

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 7
Date: February 21, 2024
File No(s): HR-DP-2888-22

Between:

Iad Abdul-Rahman

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Ruling

Member: Athanasios Hadjis

Table of Contents

I.	OVERVIEW.....	1
II.	DECISION.....	1
III.	CONFIDENTIALITY ORDER.....	1
	A. Issue 1: There is a real and substantial risk that publicly disclosing the Assessment Documents will cause Transport Canada undue hardship, which poses a serious risk to an important public interest	4
	B. Issue 2: The confidentiality order is necessary; no alternative measures would prevent the serious risk of undue hardship to Transport Canada while preserving the values underlying the open court principle.....	6
	C. Issue 3: The substantial risks of hardship outweigh the societal interest in knowing the information contained in the Assessment Documents; the benefits of the order outweigh any harms.....	6
IV.	<i>PRIVACY ACT</i> ORDER.....	7
V.	ORDER	9

I. OVERVIEW

[1] The Respondent, Transport Canada, has made a motion for a confidentiality order and an order enabling it to disclose information in conformity with the *Privacy Act*, R.S.C., 1985, c. P-21.

[2] The Complainant, Iad Abdul-Rahman, and Transport Canada have filed their Statements of Particulars. But Transport Canada says there are some documents that it has yet to disclose to Mr. Abdul-Rahman and the Canadian Human Rights Commission (the “Commission”), as is required by the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the “Rules of Procedure”). Transport Canada requests a confidentiality order for those documents before they are disclosed. It also asks that the Tribunal formally order the disclosure of some of those documents to ensure Transport Canada’s compliance with its obligations under the *Privacy Act*.

II. DECISION

[3] The confidentiality order is granted in part. The privacy order is granted.

III. CONFIDENTIALITY ORDER

[4] Mr. Abdul-Rahman, applied to Transport Canada for employment through numerous external appointment processes. He was not successful and alleges that his race, colour, national or ethnic origin, and religion were factors in the decisions not to appoint him.

[5] Mr. Abdul-Rahman was screened out at the application stage for most of the appointment processes at issue. But he was screened in for three of them and was placed in a pool of partially qualified candidates for one of those three processes.

[6] Transport Canada asks that documents relating to Mr. Abdul-Rahman’s assessment in those three processes (the “Assessment Documents”), be subject to a confidentiality order before they are disclosed to him and the Commission. The Assessment Documents are identified in a table marked as Exhibit 1, which was attached to an affidavit signed on

January 9, 2024, by Marie-Claude Mailloux, the Assistant Director of Human Resources Client Services at Transport Canada, and filed in support of Transport Canada's motion.

[7] The table describes the Assessment Documents as interview notes and ratings, written exams/exercises, and rating guides, all in relation to Mr. Abdul-Rahman.

[8] Transport Canada requests an order designating the Assessment Documents confidential and setting conditions on how they are handled, not only in disclosure but also for the purposes of production at the hearing. It asks that the documents be filed with the Tribunal in a sealed envelope and not form part of the "public record" nor be accessible to the public.

[9] The Commission does not oppose the confidentiality order being sought. Mr. Abdul-Rahman does not consent to Transport Canada's request insofar as it would "keep the details of [his] case 'confidential'." His submissions focused on the information that he intends to bring about his case. However, this is not what the confidentiality order would address. Moreover, the details of Mr. Abdul-Rahman's case will not be "confidential" if the order is granted. The scope of the order being sought is limited to the Assessment Documents.

[10] On its face, Transport Canada's request is premature. We are still at the stage where parties are disclosing to each other arguably relevant documents in their possession before any hearing dates have been set. Disclosure documents are not filed with the Tribunal and, as such, are not part of the Tribunal's official record, as defined in Rule 47 of the Rules of Procedure. There is nothing for the public to access yet.

[11] The Tribunal was faced with a similar issue in *Valenti v. Canadian Pacific Railway*, 2017 CHRT 31 (*Valenti*), where a confidentiality request was made during the disclosure period. It was argued that confidentiality concerns could more appropriately be addressed as they arise at the hearing. Nevertheless, the Tribunal found the timing of the confidentiality order request to be reasonable. It noted, at para. 17, that issuing confidentiality orders early on allows for protections to be applied to the disclosure process and assists in the smooth progression of the proceedings as well. The Tribunal added, at para. 18, that it would prefer declaring a document confidential during the disclosure process and changing its

designation at the hearing—if an objection is raised and a convincing argument is made at the hearing—than the other way around.

[12] I accept that, in certain instances like the present case, it makes sense to deal with confidentiality issues earlier in the process.

[13] As the Tribunal observed recently in *SM, SV and JR v. Royal Canadian Mounted Police*, 2023 CHRT 46 at paras. 7-9, court proceedings, including those of this Tribunal, are presumptively open to the public, and the open court principle is essential to the proper functioning of Canadian democracy. However, Canadian law recognizes that there are times when there need to be discretionary limits on court openness to protect other public interests where they arise.

[14] The need for this flexibility in the application of the open court principle for the Tribunal is set out explicitly in s. 52 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA), which provides broad statutory powers to the Tribunal to make any order it considers necessary to ensure the confidentiality of an inquiry in certain circumstances.

[15] This includes where there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public (s. 52(1)(c) of the CHRA).

[16] Section 52(1)(c) reads as follows:

52 (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that (...)

(c) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the

52 (1) L'instruction est publique, mais le membre instructeur peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance pour assurer la confidentialité de l'instruction s'il est convaincu que, selon le cas : (...)

c) il y a un risque sérieux de divulgation de questions personnelles ou autres de sorte que la nécessité d'empêcher leur divulgation dans l'intérêt des personnes concernées ou dans l'intérêt public l'emporte sur l'intérêt qu'a

persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; (...)

la société à ce que l'instruction soit publique; (...)

[17] I note that the French rendering of this provision does not explicitly refer to the notion of undue hardship. Requiring proof of undue hardship may raise the threshold that must be met to vary from the open court principle. I find, however, that this would be entirely consistent with the clear message from the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 3, that a high bar must be met to limit court openness. It is therefore appropriate to assess for undue hardship in the analysis.

[18] The statutory analysis for this type of confidentiality order request is informed by the three-part test in *Sherman Estate*, which is generally consistent with the test set out in s. 52(1) of the CHRA (*A.B. v. Correctional Service of Canada*, 2022 CHRT 15 at paras. 14-15). The Supreme Court stated at para. 38 of *Sherman Estate* that the person asking a court or tribunal to exercise its discretion in a way that limits the presumption that hearings are held in open court must establish that:

- 1) court openness poses a serious risk to an important public interest;
- 2) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[19] Accordingly, s. 52(1)(c) of the CHRA, informed by the Supreme Court's analysis in *Sherman Estate*, sets out the issues that I must address in this ruling.

A. Issue 1: There is a real and substantial risk that publicly disclosing the Assessment Documents will cause Transport Canada undue hardship, which poses a serious risk to an important public interest

[20] Ms. Mailloux states in her affidavit that if the Assessment Documents become available to the public, the integrity of Transport Canada's hiring process and the testing of candidates to ensure they meet the merit criteria and essential qualifications in future

appointment processes would be compromised and undermined. She asserts that this would place undue hardship on Transport Canada and would create a serious risk to an important public interest—the integrity of selection processes for public service appointments.

[21] Ms. Mailloux's submissions align with the findings of the Federal Court (Trial Division) in *Canada (Attorney General) v. Gill*, 2001 FCT 814 (CanLII) (*Gill*) at para. 7. The Court recognized, in the context of staffing within the federal public service, the importance of maintaining the confidentiality of standardized tests. It noted that disclosure of confidential test materials to public servants and others likely to take such tests could place them in a position to acquire information concerning expected responses and to use that information in future competitions, as they were described at the time, or disseminate it to others, either intentionally or unintentionally. Replacing these tests could come at a great cost. The Court concluded that the confidentiality of test materials is therefore an important aspect of the merit principle.

[22] *Gill* was decided under the previous version of the *Public Service Employment Act*, R.S.C., 1985, c. P-33, but in *Aucoin v. Canada Border Services Agency*, 2006 PSST 12 at para. 31, the Public Service Staffing Tribunal found that the principles established in *Gill* under the former act are applicable under the current act, the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13.

[23] I note, however, that the material at issue in both *Gill* and *Aucoin* involved “standardized tests” established by the Public Service Commission. Ms. Mailloux does not indicate in her affidavit whether the Assessment Documents fall into this category. The materials appear to emanate from within Transport Canada, not the Public Service Commission. That said, all the appointment processes at issue are for technical positions, and I am prepared to accept, if narrowly so, that public disclosure of details about assessment tools for such technical positions would give rise to the kind of real and substantial risks mentioned in *Gill* and *Aucoin*. This would seriously hinder Transport Canada's ability to run other appointment processes for these and other positions, which would not be in the public interest. I am satisfied on the balance of probabilities that this constitutes undue hardship within the meaning of s. 52(1)(c).

B. Issue 2: The confidentiality order is necessary; no alternative measures would prevent the serious risk of undue hardship to Transport Canada while preserving the values underlying the open court principle

[24] I am satisfied that the confidentiality measures being sought are necessary and that no alternative measures would prevent the serious risk of undue hardship to Transport Canada if the Assessment Documents were made publicly available.

[25] As Ms. Mailloux points out, there would be no feasible alternative measures to prevent this risk except to eliminate the questions in their assessment tools for future selection processes and create new questions and rating guides, not only for the positions at issue but for others as well, since some of the questions have wide application to many types of positions. The testing materials would no longer be usable and would need to be redesigned at great expense.

[26] Furthermore, since the Assessment Documents concern exams/exercises and rating guides, ordering the disclosure of redacted versions only of the documents as an alternative confidentiality measure is not likely to be useful in my view. All pertinent information would probably be extracted, rendering them irrelevant to the proceedings.

[27] The confidentiality order is therefore necessary to preserve the value of the documents.

C. Issue 3: The substantial risks of hardship outweigh the societal interest in knowing the information contained in the Assessment Documents; the benefits of the order outweigh any harms

[28] I am also persuaded that the requested measures to address the undue hardship that Transport Canada would experience if the Assessment Documents were publicly revealed outweigh the societal interest in a public inquiry. Mr. Abdul-Rahman has the right to receive disclosure of this material, and the parties may find it necessary to file some of it in evidence at the hearing for a fair inquiry into his complaint. These rights must be preserved while at the same time not causing the undue hardship referred to above. The only way to achieve this is to ensure that the specific assessment information that needs to be protected

is not publicly accessible. I am satisfied that this can only be achieved by issuing the confidentiality order being requested.

[29] The inquiry will still effectively be public, and the parties will be able to refer to this material throughout the course of the hearing with the only restriction being that they not publicly disclose details about exam questions, rating guides, and the like. Those details will still form part of the official record. I will issue any needed orders along the way to preserve the information's confidentiality while still enabling the parties to present their case.

[30] All the parties will have access to the Assessment Documents for the purposes of the hearing, in line with the principles of procedural fairness. Furthermore, as noted in *Valenti*, nothing prevents a party from requesting that the confidentiality order be varied if new circumstances warrant it.

[31] For these reasons, I find that all the criteria have been met. I grant the confidentiality order, in the form set out at the end of this ruling. Transport Canada included a request that any copies of the Assessment Documents that are filed with the Tribunal be presented in a sealed envelope. The Tribunal functions digitally, and its hearing processes are no longer paper-based. The Assessment Documents can be filed using encryption, and the Tribunal will ensure that they are stored in a secure manner, in accordance with the Tribunal's order.

IV. PRIVACY ACT ORDER

[32] Transport Canada states that to comply with its disclosure obligations under the Rules of Procedure, it must disclose to Mr. Abdul-Rahman and the Commission the names of the successful candidates who were hired and the related articulations of decisions for the one selection process in which Mr. Abdul-Rahman was placed into the pool of partially qualified candidates (the "Candidate Information"). The documents comprising the Candidate Information are listed in a table that was also attached to Ms. Mailloux's affidavit, as Exhibit 2.

[33] Transport Canada claims that this is personal information of third parties and that an order is needed from the Tribunal to disclose this information in conformity with the *Privacy Act*.

[34] Transport Canada points out that pursuant to s. 8(2)(c) of the *Privacy Act*, personal information under the control of a government institution may be disclosed for the purpose of complying with a subpoena or warrant issued or order made by an authority like the Tribunal or for the purpose of complying with the “rules of court” relating to the production of information. Transport Canada asks that the Tribunal issue an order meeting the criteria set out in this provision to comply with the *Privacy Act*.

[35] The Commission correctly points out, however, that a specific disclosure order is not necessary since the Tribunal’s “rules of court” (i.e., the Rules of Procedure) oblige Transport Canada, as a respondent, to disclose all arguably relevant information (see *Gagno v. Royal Canadian Mounted Police*, 2023 CHRT 10 (*Gagno*) at para. 18). The Commission nonetheless does not oppose the issuance of the requested order. Mr. Abdul-Rahman did not specifically address the *Privacy Act* issue in his submissions.

[36] I will issue the order even though I question its necessity.

[37] I note, however, that Transport Canada also asks in the last paragraph of its submissions that the disclosure of the Candidate Information be subject to the confidentiality order as well. The only basis for this request is a single paragraph in Ms. Mailloux’s affidavit that the articulations of decision justifying the appointment of the successful candidates contain “personal information.” No further explanation or justification for this allegation is provided. I find there is no basis for extending the confidentiality order broadly to the Candidate Information.

[38] In any event, as the *Gagno* decision pointed out at para. 19, any information that is communicated during the disclosure process is subject to the implied undertaking rule that a party shall not disclose information obtained during the disclosure process for any purpose other than the litigation.

V. ORDER

[39] The Tribunal orders the following:

1) With respect to the documents listed in Exhibit 1 attached to Ms. Mailloux's affidavit of January 9, 2024:

- a) when filed with the Tribunal digitally, the documents will be sent using encryption. The Tribunal will secure the documents and not make them, or any parts thereof, available to the public;
- b) The documents will not be disclosed, directly or indirectly, in any manner during the course of this proceeding, without Transport Canada's consent, to anyone other than:
 - i) Mr. Abdul-Rahman,
 - ii) the Commission, and
 - iii) the Tribunal;
- c) Mr. Abdul-Rahman and the Commission will not use the documents for any purpose other than for pursuing the complaint before the Tribunal;
- d) Mr. Abdul-Rahman and the Commission will keep confidential and protect the disclosed information;
- e) Mr. Abdul-Rahman and the Commission will not make any electronic or paper copies of the documents without following these requirements:
 - i) In the case of Mr. Abdul-Rahman: store all digital copies locally (not uploaded or stored on external services, including "cloud" servers or artificial intelligence platforms);
 - ii) In the case of the Commission: store all digital copies on its secure servers and in accordance with the Commission's established protocols for the protection of personal, private, and confidential information;
 - iii) Ensure that all files are physically and digitally secured at all times; and
 - iv) Delete all copies upon conclusion of the proceeding;
- f) Within 10 days after the judicial review rights relating to the Complaint have expired, Mr. Abdul-Rahman and the Commission will destroy the documents, including notes, charts and memoranda based on this information. Once completed, Mr. Abdul-Rahman and the Commission's counsel will inform Transport Canada's counsel that the documents have been destroyed.

2) With respect to the documents listed in Exhibit 2 attached to Ms. Mailloux's affidavit of January 9, 2024:

- a) The Tribunal orders Transport Canada to disclose the documents to the other parties in accordance with the Rules of Procedure;
- b) Mr. Abdul-Rahman and the Commission will not use the documents for any purpose other than for pursuing the complaint before the Tribunal.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
February 21, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: HR-DP-2888-22

Style of Cause: Iad Abdul-Rahman v. Transport Canada

Ruling of the Tribunal Dated: February 21, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Iad Abdul-Rahman, for the Complainant

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