

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Mohamed Yaffa

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

File No.: T1863/9312

Member: David Thomas

Date: August 8, 2014

Citation: 2014 CHRT 22

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I. Complaint & Motions for Disclosure

[1] The Complainant is a Muslim Canadian of African descent and describes himself as having brown skin colour. Pursuant to section 5(b) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*), he alleges he was treated in an adverse differential manner in the provision of a service offered by the Respondent. In summary, he claims the Respondent air carrier subjected him to enhanced security screening, because of his race, national or ethnic origin, colour and religion, on six different occasions from March to June 2010. The Respondent maintains it has not discriminated against the Complainant and that it was simply following American as well as Canadian aviation security requirements, including each country's "No-Fly Lists", in its interactions with the Complainant.

[2] In preparing for the hearing of this case, each party brought a motion for the disclosure of information. These motions are the subject of the present ruling.

II. Principles of Disclosure

[3] Pursuant to section 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 information 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, it should be disclosed pursuant to paragraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (see *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).

[4] However, the request for disclosure must not be speculative or amount to a "fishing expedition". The documents requested should be identified with reasonable particularity. That is,

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).

[5] It should also be noted that the disclosure of arguably relevant information 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).

III. Respondent's Motion for Disclosure

[6] The Respondent seeks the disclosure of the Complainant's medical records and human resources file, along with his income tax returns and notices of assessment. From the Commission, it also seeks the disclosure of information pertaining to the Complainant's complaint against the Canadian Air Transport Security Authority (CATSA).

A. Medical records

[7] The Respondent's request for medical records is as follows:

- a) that the Complainant produce a list of the health care professionals, including physicians, psychologists, social workers or counsellors he has attended for reason of symptoms or treatment for anxiety, depression, insomnia or any other health conditions, from January 2006 to date; and,
- b) that the Complainant produce to the parties any medical documentation in his possession from the following individuals/organizations and that the Complainant provide an authorization that the Respondent may obtain the complete files from the following individuals/organizations from January 2006 to date regarding treatments received by the Complainant or obtain such documentation himself:
 - (i) North End Community Health Centre;
 - (ii) Mr. Glen Campbell;
 - (iii) Mr. Gerald Hann;
 - (iv) Ms. Rose; and,
 - (v) Dr. Woods.

[8] The Respondent states that as a result of the alleged discriminatory practice, the Complainant claims to have suffered damages, including personal injuries such as depression, anxiety, insomnia and diminished self-esteem, for which he seeks compensation for pain and suffering. Therefore, according to the Respondent, the Complainant has directly called into issue his medical history prior to and subsequent to the alleged incidents. As such, the Respondent submits that the medical documentation requested is necessary in order for it to appropriately defend against the allegations raised by the Complainant.

[9] Also, the Respondent states it has made repeated requests to the Complainant regarding his medical records; however, the Complainant has provided limited medical documentation thus far, which mainly comprise of reporting letters wherein it appears medical professionals have been specifically asked to comment only on issues requested by the Complainant. According to the Respondent, none of the records produced include consultation notes, clinical notes and records, or a summary of the examinations conducted in light of the Complainant's alleged injuries.

[10] The Complainant believes the request for his medical information is too broad, goes beyond the scope of the case and infringes on his privacy. He claims to have already submitted documents that are linked directly to how his allegations have affected him. The Complainant contends he did not create those documents, but rather they are testimonies of medical and health practitioners.

[11] The Commission echoes the Complainant's submissions. According to the Commission, the Complainant does not allege that the actions in question exacerbated an existing condition that predated the alleged incidents; but that the alleged actions caused him distress, anxiety, stress, lack of sleep and chronic apprehension at the airport. Accordingly, the Commission states the Complainant's entire medical file dating back to 2006, as well as the files of the 6 (six) named individuals, far exceed what is relevant to the facts and issues in this case. In the Commission's view, should the Tribunal grant the Respondent's request for medical records, it

should be limited to the pain and suffering alleged and should not pre-date the period of time at issue.

[12] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to his or her medical records (see *Beaudry v. Canada (Attorney General)*, 2002 CanLII 61851 (CHRT), at para. 7 [*Beaudry*]; *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 38296 (CHRT), at para. 3 [*McAvinn*]). However, that right to privacy and confidentiality may cease when that person puts his or her health in issue (see *McAvinn*, at para. 4; *Guay*, at para. 45; *Communications, Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*, 2005 CHRT 9, at paras. 9-11; see also *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 SCR 647; and *M. (A.) v. Ryan*, [1997] 1 SCR 157 [*M. (A.)*]). That said, “the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure” (*M. (A.)*, at para. 33). In cases where the Tribunal has ordered the disclosure of medical records, it has usually put conditions on the disclosure to protect the privacy and confidentiality of the information, such as restricting who may see and copy them (see for example *Guay*, at para. 48; *McAvinn*, at paras. 19-20; *Beaudry*, at paras. 7 and 9; *Palm v. International Longshore and Warehouse Union, Local 500 et al.*, 2012 CHRT 11, at para. 19; and *Rai v. Royal Canadian Mounted Police*, 2013 CHRT 6, at para. 37).

[13] The Complainant has put his health in issue by stating that he sought treatment for depression, anxiety, insomnia and diminished self-esteem as a result of the alleged discrimination. In this regard, he also claims damages for pain and suffering. As a result, I am of the view that the Complainant’s medical records related to treatment for depression, anxiety, insomnia or diminished self-esteem are arguably relevant to this complaint to allow the Respondent to properly respond to the allegations regarding the effects of the alleged discrimination on the Complainant. This also necessitates the Complainant disclosing a list of the health care professionals, including physicians, psychologists, social workers or counsellors he has attended for treatment of depression, anxiety, insomnia or diminished self-esteem.

[14] The Respondent requests medical records going back to 2006. There is no indication why this specific time period was requested. However, it is reasonable for the Respondent to be able to assess whether any of the symptoms experienced by the Complainant in 2010 and thereafter had any connection to a pre-existing medical condition or to a prior traumatic experience. The period beginning in 2006, however, may be too far-reaching. Therefore, the above mentioned medical records should be disclosed from the period beginning January 2008 to present.

[15] In order to protect the Complainant's right to the confidentiality of his medical records, the documents shall be disclosed to counsel for the Respondent and Commission only, and shall not be disclosed to any other individuals without prior permission from the Tribunal and notification to the Complainant. The documents may not be used for any purpose outside of the present inquiry. If the Complainant is of the view that any of these records are personal and not arguably relevant, I will give him the option of sharing such records with me in advance and I will determine whether or not they should be disclosed. If the Complainant avails himself of this opportunity, notice of my review of such records will be given to the other parties.

B. Human resources file

[16] For the human resources file, the Respondent requests:

- (a) that the Complainant produce to the parties or provide an authorization to obtain the complete human resources file from his employer.

[17] The Respondent's request for the Complainant's human resources file is based on the following statements found in the complaint form and the Complainant's Statement of Particulars:

I have been affected in my work and among my colleagues as I am often anxious about perceptions and stigma.

I have used my vacation days from my work to pursue healing. I have taken more than average sick days at my work since this ordeal started...

[18] The Respondent argues that it can only ascertain the veracity of these allegations if it is afforded the opportunity to review the Complainant's human resources file. It would then be able to compare the vacation dates to the dates on which the Complainant sought treatment and explore whether the Complainant has truly been affected at work.

[19] The Complainant contends he is willing to ask his Director for a comparison of his sick leave to a general statistical representation of the sick leave of other people with similar jobs in his department, from March 2010. He also suggests that, should the complaint go to hearing, his Director could also be called as a witness.

[20] The Commission submits that the disclosure of the Complainant's entire human resources file far exceeds what is relevant to the facts and issues in this case. According to the Commission, the employment issues associated with the Complainant's claim for the pain and suffering relate to his attendance being adversely impacted. He does not allege that the actions in question exacerbated pre-existing problems at work or that his work performance has suffered. Therefore, in the Commission's view, the most the Respondent is entitled to are those employment records since the alleged incidents at issue. For comparative purposes, the Commission also adds that the Respondent may also be entitled to some records for the immediate period predating March 2010 when the first alleged incident occurred. However, the Commission submits that any disclosure of employment records should be limited to attendance, as this is the only area the Complainant claims his employment was impacted as a result of the alleged discrimination.

[21] I am of the view that the Complainant's human resources file is arguably relevant to his claim of having been affected at work by the alleged discrimination. The Respondent requests the Complainant's complete human resources file. While the Complainant is not specific about how his work has been affected, he does allege that it has. Therefore, I think it is reasonable for the Complainant to disclose his entire human resources file in order for the Respondent to be

able to assess a reasonable period before and after the alleged discriminatory behaviour. The human resources file should be complete and should provide all information for the period of January 2007 to December 2013. It should also include an account of the Complainant's sick leave for the same period as it is arguably relevant for comparative purposes. Furthermore, given the Complainant's claim that he used vacation days to pursue healing, I believe it is arguably relevant for the Complainant to disclose the dates on which he has taken vacation since March 2010, that being the period of the first alleged incident.

C. Income tax returns & notices of assessment

[22] As a result of the alleged discrimination, the Complainant states:

I have cancelled and or missed many opportunities to travel to places for my own benefit and that of my family and therefore suffered serious losses to my well being and those of my family.

[23] According to the Respondent, the Complainant has not provided particulars regarding what he deems to be missed opportunities or how said opportunities would have been to his or his family's benefit. Nor has the Complainant indicated whether these missed opportunities have resulted in a financial loss. Therefore, the Respondent seeks:

- (a) that the Complainant produce to the parties his income tax returns and notices of assessment from 2006 to date;

[24] The Respondent requests the production of these documents in order to ascertain whether the Complainant has suffered any losses of a financial nature as a result of the alleged incidents.

[25] Both the Complainant and the Commission submit that the income tax records are irrelevant to the issues in this case. The Commission points out that the Complainant's requested remedial compensation is limited to pain and suffering and wilful and reckless discrimination; there is no request for compensation for lost wages, nor does the Complainant allege that he lost

income as a result of the alleged discrimination. Therefore, according to the Commission, the Respondent's request for income tax returns and notices of assessment should be denied.

[26] I do not see the arguable relevance of the Complainant's income tax returns and notices of assessment as this claim does not include a claim for lost wages or income as a result of the alleged discriminatory behaviour. If it did include such claims, then I believe the income tax records would be arguably relevant. As the claim presently does not include such claims, the Respondent's request for the Complainant's income tax returns and notices of assessment is denied.

D. Complaint against CATSA

[27] The Respondent claims the disclosure it has received so far included numerous documents that made reference to another complaint made by the Complainant against CATSA. In the documentation it has received, the Respondent says the Complainant has confirmed that the allegations against CATSA occurred between or during the check-in and security processes prior to boarding an aircraft on at least two of the same dates as the incidents alleged in the present complaint. Furthermore, the Respondent contends the disclosure package included a memorandum to file indicating that CATSA had provided particulars or documentation implicating the Respondent in the alleged incidents. In the Respondent's view, the allegations in both complaints are inextricably linked as they occurred contemporaneously and a significant part of the present complaint is related to secondary screening conducted by CATSA.

[28] Therefore, the Respondent submits the information contained in the CATSA file would not only shed light on the factual circumstances giving rise to the present complaint, but it would also give the Respondent the opportunity to review and address all implications made against it. The Respondent adds that, given the circumstances of both complaints are similar, it would also like to ascertain whether the Complainant seeks to recover damages from both CATSA and the Respondent for the same alleged injuries. If that is the case, the Respondent submits it cannot be found liable for any damages for which CATSA may be or has already been found liable.

[29] As a result, the Respondent requests the following documents from the Commission:

- (a) that the Commission produce the complete file pertaining to the Complainant's complaint against the Canadian Air Transport Security Authority ("CATSA") for the same travel dates that are the object of this present complaint; or,
- (b) in the alternative, that the Commission provide particulars of the allegations made against CATSA by the Complainant for the same travel dates that are the object of this present complaint and the status of the complaint against CATSA.

[30] The Respondent asserts it has requested the consent of both the Complainant and CATSA with respect to the production of the CATSA file. According to the Respondent, CATSA has advised that it will consent to the disclosure provided it is given the opportunity to review the documentation to ascertain whether it includes any security-sensitive information and possibly propose measures to protect such information.

[31] The Commission submits that its file in the complaint against CATSA is not relevant to the present complaint. According to the Commission, the allegations in the present complaint are entirely against the Respondent's agents. While the Complainant does make several references to CATSA in his materials, the Commission says they are almost entirely with respect to allegations that the Respondent flagged him for secondary screening by CATSA. Moreover, the Commission argues the remedies sought by the Complainant are entirely against and with respect to the actions of the Respondent. The Commission also notes that the complaints against CATSA and the Respondent were treated as separate files, were investigated separately, and that the complaint against CATSA was ultimately dismissed.

[32] The Commission adds that if the Respondent obtains the consent of CATSA and the Complainant to release the file information, the information will be provided.

[33] While the Commission objects to the disclosure of the CATSA complaint materials on the basis of relevance, it is still prepared to provide the information under the consent of CATSA

and the Complainant. CATSA has consented. Therefore, the only barrier to the disclosure of this information is the Complainant. In his response to the Respondent's motion, the Complainant did not indicate why he objects to the disclosure of this information. In any event, I am satisfied that it is arguably relevant.

[34] The security procedures from airport check-in, conducted by the Respondent, to security screening, performed by CATSA, are sequential and there appear to be linkages to the separate procedures. Considering the Respondent's position in response to this complaint, that it was simply following Canadian and American security regulations in its alleged treatment of the Complainant, I believe it would be arguably relevant to understand CATSA's viewpoint on the circumstances of this case, including how it perceives the Respondent's role in the alleged treatment of the Complainant. Given the Respondent's claim that the allegations in both complaints appear to be similar, I also think the information contained in the CATSA file may be arguably relevant to better understanding the factual circumstances giving rise to the present complaint. Furthermore, as there is suggestion that CATSA has implicated some wrongdoing on the part of the Respondent, it is only fair that the Respondent also be aware of such implications. Therefore, I am of the view that the Commission's file information on the Complainant's complaint against CATSA should be disclosed.

IV. Complainant's Motion for Disclosure

[35] The Complainant requests four types of documents from the Respondent. Two of the requests can be categorized as information regarding training provided to the Respondent's employees. The Complainant also seeks documents showing the Respondent's stance on human rights and information on any complaints made against the Respondent that are similar to the present one.

A. Information regarding training provided to the Respondent's employees

[36] The full wording of the Complainant's requests under this heading are as follows:

1. All relevant resources for the development of organization capacity in Diversity and Cultural Competence, including, but not limited to, strategies, training curricula, policies, position statements on Diversity Inclusion and Cultural Competence and any reviews.

2. All records of training on Cultural Sensitivity, Cultural Competence, attended by the staff and individuals who dealt with me at the airport and the contents of such curriculum.

[37] Similarly, the Commission's motion for disclosure also requests the following:

d. Information regarding the training provided to the Respondent's employees on how to deal with handling complaints from passengers subject to enhanced questioning and/or enhanced security screening or barred from flying due to alleged security concerns.

e. Information regarding the training provided to Air Canada employees on human rights and/or sensitivity training provided by Air Canada to its employees who deal directly or indirectly with security screening of passengers.

[38] According to the Complainant, an organization's position and approach to cultural sensitivity has direct implications on the attitudes and behaviour of its staff. The Complainant speaks of an atmosphere of fear of Muslims following the tragic events of September 11, 2001, and, therefore, the Complainant believes it is important to know what the Respondent has been doing to ensure its employees are culturally sensitive. If cultural sensitivity training is indeed provided to the Respondent's employees, the Complainant would also like to know whether the staff involved in the alleged incidents in this case took the training and when.

[39] For its part, the Commission asks that the Respondent provide all the requested training materials or confirm in writing that no such materials exist. In the Commission's view, this

information is arguably relevant because the allegations, in part, go directly to the Complainant's interactions with the Respondent's staff applying additional security measures or answering questions by the Complainant concerning such measures.

[40] Furthermore, the Commission views the complaint as one raising a number of indicators that systemic matters are likely at issue. First, the Commission asserts the Respondent argues that it was simply applying American as well as Canadian regulatory and statutory requirements in its treatment of the Complainant. Therefore, according to the Commission, the Respondent was operating pursuant to a policy or practice, which it applied to the Complainant, and which likely has systemic implications. In the Commission's view, this is reinforced by: the repetitive nature of the Complainant being subjected to additional security screening; the fact that, during the same period of time at issue, the Complainant traveled with another air carrier, yet was not subjected to any additional security measures; and the fact that the Respondent has been the subject of complaints by other individuals raising the same allegations as the present complaint. The Commission argues that systemic issues are likely at issue in this complaint and therefore reasons that having knowledge of the training provided to the Respondent's employees will assist the Tribunal in determining whether inferences of discrimination may be drawn with respect to the conduct of these employees or agents and in deciding what public interest remedies are appropriate if the complaint is substantiated.

[41] In terms of human rights and/or cultural sensitivity training, the Respondent argues that neither the Complainant, nor the Commission, have proffered any proof so as to establish differential treatment on the basis of race or religion. As such, the Respondent contends the relevance of the requested training materials on "cultural sensitivity and cultural competence" have no bearing on the primary issue of whether the Complainant was subjected to differential treatment or whether his experiences were the result of standard protocol. Therefore, in the Respondent's view, the requested documentation would be irrelevant until a rational connection is established so as to warrant disclosure.

[42] With regard to other training materials, the Respondent maintains that it does not conduct security screening of passengers. Rather, it is required to screen each passenger based on procedures set forth by the Canadian and United States governments. The Respondent describes this procedure as follows:

When a passenger's name is a close match to any name on the U.S. or Canadian No-Fly List or Selectee List, an automatic prompt will appear on the agent's screen stating that the passenger is "Deemed High Profile" ("DHP"). The agent is then required to contact a division within the Respondent's Corporate Security Department called the Operation Security Centre ("OSC"). The OSC agent would then request additional information pertaining to the passenger, which will often lead to an airport agent asking questions to said passenger for identification purposes. The OSC may require confirmation from the government authority responsible for the relevant list, following which, the OSC will dictate whether a boarding pass will be issued without limitation, whether it will be issued with a secondary screening requirement or whether it will not be issued at all. The airport agent and the air carrier would not be privy to discussions between the OSC and government agencies. Furthermore, it would not partake in any decision or the carrying out of any additional security measures that may be necessitated.

[43] In this regard, the Respondent maintains that it has already provided all arguably relevant information, including a document entitled "Security Clearance for Deemed High Profile Edits – Policy and Conditions" and its Corporation Policy and Guidelines on Business Conduct.

[44] The request for training materials by the Complainant and Commission are similar and can be dealt with together. The Respondent argues that neither the Complainant, nor the Commission, have proffered any proof so as to establish differential treatment on the basis of race or religion. Therefore, in the Respondent's view, any training materials on human rights or cultural sensitivity are irrelevant. However, at the disclosure stage, it is not necessary for the Complainant or the Commission to prove or substantiate their allegations in order to be entitled to disclosure from the Respondent. The only requirement for disclosure, as discussed above, is that the information be arguably relevant.

[45] In this regard, I believe the training materials requested by the Complainant and Commission are arguably relevant because some of the Complainant's allegations deal with the

actions and statements of the Respondent's employees. Plus, this information is arguably relevant to the allegations of systemic discrimination outlined by the Commission and, if the complaint is substantiated, the remedy thereof.

[46] While the Respondent claims to have already disclosed arguably relevant information in this regard, it is unclear from its response whether or not its employees actually receive training on dealing with passengers in relation to security procedures and/or training on human rights and/or cultural sensitivity. The Respondent's answers to the requests did not specifically indicate whether or not such training exists. Accordingly, one might assume from the Respondent's answers that no such training is provided to the Respondent's employees in question. However, I think it would be more appropriate if the Respondent were to confirm if the training exists or not, and if it does provide such training, to disclose the arguably relevant information to the other parties.

[47] Therefore, to satisfy the requests of both the Complainant and Commission, I would direct the Respondent to: (1) confirm whether or not it provides training to its front-line airport employees, such as the ones who dealt with the Complainant, on how to deal with handling complaints from passengers subject to enhanced questioning and/or enhanced security screening or barred from flying due to alleged security concerns; and, if it does provide such training, to disclose those training materials; and, (2) confirm whether or not it provides training to its front-line airport employees, such as the ones who dealt with the Complainant, on human rights and/or cultural sensitivity; and, if it does provide such training, to disclose those training materials.

B. Documents showing the Respondent's stance on human rights

[48] The Complainant requests:

All documents, electronic or otherwise, showing the respondent's stance on Human Rights or "serious" expression of concern about Human Rights violations, during the negotiations, communications or meetings between the respondent and authorities concerned with security, here and abroad, that led to the introduction

of the so-called security measures, which are cited as premise for the way I was and others were treated.

[49] The Complainant's rationale for this request is as follows:

Air Canada is responsible for ensuring that its negotiations to undertake any operations do not include direct or indirect violations of Canadian laws. In the course of this case, the respondent has consistently made its case for responsibility for security and its so-called measures. What we have not heard much about is the balancing act of responsibility for Human Rights in that process or the efforts that were made by Air Canada to preserve Human Rights. It is essential to know at which stage, if at all, did Air Canada show serious concerns and took clear stance for Human Rights during the above process. Are there documents, public statements etc., to prove this? If so, what parts of such documents can be shared. What concerns, if any, would there be for not sharing all or part of such document?

[50] The Respondent contends the Complainant's request is unclear and that it has received limited information to aid it in deciphering exactly what is being requested. As such, the Respondent argues it has not been given the opportunity to appropriately consider the Complainant's request and ascertain its position with respect to whether or not the requested documentation would be arguably relevant to the issues in this case.

[51] I am also unclear as to what the Complainant is requesting here. As such, I must deny the request at this time. However, the Complainant is free to clarify his request and resubmit it to the Respondent or by way of Notice of Motion. The Respondent would then be given the opportunity to consider the request and provide submissions if need be.

C. Information on similar complaints made against the Respondent

[52] More specifically, the Complainant requests:

All complaints made against the respondent for alleged discrimination on the basis of Islam/Muslim and also other religions, ethnicity, race or other protected characteristics, from September 11, 2001 to 2013, inclusive, and a similar period in length before September 11, 2001.

[53] The Commission's motion also contains a similar request for the disclosure of complaints:

Information re complaints by passengers regarding matters related to Air Canada's application of government imposed security lists such as references to enhanced questioning or security screening and passengers barred from flying due to alleged security concerns as well as information concerning any and all systemic resolutions and outcomes for any such complaint.

[54] The Complainant submits that a serious question raised by his complaint is whether the alleged treatment he received was an isolated incident or a pattern of systemic discrimination. Therefore, in his view, information regarding other complaints similar to his own would be arguably relevant to establishing whether this pattern of systemic discrimination indeed exists.

[55] For the Commission, as mentioned above at paragraph 40, it views this complaint as one raising a number of indicators that systemic matters are very likely at issue in this complaint. If systemic issues do exist, the Commission submits that the disclosure of past complaints that raise the same or similar allegations as the present case would assist in better understanding the extent of the problem: that is, whether the Respondent's policies and practices have a disproportionate adverse impact on persons identified by the prohibited grounds cited in the complaint. Also, should the complaint be substantiated, the Commission says this type of information will be important to the Tribunal in crafting a remedy, as it will need to consider the system as a whole.

[56] To respect the privacy of the parties who made the complaints, neither the Complainant, nor the Commission, seek to know their names or their personal information.

[57] Again, the Respondent argues that no evidence has been provided to suggest the Respondent's involvement in security screening or its prejudicial treatment of the Complainant was on the basis of race and religion. According to the Respondent, until the Commission or the Complainant substantiates the material facts with respect to the Respondent's involvement in this regard, their motions for disclosure of similar complaints are premature. Absent any such valid

basis, the Respondent believes the disclosure request would be equivalent to a “fishing expedition”, which does not warrant disclosure.

[58] Even if the similar complaints were relevant to the issues at hand, the Respondent argues the Complainant’s request is overly broad insofar as he requests documentation covering over a decade in time and provides no additional information with respect to the context of the similar complaints made. Furthermore, the Respondent claims it is not permitted to disclose the information as it would contain private and confidential information pertaining to uninvolved third parties, which cannot be severed from the records.

[59] Again, at the disclosure stage, it is not necessary for the Complainant or Commission to prove or substantiate their allegations in order to be entitled to receive disclosure from the Respondent. The only requirement is that the information be arguably relevant.

[60] I agree that past complaints against the Respondent that raise the same or similar allegations as the present case, including their outcomes, are arguably relevant to the issue of systemic discrimination. However, I am concerned that the request as it is presently worded, in terms of time and specificity, is overly broad. In my view, to be arguably relevant to this complaint, the past complaints must have alleged discrimination, on one or more of the same grounds as the Complainant (race, national or ethnic origin, colour and/or religion), and must have emanated from the Respondent’s application of government-imposed security lists.

[61] In terms of time period, I note the following from the Respondent’s Statement of Particulars:

48. In 2007 Canada and the United States entered into a bilateral treaty to address, among other things, aviation security. [...] Article 14 of the treaty specifically addressed aviation security issues, including sub-articles 3 and 4:

[...]

4) **Each Party agrees that its operators of aircraft may be required to observe the aviation security provisions required by the other Party for entrance into, departure from, or while within, the territory of that other Party.** Each Party shall ensure that effective measures are taken within its territory to protect aircraft, to inspect passengers and their carry-on items, and to carry out appropriate checks on crew, cargo (including baggage) and aircraft stores prior to and during boarding or loading. Each Party shall also act favourably upon any request from the other Party for reasonable special security measures to meet a particular threat. [Emphasis added]

[62] With regard to Canada's own "No-Fly List", the Respondent's Statement of Particulars indicates:

6. The Government of Canada has established a list of persons of interest under the Passenger Protect Program (the "Canadian List"). The Passenger Protect Program identifies individuals who may pose a threat to aviation security and disrupts their ability to cause harm by taking action, such as preventing them from boarding an aircraft.

[...]

50. Implementation of the Canadian List has been effected through the *Aeronautics Act* and the *Identity Screening Regulations*. Section 3(1) of the *Identity Screening Regulations* requires:

An air carrier shall, before issuing a boarding pass to any person who appears to be 18 years of age or older, screen the person by comparing his or her name with the names of persons specified to the air carrier by the Minister under paragraph 4.81(1)(b) of the Act.

[63] The *Identify Screening Regulations* were registered on April 26, 2007 (*Identity Screening Regulations*, SOR/2007-82, available on the Department of Justice's website at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2007-82/page-1.html>).

[64] Therefore, given that the Respondent's obligation to apply the government-imposed security lists seems to have commenced in 2007, I believe this is a reasonable time limitation for disclosing similar complaints.

[65] As a result, I would direct the Respondent to disclose past passenger complaints made against it, from March 2007 to present, alleging discrimination based on race, national or ethnic origin, colour and/or religion, and emanating from the Respondent's application of government-imposed security lists. If the Respondent has information regarding the outcome of those complaints, that information would be arguably relevant as well. To protect the identity and personal information of the parties involved in those complaints, the Respondent should redact any personal information from the disclosed materials.

V. Commission's Motion for Disclosure

[66] Apart from the requests which have already been analyzed above, the Commission's motion for disclosure also requests information requiring the Respondent to subject some passengers who are on the "Specified Passengers Lists" to additional security screening and information/agreement between the Respondent (or airlines more generally) and various governments to no longer require the Respondent to subject certain passengers to enhanced security screening.

A. Information requiring the Respondent to subject some passengers who are on the "Specified Passengers Lists" to additional security screening

[67] The Commission contends it has not received from the Respondent all of the relevant American and Canadian legislative and/or regulatory sources that mandate it to conduct the type of passenger security screening at issue in this case. The Commission argues that this information is arguably relevant because the Respondent maintains that it was simply following American as well as Canadian requirements in its interactions with the Complainant. The Commission submits that it is entitled to know the full regulatory and legislative requirements that the Respondent claims were in place at the time of the alleged incidents as well as what changes, if any, have subsequently been made to the security regime.

[68] In its motion, the Commission identifies what it believes to be some of the relevant Canadian and American sources for the Respondent's conduct; however, the Commission is

seeking disclosure of the laws, regulations and rules that the Respondent understood to apply to it at the time of the Complainant's allegations, as well as the Respondent's understanding of how those laws, regulations and rules have since changed. The Commission asks that it be provided with the relevant portions of these items, in addition to any other relevant Canadian and American statutes and/or regulations.

[69] The Respondent submits that this request has already been satisfied. In its response to the motion, it lists the legislation it claims it has cited and provided to the Commission. Furthermore, the Respondent argues it produced a letter from the Transportation Security Administration of the United States Department of Homeland Security, which further describes the nature of the "No-Fly List" and "Selectee List" and an air carrier's responsibility to verify all passengers against said lists. According to the Respondent, this letter further identifies relevant American legislation. The Respondent adds that it is unaware of any case law that would assert that legislation, although publicly available to all parties from numerous sources, must be produced by one party.

[70] In my view, it is not incumbent upon parties to produce copies of the legislation they are relying on. While parties are required to disclose and produce documents in their possession (see Rules 6(1)(d) and 6(4) of the Tribunal's *Rules of Procedure (03-05-04)*), I do not believe legislation that is publicly available can properly be characterized as a document in the possession of a party. The same can be said for relying on and citing case law. It may be a different story if the legislation or legal authority is not publicly available, but that is not what is being argued in this case.

[71] That said, Rule 6(1)(b) of the Tribunal's *Rules of Procedure (03-05-04)* requires each party to set out in its Statement of Particulars its position on the legal issues raised by the case. Pursuant to this Rule, I would expect the Respondent to have outlined and cited in its Statement of Particulars all of the American and Canadian legislative and/or regulatory sources that it believes mandate it to conduct the type of passenger security screening at issue in this case. In response to the Commission's motion, the Respondent claims it has. This is sufficient to ensure

the Commission knows the case it is up against. Therefore, I see no reason to grant the Commission's request.

[72] However, the Respondent is reminded that a party who does not raise an issue under Rule 6 shall not raise that issue at the hearing (see Rule 9(3)(a) of the Tribunal's *Rules of Procedure (03-05-04)*). If there are indeed other American and Canadian legislative and/or regulatory sources that the Respondent argues mandate it to conduct the type of passenger security screening at issue in this case, they should be disclosed prior to the hearing.

B. Information/agreement between the Respondent (or airlines more generally) and various governments to no longer require the Respondent to subject certain passengers to enhanced security screening

[73] Similar to its argument for the disclosure of the previous item, the Commission submits that it is entitled to know the full framework under which the Respondent is mandated to carry out certain security screening procedures, as it goes directly to the facts and issues raised in the present complaint. For this particular request, the Commission understands that the framework mandating the Respondent to conduct certain security screening operations has changed on a number of occasions in the last decade. The Commission also understands that there were certain exceptions for Canadian and Mexican airlines carrying out domestic flights that overfly the continental United States, as well as changes to the requirements surrounding international flights. Therefore, the Commission submits its request goes to changes in the regulatory and legislative frameworks in the United States and Canada rather than agreements between those governments and airlines. However, if there are any such agreements, special exceptions or arrangements made for the Respondent concerning its role in security screening, then the Commission contends any such information would also be arguably relevant.

[74] The Respondent maintains that all relevant legislation, including changes to the regulatory and legislative frameworks, has already been provided. According to the Respondent, this includes certain items in Schedule "A" of its Statement of Particulars, which pertain to the

“Secure Flight Program” and additional changes implemented in 2011 pertaining to screening electronic manifests.

[75] Again, pursuant to Rule 6(1)(b) of the Tribunal’s *Rules of Procedure (03-05-04)*, I would expect the Respondent to have outlined and cited in its Statement of Particulars the full legal framework under which the Respondent argues it is mandated to carry out certain security screening procedures, including any changes to that framework since the incidents alleged in the complaint. The Respondent claims it has. Therefore, I again see no reason to grant the Commission’s request. However, I repeat that a party who does not raise an issue under Rule 6 shall not raise that issue at the hearing (see Rule 9(3)(a) of the Tribunal’s *Rules of Procedure (03-05-04)*).

VI. Decision

[76] Pursuant the reasons above, the Tribunal directs as follows:

- (1) The Complainant shall produce a list containing the names and addresses of all health care professionals he has attended, including physicians, psychologists, social workers or counsellors, for reason of symptoms or treatment for depression, anxiety, insomnia, and/or diminished self-esteem since January 2008.
- (2) The Complainant shall obtain and produce, or authorize the Respondent to obtain and produce, any medical documents, whether in hard copy or electronic format, from the health care professionals listed in direction (1) above, that relate to any symptoms of or treatment for depression, anxiety, insomnia, and/or diminished self-esteem since January 2008.
- (3) To protect the Complainant’s right to confidentiality of his medical records, they shall be disclosed to counsel for the Respondent and the Commission only and shall not be disclosed to any other individuals without prior permission from the Tribunal and notification to the Complainant. The documents may not be used for any purpose outside of the present inquiry. If the Complainant is of the view that any of these records are personal and not arguably relevant, I will give him the option of sharing such records with me in advance and I will determine whether or not they should be disclosed. If the Complainant avails himself of this opportunity, notice of my review of such records will be given to the other parties.

- (4) The Complainant shall obtain and produce his entire human resources file from his employer for the period of January 2007 to December 2013. It should also include an account of the Complainant's sick leave for the same period and disclose the dates on which he has taken vacation since March 2010, that being the period of the first alleged incident, to present.
- (5) The Commission shall produce its file pertaining to the Complainant's complaint against CATSA for the same travel dates that are the object of this present complaint.
- (6) The Respondent shall: (1) confirm whether or not it provides training to its front-line airport employees, such as the ones who dealt with the Complainant, on how to deal with handling complaints from passengers subject to enhanced questioning and/or enhanced security screening or barred from flying due to alleged security concerns; and, if it does provide such training, to disclose those training materials; and, (2) confirm whether or not it provides training to its front-line airport employees, such as the ones who dealt with the Complainant, on human rights and/or cultural sensitivity; and, if it does provide such training, to disclose those training materials.
- (7) The Respondent shall disclose past complaints made against it, from 2007 to present, alleging discrimination based on race, national or ethnic origin, colour and/or religion, and emanating from the Respondent's application of government-imposed security lists. If the Respondent has information regarding the outcome of those complaints, that information shall be disclosed as well.
- (8) To protect the identity and personal information of the parties involved in the past complaints that may be disclosed under direction (7) above, the Respondent shall redact any personal information from the disclosed materials.

Signed by

David Thomas
Tribunal Member

Ottawa, Ontario
August 8, 2014