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# Civil aviation medicine - access to information

Many Canadian pilots will, over the course of their flying careers, encounter difficulties with Transport Canada's civil aviation medicine department. These difficulties arise because Transport Canada's civil aviation medicine department consistently refuses pilots aeromedical certification if there is an abstract risk to aviation safety.

To be clear, Transport Canada is entitled under the Canadian Aviation Regulations to refuse to certify a pilot as medically fit to fly if there is an actual risk to aviation safety. An actual risk to aviation safety is made out using an evidence-based approach.

The issue that many pilots encounter with Transport Canada's civil aviation medicine program is that the program's actual implementation is not evidence-based. Far from it–doctors in Transport Canada's service are encouraged to make subjective decisions based on their personal evaluation of a pilot's risk to aviation safety:

Aviation personnel, although not basically dishonest, may not volunteer information which may affect their medical certification. They will, however, respond to direct questions and will sometimes give you much more information than you expect if you convince them that your prime interest is keeping them at work. Sometimes they have problems that may affect their medical certification that they would like to discuss with someone of good will. Of particular importance in the interview is any suggestion of substance abuse, mental instability, lack of insight or inappropriate reactions. You have an opportunity to decide whether this is the type of person with whom you would fly or to whom you would entrust your family. Remember, that the next time you climb on board as a passenger this may be your Captain!

Handbook for Civil Aviation Medical Examiners - TP 13312

Transport Canada's overt encouragement of subjective decision making should be viewed by pilots and the public alike as a failure to properly regulate aeromedical certification. Any regulated population loses confidence in the regulator when the regulator fails to use its legal authority responsibly and fairly. The Supreme Court of Canada makes this point clear in Canada (Minister of Citizenship and Immigration) v. Vavilov: "the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (para. 95).

# Pilot requests for information:

Following on our guide to making access to information (ATIP) requests, we believe that it is imperative that pilots hold the regulator to account when their interests are at issue. The best way to keep Transport Canada accountable is requesting full disclosure of medical records in each case. A pilot's careful review of Transport Canada's records and decision-making tree allows each pilot to properly decide whether Transport Canada has justified its decision in their case.

The Privacy Act allows pilots to obtain access to unredacted information regarding their medical files held by Transport Canada. This right of access is paramount for pilots to correct the information contained in their files. An ATIP request lets pilots better understand

- how the medical file is being handled;
- who has seen the file;
- what each Transport Canada official with access to the file has done with the file;
- the manner in which Transport Canada officials understand the file;
- the procedure by which a file is processed; and
- the evidence used and given additional weight in a file.

A pilot is better able to respond to the decision being made by Transport Canada with all of the information relating to their file in hand.

# Making the request:

In order to make an effective ATIP request, a pilot must submit a clear scope of requested information. The clearer the scope, the less likely the

request will be denied. An unequivocal scope for the information sought speeds up processing time.

The scope of a pilot's request for information should include the following items:

- pilot's full legal name, as displayed in the pilot's aviation document booklet or student pilot permit;
- pilot's Transport Canada civil aviation medicine file number;
- a description of the time for which responsive records are sought;
- a statement that all records for the responsive time period are being sought;
- a statement that the records sought each contain personal information to which the pilot has a right of access pursuant to the Privacy Act;
- a request for all policy documents, staff instructions, memoranda, guidelines, or other decision-making document that is referenced by any document in the file;
- a request for the names of each Transport Canada official, including members of the Aviation Medical Review Board, who had access to the file during the responsive period;
- a request for a copy of each secondary source used to evaluate the medical file or otherwise make a decision in relation to the medical file, including sources cited by members of the Aviation Medical Review Board;
- and other document that was used in connection with the medical file.

## Sample text of the request:

All records relating to the aviation medical file maintained by Transport Canada as file number [insert pilot's aviation medical file number] for [insert pilot's full legal name], the individual making this access to information request, for the time that Transport Canada has maintained file number [insert pilot's aviation medical file number], beginning [insert date of first application for medical certification] to the day on which this request was made. Without limiting the generality of the foregoing request, the individual making this access to information request seeks: all policy documents, staff instructions, memoranda, guidelines, or other decision-making document that is referred to by any document in the aforementioned file; the names of each Transport Canada official, including members of the Aviation Medical Review Board, who had access to the file during the period for which records are sought; a copy of each document used to evaluate the individual's applications for medical certification or otherwise make a decision in relation to the medical file, including sources cited by the Aviation Medical Review Board; and any other document that was used in connection with the medical file.

## Receiving the disclosed records:

More work needs to be completed once a pilot receives records from Transport Canada. The pilot must read the file several times over to make sure that they have a clear mental model of its contents. Each medical file contains two critical components:

# The procedure:

- details about Transport Canada's procedure used to assess a file; and
- information about the collection and assessment of medical information used to make a decision about the file.

When a pilot reviews records disclosed by Transport Canada, the procedure that Transport Canada has chosen for the pilot's case matters. Transport Canada must treat pilots fairly. In particular, Transport Canada must

- inform the pilot of the case being made against them;
- advise the pilot of the evidence that is being assessed by Transport Canada;
- invite the pilot to provide further evidence that can address the case being made against the pilot;
- provide a reasonable amount of time for the pilot to obtain and provide further evidence; and
- invite the pilot to make any further submissions regarding the evidence and regulatory concerns being considered by Transport Canada.

If Transport Canada fails to provide a pilot with these opportunities, the pilot does not have a fair chance to respond to Transport Canada's concerns. In these circumstances, a pilot may seek judicial review of Transport Canada's conduct before Transport Canada makes a final decision regarding the pilot's medical certification.

# Collection and assessment of medical information:

Transport Canada's regulatory activities and decisions should be evidence-based. Administrative decision makers must make evidence-based decisions to withstand judicial scrutiny: "A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (Law Society of New Brunswick v. Ryan, 2003 SCC 20, para. 55). The Canadian Aviation Regulations require this line of analysis rooted in the medical information that a pilot submits:

> The Minister shall assess any medical reports submitted pursuant to paragraph 404.17(b) to determine whether an applicant for the issuance or renewal of a medical certificate meets the medical fitness requirements set out in the personnel licensing standards that are necessary for the issuance or renewal of the medical certificate.
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> Canadian Aviation Regulations, SOR/96-433, s. 404.11(1).

The requirement to assess a pilot's application for medical certification seems obvious–so obvious it may be banal. The case of Davis v. Canada (2022 TATCE 67) highlights the need for pilots' vigilance against Transport Canada and the medical opinions that it produces. In a decision highly critical of Transport Canada, the Transportation Appeal Tribunal found that

a professional pilot's medical certification had been improperly denied for eight years because doctors employed by or advising Transport Canada had failed to objectively consider the pilot's medical evidence.

Transport Canada routinely fails to adequately consider or explain its medical certification decisions in a manner that could be said to be evidence-based. As a result, the pilot must not only act as the regulated individual, but as the member of the public that can hold Transport Canada to account for its decisions.

The first thing that a pilot should do when she or he encounters difficulty with Transport Canada's aeromedical certification process is make an access to information request. If the adage when flying is 'divert early and often', the adage when on the ground is 'get information early and often'. Do not take the regulator at its word; check the regulator's work to make sure that its decision is evidence-based.

Disclaimer: This guide is provided for informational purposes and does not constitute legal advice. If you require assistance in drafting a highly technical request or wish to challenge a government refusal, please contact your counsel at A.P. Strom & Associates.