

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2016 CHRT 3

**Date:** February 4, 2016

**File No.:** T2034/3514

**Between:**

**Youssef Almalki**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Air Canada**

**Respondent**

**Ruling**

**Member:** David L. Thomas

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## **I. Introduction**

[1] The Complainant is a Canadian citizen and self-identifies as an Arab and a Muslim. He immigrated to Canada from Syria with his family in 1987 when he was 8 years old. He is now a medical doctor specializing in radiology. He is the Chief of Diagnostic Imaging at Bluewater Health Hospital in Sarnia, Ontario. He alleges, under subsection 5(b) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*), that he was treated in an adverse differential manner in the provision of a service offered by the Respondent airline.

[2] In June of 2011, Mr. Almalki was refused boarding on an Air Canada flight from London, Ontario to Toronto. It was the first leg of a two-flight trip to Vancouver with his family. Mr. Almalki claims the experience resulted in pain and suffering, harm to dignity and humiliation for himself and his family. He further alleges that he suffered substantial losses of earnings due to the fact Air Canada subsequently would not allow him to fly on certain flights to New Brunswick where he periodically provided locum services.

[3] Air Canada states it did not discriminate against Mr. Almalki. It contends that Mr. Almalki's name appeared on an American security list and that the United States Transportation Security Administration (the "TSA") directed it not to board Mr. Almalki on the flights in question. According to Air Canada, it had no choice in denying Mr. Almalki the services.

[4] In preparing for the hearing of this case, Mr. Almalki has brought a motion for the disclosure of arguably relevant documents. This motion is the subject of the present ruling.

## **II. Disclosure should ordinarily proceed through direct requests between parties**

[5] As a preliminary matter, the Tribunal would like to draw the parties' attention to the standard practice concerning disclosure. Under Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)* (the "Rules"), parties are required to provide additional disclosure and production of documents where new facts, issues or forms of relief are raised by

another party's Statement of Particulars (SOP) or Reply, or where a party discovers there is a flaw in its previous disclosure.

[6] Parties are expected to first inquire directly with each other for the disclosure of additional documents that do not appear in a party's document list in their SOP. The Tribunal prefers parties to only avail themselves of the motion process when there is a dispute over the disclosure after such a direct request has been made.

[7] In the present motion, the Respondent alleges that, "[a] substantial number, if not all, of the records requested were requested for the first time in the Complainant's motion record." The Respondent claims that since the filing of the Complainant's motion, it has responded to all of the Complainant's requests for disclosure and additional further documentation has been provided.

[8] If this is the case, then the Tribunal is unnecessarily wading into the disclosure process between the parties. Furthermore, the Complainant has not opted to provide a Reply to Air Canada's Responding Submissions, resulting in the Tribunal not being aware of which disclosure requests, if any, are currently still in dispute. It is in the interest of all parties to make disclosure requests directly to each other, and to bring disclosure motions before the Tribunal only when the parties are in disagreement.

### **III. Complainant's Requests for Disclosure**

[9] The Complainant's motion requests disclosure from Air Canada of the following eight items:

1. Any records from the Operation Security Centre ("OSC") in relation to the Complainant's attempt to check in for flights AC7702 and AC1173 on June 18, 2011, including communications between on-site and off-site OSC agents, any reports generated from the automated system that identified the Complainant on the "Specified Persons" list, and records of any communications with the US Transportation Security Administration;
2. All records held by the Respondent regarding the Complainant, including Air Canada's travel history, previous security logs, bookings records, boarding pass records, passenger name records, passenger assessment system records, customer profiles and preferences;

3. Flight charts, plans, over-flight permits, or other information regarding the scheduled and actual routes of flights AC7702 and AC1173 on June 18, 2011, including any internal records and/or communications identifying specific routes as overflying the US (in particular, for flights AC7702 and AC1173);
4. Any internal memoranda or documents with respect to Air Canada's security obligations and procedures which may have been relied upon to reach its decision not to board the Complainant on flights AC7702 and AC1173 on June 18, 2011;
5. All of the Respondent's protocols, procedures, policies and training manuals relating to check-in security clearance procedures which were in use on June 18, 2011 along with any confirmations that the Respondent's employees actually received training on dealing with passengers in relation to security procedures, human rights, and/or cultural sensitivity;
6. Records of all past complaints against the Respondent alleging discrimination based on race, national or ethnic origin, colour and/or religion, relating to the Respondent's application of government imposed security lists, along with information regarding the outcomes of these complaints;
7. Identify and provide further and additional particulars of the specific Canadian and/or US statutes, regulations, agreements, or other rules on which it relied in refusing to board the Complainant on June 18, 2011; and
8. Provide a more detailed summary of anticipated testimony of each potential witness.

[10] In a letter dated August 21, 2015, Air Canada responded to each of the above eight requests. I will address each item below. However, it should be noted that Air Canada advises certain information and/or documentation is security-sensitive and has been withheld because Air Canada is not permitted to disclose it. In the last case management conference call in this matter, held on July 7, 2015, Respondent counsel advised the other parties of these restrictions and suggested that Complainant counsel may wish to invite submissions from the TSA on his requests for disclosure of the security-sensitive information and/or documentation. Complainant counsel undertook to give notice to the TSA by July 14, 2015 and request a reply by August 24, 2015. Unfortunately, Complainant counsel did not send notice to the TSA until August 24, 2015. The TSA was invited to send a reply by October 8, 2015 if they wished to make any submissions. To the Tribunal's knowledge, the TSA did not send any reply before the October 8, 2015 deadline or by the date of this ruling.

#### **IV. Principles of Disclosure**

[11] Pursuant to subsection 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case. To be given this opportunity, parties require, among other things, the disclosure of arguably relevant information in the possession or care of the opposing party prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case it is up against and, therefore, adequately prepare for the hearing. For that reason, if there is a rational connection between a document and the facts, issues or forms of relief identified by the parties in the matter, the document should be disclosed pursuant to subparagraphs 6(1)(d) and 6(1)(e) of the Rules (see *Yaffa v. Air Canada* 2014 CHRT 22; *Guay v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34, at para. 42 [*Guay*]; *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6, at para. 28; and, *Seeley v. Canadian National Railway*, 2013 CHRT 18, at para. 6).

[12] However, the request for disclosure must not be speculative or amount to a "fishing expedition." The documents requested should be identified with reasonable particularity. Moreover, the request should not subject a party or a stranger to the litigation to an onerous and far-ranging search for the documents (see *Guay*, at para. 43).

[13] It should also be noted that the disclosure of arguably relevant documents does not mean that this information will be admitted in evidence at the hearing of the matter or that significant weight will be afforded to it in the decision-making process (see *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28, at para. 4).

#### **V. Tribunal Ruling**

[14] Set forth below are the eight items requested by Mr. Almalki. Below each request is the response of Air Canada from their letter dated August 21, 2015. Below the Air Canada response is the Tribunal's decision in respect of each item. It is appropriate to note that the Complainant was given an opportunity to submit a Reply to Air Canada's submissions. Although the deadline was communicated to the parties, the Complainant

did not submit a Reply to the Tribunal, which has made it difficult to assess Air Canada's objections to disclosure (this will be discussed below).

**1. Any records from the Operation Security Centre ("OSC") in relation to the Complainant's attempt to check in for flights AC7702 and AC1173 on June 18, 2011, including communications between on-site and off-site OSC agents, any reports generated from the automated system that identified the Complainant on the "Specified Persons" list, and records of any communications with the US Transportation Security Administration;**

**Air Canada's Response:**

Air Canada is prohibited from disclosing the requested records as it would fall squarely under the definition of security sensitive information under the aforementioned **[see below]** statutes[sic]. As such, the disclosure of said information would pose a threat to national security and would result in Air Canada being penalized by government agencies, including the TSA. It is our understanding that counsel for the Complainant has undertaken to serve the TSA with his motion materials; however, in spite of numerous requests, we have not been copied with any correspondence directed to the TSA.

[15] In motion submissions in response to the request, Respondent counsel has cited the *Canadian Aviation Security Regulations, 2012*, SOR/2011-318 ("CASR") as prohibiting Air Canada from complying with this disclosure request. Section 235.1 of the CASR reads:

A person other than the Minister must not disclose security-sensitive information that is created or used under this Division unless the disclosure is required by law or is necessary to comply or facilitate compliance with the aviation security provisions of the Act, regulatory requirements or the requirements of an emergency direction.

[16] Respondent counsel also claims that certain American regulations also restrict their disclosure of the information requested. Specifically, Air Canada cites *49 Code of Federal Regulations*, §§1520.5 to 1520.7, which concern the Protection of Sensitive Security Information, the scope of the regulation and the parties covered. In this last regard, the Respondent submits that a foreign air carrier is a person subject to part 1520.



**Tribunal Decision:**

[17] In accordance with the principles of disclosure, I find the materials requested to be of arguable relevance.

[18] It is unfortunate that Complainant counsel did not reply to the objections, as it is not entirely clear that the objections are valid. Firstly, in regard to the Canadian regulations cited, the *CASR* appear to expressly permit disclosure in cases where it is “required by law” which would include, presumably, an order by this Tribunal. With regard to the American law cited, it is not clear to the Tribunal which provision in §1520.5 or §1520.7 actually restricts the disclosure of sensitive security information. Is the CHRT bound by foreign law to the extent that it cannot issue an order for the disclosure of such information? The Tribunal would have entertained submissions on these points as they are likely to be raised again in the course of this inquiry.

[19] In the absence of reply submissions and any argument to the contrary, the Tribunal makes no order to Air Canada concerning the disclosure of the items sought.

**2. All records held by the Respondent regarding the Complainant, including Air Canada’s travel history, previous security logs, bookings records, boarding pass records, passenger name records, passenger assessment system records, customer profiles and preferences;**

**Air Canada’s Response:**

The Complainant’s Passenger Name Record is attached as TAB 1 and was included in the [sic]Air Canada’s Statement of Particulars. We are in the process of ascertaining whether any further non-security sensitive documentation exists that would include additional information that has not been disclosed thus far and will produce any such relevant documentation, if located.

**Tribunal Decision:**

[20] The Tribunal makes no order concerning this item as the Respondent has made certain disclosure and undertakes to give further disclosure if additional relevant

documentation is located. In addition, the Complainant has not filed a Reply disputing the adequacy of this response.

**3. Flight charts, plans, over-flight permits, or other information regarding the scheduled and actual routes of flights AC7702 and AC1173 on June 18, 2011, including any internal records and/or communications identifying specific routes as overflying the US (in particular, for flights AC7702 and AC1173);**

**Air Canada's Response:**

As the subject flights took place over four years ago, we are in the process of ascertaining whether any non-security sensitive, arguably relevant documentation exists with respect to the flight routes of the specific flights and will produce any such documentation, if located. Air Canada is prohibited from disclosing any security sensitive records, due to the aforementioned *statues* [sic]. The disclosure of any security sensitive documentation should be sought from the relevant government authority.

**Tribunal Decision:**

[21] Air Canada has advised in its SOP that both flights in question were “considered to overfly the United States and are (were) therefore subject to United States Regulations.”

[22] The Tribunal finds the information requested to be arguably relevant. The Tribunal therefore orders Air Canada to disclose the information requested which indicates whether the air routes of these flights actually entailed the aircraft entering United States airspace, or alternatively, to disclose any documentation that may indicate why the flights may have been deemed to be within U.S. jurisdiction, unless such disclosure is prohibited by the aforementioned legislative authorities. If such disclosure is prohibited, the Respondent will indicate specifically which provisions of the aforementioned regulations actually prohibit the disclosure of documents.

**4. Any internal memoranda or documents with respect to Air Canada's security obligations and procedures which may have been relied upon to reach its decision not to board the Complainant on flights AC7702 and AC1173 on June 18, 2011;**

**Air Canada's Response:**

The requested records cannot be disclosed due to their security sensitive nature, pursuant to the aforementioned statutes [*sic*]. The disclosure of said information would endanger the public and would result in Air Canada being penalized by government agencies, including the TSA.

**Tribunal Decision:**

[23] By the above response, it appears that such documents may exist and I would find them to be arguably relevant. It is unfortunate that the Respondent did not specify under which legislative provisions it would be subjected to government penalties. Furthermore, it is noted that Parliament gave the Tribunal the power under s. 52 of the *Act* to take confidentiality measures vis-à-vis "public security", or endangerment to "life, liberty or security of a person." Therefore, the Tribunal would be interested to know why there could not be compliance with this request in light of s. 52. However, having received no reply argument from Complainant counsel, the Tribunal makes no order concerning this request at this time.

**5. All of the Respondent's protocols, procedures, policies and training manuals relating to check-in security clearance procedures which were in use on June 18, 2011 along with any confirmations that the Respondent's employees actually received training on dealing with passengers in relation to security procedures, human rights, and/or cultural sensitivity;**

**Air Canada's Response:**

Deemed High Profile (DHP) training is provided as part of an initial training course. Furthermore, it is required that DHP training be renewed every two years. DHP training is currently included in three modules, entitled Security in Your Workplace, which is part of an initial course that is mandatory for all new employees. It is also included in two other courses, entitled Security a Way of Life and Security and Operational Awareness. These courses do not

pertain solely to DHP training. Nevertheless, we enclose the course materials of said modules that deal specifically with the topic at TAB 2. Note that sections have been redacted as they contain confidential and security sensitive information.

In addition to the aforementioned modules/courses, Air Canada employees also have access to documentation that discusses the DHP list, including the document entitled Security Clearances for Deemed High Profile (DHP) Edits, found at TAB 2.

Air Canada also offers training courses that deal with general topics such as harassment. These courses address human rights as well as themes such as respect, which would be integral to cultural sensitivity. At TAB 3, we enclose excerpts from a course on the subject of employee relations and harassment that provide an example of such materials.

### **Tribunal Decision:**

[24] Given the significant disclosure made in response to this request, and having received no reply submissions from the Complainant from which to determine the satisfactoriness of the Respondent's disclosure, the Tribunal makes no order concerning this item.

### **6. Records of all past complaints against the Respondent alleging discrimination based on race, national or ethnic origin, colour and/or security lists, along with information regarding the outcomes of these complaints;**

#### **Air Canada's Response:**

Air Canada received complaints in the recent past pertaining to discrimination based on race, national or ethnic origin, colour and security lists as follows:

- In 2008, there were a total of 12 complaints made that appear to allege discrimination based on nationality only and 1 based on ethnic origin.
- In 2009, there were a total of 4 complaints made, two of which appear to allege discrimination based on nationality and two of which pertain to race.
- In 2010, there were 1 complaint made that appears to allege discrimination based on race and 2 based on ethnic origin.

- In 2011, there were 7 complaints made that appear to allege discrimination based on ethnic origin.
- In 2012, there were 6 complaints made that appear to allege discrimination based on ethnic origin.
- In 2013, there were 2 complaints made that appear to allege discrimination based on ethnic origin.
- In 2014, there was 1 complaint made that appears to allege discrimination based on ethnic origin.

In summary, from the period of 2008 onwards, Air Canada has identified a total of 35 complaints, 18 of which pertain to ethnic origin, 14 of which pertain to nationality and 3 of which pertain to race. With respect to the 35 claims, 30 were resolved by way of a letter sent to the complainant explaining the security requirements and 1 was resolved on a confidential basis following a complaint to the Canadian Human Rights Commission. To date, 4 remain unresolved.

Records with respect to the same would contain private and confidential information pertaining to uninvolved third parties, which cannot be severed from the records and thus, cannot be disclosed, pursuant to s. 9(1) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

### **Tribunal Decision:**

[25] Given the significant disclosure made in response to this request, and having received no reply submissions from the Complainant from which to determine the satisfactoriness of the Respondent's disclosure, the Tribunal makes no order concerning this item. However, the Tribunal notes that subsection 7(3)(c) of the *Personal Information Protection and Electronic Documents Act (supra)* permits disclosure without knowledge or consent of the individuals concerned where the disclosure is "...required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;" (see *Thambiah v. Maritime Employers Association*, 2009 CHRT 30, at para. 4).

**7. Identify and provide further and additional particulars of the specific Canadian and/or US statutes, regulations, agreements, or other rules on which it relied in refusing to board the Complainant on June 18, 2011;**

**Air Canada's Response:**

The relevant statutes and regulations have been identified in Air Canada's Statement of Particulars. The documentation from the TSA, which was relied upon by Air Canada is expressly categorized as security sensitive by s. 1520.7(b) of 49 *Code of Federal Regulations* and thus, cannot be disclosed by Air Canada in the absence of the TSA's consent. Furthermore, said documentation includes particulars of confidential security procedures, the disclosure of which would pose a threat to national aviation security.

**Tribunal Decision:**

[26] Having received no reply submissions from the Complainant from which to determine the satisfactoriness of the Respondent's disclosure, the Tribunal makes no order concerning this item.

**8. Provide a more detailed summary of anticipated testimony of each potential witness;**

**Air Canada's Response:**

The witness(es) called by Air Canada have yet to be determined; however, the anticipated testimony will be primarily focused on the main issue of whether or not Air Canada discriminated against the Complainant based on a prohibited ground in its application of security procedures. It will be Air Canada's evidence that the security procedures in the within matter were applied equally and without exception to every single passenger on the subject flight and thus, Air Canada did not discriminate based on a prohibited ground.

**Tribunal Decision:**

[27] Having received no reply submissions from the Complainant to determine the satisfactoriness of the Respondent's disclosure, the Tribunal makes no order concerning this item. However, it is presumed and directed that when individual witnesses are

identified, timely disclosure will be made to the other parties in accordance with Rules 6(1)(f) and 6(5).

*Signed by*

**David L. Thomas**  
Tribunal Chairperson

Ottawa, Ontario  
February 4, 2016