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (“UNHCR”). She filed an appeal with the former United Nations Administrative Tribunal contesting the decision of the Ethics Office dated 18 December 2006 which found that though she had engaged in a protected activity by reporting misconduct, there was no *prima facie* case of retaliation against her (“the Contested Decision”).

## **Background**

2. A Case Management Hearing was held on Tuesday, 2 October 2012 and Case Management Order No. 129 (NBI/2012) was issued ordering: (i) the Applicant to provide a chronology of events beginning from the reporting of the protected activity and (ii) the Respondent to provide the Tribunal on an *ex parte* basis, with a numbered list of all the documents relevant to the decision made by the Ethics Office about the Applicant’s complaints and reports to the Ethics Office while indicating whether he sought confidentiality for any documents or parts of documents.

3. Pursuant to Order No. 129 (NBI/2012), on 11 October 2012, the Applicant filed the chronology of events and on 25 October 2012, the Respondent filed an *ex parte* submission which contained 2 annexes.

4. Annex 1 identified and listed those documents obtained from the Ethics Office file regarding the Applicant’s case over which the Respondent does not assert privilege. These documents are all emails or documents prepared by or sent to the Applicant.

5. Annex 2 identified and listed documents described by the Respondent as internal working documents prepared by officers within the Ethics Office during the course of the Applicant’s complaint. The Respondent asserts privilege over these documents.

6. Pursuant to Order No. 002 (NBI/2013), on 16 January 2013 the Respondent provided *ex parte* copies of the documents listed in annex 2 for inspection by the Tribunal.

7. Having inspected the documents, the issue for the Tribunal is whether privilege should attach to the annex 2 documents as asserted by the Respondent.

8. The Respondent filed his motion *ex parte* and the Applicant has therefore not had an opportunity to comment on it. However, in the light of the result of this decision there is no prejudice to the Applicant.

9. The documents in question are dated between 7 April 2006 and 5 December 2006. They therefore pre-date the decision by the Ethics Office made on 18 December 2006, which is the subject of the Applicant's claim. They fall into two broad classes: email correspondence between the Respondent and the Applicant which have been annotated by hand by the Ethics Office personnel; and internal file notes made by the Ethics Office in which the Applicant's claims are summarized. Apart from these there is a letter from a former staff member of the Ethics Office describing his telephone contact with the Applicant after he left the Organization. Additionally there is a note to file relating to the action that needed to be taken by the Ethics Office in relation to the complaint lodged to it, since the departure of the staff member who dealt with the case.

10. The Respondent's reasons for asserting privilege are:

a. That the submissions are internal working documents prepared during the course of the Applicant's complaint for deliberation within the Ethics Office. They record preliminary thoughts and exchanges between Ethics officers at various stages of the deliberative process and do not provide a complete, accurate or final record of any stage of the process;

b. Disclosure of the documents of this nature will negatively impact the work of the Ethics Office by inhibiting frankness and candour in internal communications within the Ethics Office;

c. The notes have no probative value since they are preliminary thoughts on the case but not the reason for the final decision. As such it would ‘cause confusion and it is not in the interest of justice to disclose’;

d. The Respondent makes it clear that the assertion of privilege relates to the hand written notes made on the emails (most of which originate from the Applicant) while the ‘Internal notes on the file’ are summaries of the complaint lodged by the Applicant;

e. He submitted that the *ex parte* inspection procedure outlined in *Koda* UNDT/2009/024 could be followed in this case to enable the Tribunal to determine if the matter may be fairly and expeditiously resolved without the documents and/or the impact that disclosure may have on the work of the Ethics Office is an exceptional circumstance that precludes disclosure; and

f. Should disclosure of any of the documents be ordered the Respondent advises that he will seek an order for confidentiality.

### **Consideration**

11. The Respondent’s principle submission is that the annex 2 documents or the annotations on them are privileged.

12. The issue of privilege in the context of the United Nations internal justice system was discussed by Judge Boyko in a dissenting opinion in *Bertucci* 2010-UNAT-062. In that case the Respondent claimed that certain documents originating from the Executive Office of the Secretary-General (“EOSG”) should not be disclosed to the Dispute Tribunal and the Appeals Tribunal on the grounds that it is or should be protected by executive privilege.

13. The Judge stated:

Executive privilege generally pertains to communications which, if disclosed, would adversely affect the operations of the Organization. This would appear to be the nature of the communications in respect of which privilege is being asserted in this case.

The EOSG must have some freedom to ensure confidentiality in communications and good faith relations based on privacy with Heads of the Member States or their representatives. Executive privilege accorded to Heads of State has been curtailed over time in domestic laws and courts which have increasingly reviewed communications to which executive privilege ordinarily attaches, if they are found to be relevant to the case at trial. Courts are sensitive to finding the correct balance and will protect executive privilege pertaining to sensitive military or diplomatic information, or state secrets, which if disclosed could pose a security risk or impair the functioning of the organization.

Privilege may attach to information for various reasons and apart from executive privilege, communications that are based on a confidential or fiduciary relationship such as those between a lawyer and his or her client or a psychiatrist and his or her patient. Also, privilege exists under the common law principle of public interest immunity, where for example information gathered by the state cannot be disclosed if the court decides that this would be damaging to the public interest. The probative value of the impugned evidence however must be weighed by the court against the public interest sought to be protected.

*Probative Value*

14. The probative value of any evidence is evaluated in light of the issues before the Tribunal. In the present case the Applicant alleges *inter alia* that the conclusion of the Ethics Office was fundamentally flawed because it did not properly assess whether there was a *prima facie* case of retaliation due to her engaging in protected activity; they failed to conduct any and/or any adequate investigation into the case; they failed to deal with her application within the time limit of 45 days or a reasonable period; and failed to safeguard her interests pending the completion of the investigation.

15. All of these allegations relate to the actions of the Ethics Office from the time of the receipt of the Applicant's complaint of retaliation up until the decision of 18 December 2006. All of the documents in annex 2 were made or annotated during this time. Each of them adds to the body of evidence of what steps the Ethic Office was taking up until its decision including when and how the office was addressing the Applicant's claim. They are highly relevant to the issues in the case and are probative of the processes adopted by the Ethics Office in its deliberations.

*Whether the disclosure of the documents would be damaging to public interest*

16. In her decision Boyko J. refers to examples where it may not be in the public interest to disclose such as sensitive military or diplomatic information, or state secrets, which if disclosed could pose a security risk or impair the functioning of the organization. She also refers to legal professional privilege between a lawyer and client. While these categories were plainly not intended to be exhaustive they do give guidance on the degree of public interest that must exist to justify the withholding of otherwise relevant and probative evidence.

17. The Tribunal is satisfied that no such public interest has been made out by the Respondent in this case. None of the documents is legal advice, none of them was made in contemplation of legal proceedings and none of them concerns member states or high level deliberations that might compromise the organization. The application is based on the proposition that privilege should attach to internal working documents in general to enable Ethic officers to effectively perform their work. This is tantamount to a request for a blanket finding that all internal working documents of the Ethics Office should be privileged.

18. There will no doubt be cases where there are good public interest reasons for such a privilege to be recognized but this must be on a case by case basis and must relate to specific documents.

19. Having viewed the documents in question, the Tribunal finds that in the case of the annotations to the emails, there are no legitimate reasons to justify their protection on the grounds of privilege. For the most part the annotations

comprise under-linings with some brief comments or queries. The Respondent has not advised the Tribunal of any organizational or personal security issues that might be compromised by their release.

20. The internal files notes listed in annex 2 have a more limited probative value to the proceedings as are merely summaries of the Applicant's claims made to assist the deliberations. However, they are evidence of the dates on which the representatives of the Ethics Office turned their minds to her claim and, as such, are relevant to the determination of the Applicant's claims. The Respondent has not advised the Tribunal of any organizational or personal security issues that might be compromised by their release.

### *Confidentiality*

21. The principal consideration in deciding whether a document or part of it should be accorded confidentiality is the relevance of the documents and the justice/or fairness to the parties. In *Morin* UNDT/2011/069 Kaman J. listed the factors that the Tribunal should consider in making this type of determination. These include:

- a. whether the confidential material is relevant to facts at issue in the proceedings;
- b. whether legitimate confidentiality reasons are present;
- c. whether measures can be imposed to protect the particular interests at risk;
- d. whether the security interests of the Organization require confidentiality, such as accounting, auditing, inspection or investigation systems or procedures or a similar nature;
- e. whether the public disclosure might compromise the personal safety of any person or persons;
- f. whether exceptional circumstances exist that merit a designation of confidentiality;
- g. whether the interests of justice require disclosure; and
- h. any other considerations the Tribunal deems relevant to its decision.

22. Judge Adams in *Koda* UNDT/2009/024 stated that if the document is one that fairness requires to be produced, confidentiality will only be preserved in "exceptional circumstances".

23. An exceptional circumstance is one that is out of the ordinary, uncommon or unusual. It is one that requires an exception to a general rule and which is necessary in the absence of any alternative to ensure the interests of justice. It is not a circumstance that applies generally.

24. The fact that the files of the Ethics Office are treated by that office as confidential is not an exceptional circumstance to justify the non-production of documents from those files to the Tribunal. It is a circumstance of general application. Nor is the impact that the disclosure may have on the work of the Ethics Office an exceptional circumstance, as this is too inchoate to be regarded as exceptional.

25. If those factors were regarded as exceptional circumstances there would be a serious impact on the ability of the Tribunal to adjudicate cases involving the Ethics Office and other United Nations offices that maintain confidentiality. It would also unduly limit full and fair disclosure of information to the Applicant and would therefore not be in the interests of open justice.

26. The Tribunal is mindful that it is possible that there may be a need for some documents and information to remain out of the public domain. Should that arise, measures may be imposed to protect particular sensitive interests. Disclosure of documents to the Applicant may be accompanied by specific orders to preserve that confidentiality. Similarly, the question of publication of any particular document or other information which either party regards as sensitive may be raised in the course of the hearing. In this way confidentiality may be retained while ensuring adequate access to relevant material to the Applicant and to the Tribunal.

### **Findings**

27. The Tribunal finds that it is in the interest of open justice and fairness for the Applicant to be given access to the documents to assist her in the preparation of her case. The Respondent's motion for privilege and confidentiality is refused.



28. In view of the foregoing, it is **ORDERED** that:
- a. The Respondent's motion is dismissed;
  - b. All documents listed by the Respondent in the Motion of 25 October 2012, annex 2 are to be immediately released to the Applicant by the Registry; and
  - c. The Applicant is to use the documents in annex 2 solely for the purpose of the present proceedings and may not publish the documents or their contents to any person other than to the Tribunal and to any witnesses to whom it is necessary to refer the documents.

*Signed*

Judge Coral Shaw

Dated this 6<sup>th</sup> day of February 2013

Entered in the Register on this 6<sup>th</sup> day of February 2013

*(Signed)*

Legal Officer for :  
Jean-Pelé Fomété, Registrar, Nairobi