



VIA EMAIL: FCARegistry-CAFGreffe@cas-satj.gc.ca

September 13, 2022

The Judicial Administrator
Federal Court of Appeal
90 Sparks Street, Main floor
Ottawa, Ontario
K1A 0H9

Dear Sir/Madam:

Re: *Air Passenger Rights v Attorney General of Canada*
Court File No.:A-102-20

This is the Canadian Transportation Agency's ("Agency") response to the Applicant's letter dated September 12, 2022. Please bring this letter to the attention of Gleason J.A..

On August 5, 2022, the Agency made, in good faith, the undertaking to disclose the documents that are responsive to the three categories identified in the Court's July 19, 2022 Order, five days prior to the cross-examination (by September 11, 2022). This is exactly what was done on September 9, 2022.

In its latest request to the Court, the Applicant alleges that the Agency has breached its undertaking in two regards and seeks various orders/directions from the Court. The Agency submits that the matter should proceed to the cross-examination as scheduled on Friday, and that the Applicant can bring any motions thereafter.

The Applicant's Allegations Regarding Item 12

The Agency's search for documents in relation to item 12, both prior and subsequent to making the undertaking, did not reveal any responsive documents. The Agency cannot disclose a document that does not exist.

The Agency's undertaking to produce "responsive documents" cannot be interpreted as an admission that such documents exist, as is now being advanced by the Applicant. As stated in our letter to the Applicant on September 9, 2022, the Agency's written representations contained in its Motion for Relief from Production, dated May 12, 2022, made it clear that no such documents exist or otherwise have not been identified. This remains the case today.

The non-existence of a document, ordinarily, would be dealt with during the cross-examination. The Agency's undertaking to provide the responsive documents prior to cross-examination was made as a courtesy. The Agency was under no obligation to do so.¹

In the present case, the purpose of the cross-examination is to explore "what the affiant did to comply with the Court's disclosure Orders".² Despite this limited scope, the Applicant has scheduled 7 hours for the cross-examination. It is to take place this coming Friday. The Applicant's questions regarding the search for documents that are responsive to item 12, either prior to May 12, 2022 or since the Court's July 19, 2022 Order, can be put to the Agency's affiant during the scheduled cross-examination. The Agency's affiant is reasonably informed and can answer these questions.

Instead, the Applicant now seeks an Order to compel a senior employee of the Agency, who is responsible for managing its Microsoft Outlook, to provide a detailed affidavit on why the Microsoft logs do not exist or no longer exist, and seeks the right to cross-examine that person. While it seems inevitable that the Applicant will bring future motions, the Order being sought is premature until the scheduled cross-examination has been completed.

Furthermore, the Court's September 2, 2022 Order, which sets out the schedule agreed upon by the parties for completion of the various steps required to perfect the application, provides that any motions regarding objections or refusals are to be brought by the Applicant no later than November 14, 2022, and that any subsequent motion under rule 41, if necessary, is to be brought by the Applicant within 20 days of the disposition of any previous motions. The Applicant seems to be trying to skip the steps that were agreed upon for dealing with the very issues that are now being raised.

The Agency asks that the Order sought by the Applicant be denied, and that steps and schedule set out in the Court's September 2, 2022 Order be maintained.

The Applicant's Allegations Regarding Item 9

As for item 9, the Agency explained in its letter to the Applicant of September 9, 2022, that the single line was redacted because it contains sensitive technical information about the Agency's infrastructure exchange. In short, it is a pathway. It does not contain "conclusions/results from the search, including any provisos to the search results". It is not in any way relevant to the "(in)adequacy of the CTA's search for pertinent emails". In the normal course of things, this should not require the Court's intervention. Any questions regarding the single line redaction can be put to the Agency's affiant during the scheduled cross-examination. Again, the Applicant's motion in this regard is premature.

However, should it please the Court and should the Court find it necessary at this time, please accept the present as an informal motion for a confidentiality order, allowing the Agency to redact

¹ *Sierra Club of Canada v Canada (Minister of Finance)*, [1999 CanLII 7756 \(FC\)](#) at para 16.

² Reasons for Order of Gleason J.A. dated July 19, 2022 at para 46.

the single line containing sensitive technical information about the Agency's infrastructure exchange. The redacted information is not relevant and Applicant will not suffer any prejudice. The Agency proposes that it file with the Court the unredacted document following disposition of this informal motion.

Finally, the Applicant's arguments seem to rely on the suggestion, without evidence, that the Agency and its counsel have acted with some sort of malfeasance. This is inappropriate.

Sincerely,



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