Government of Canada | Gouvernement du Canada

Info Source

Privacy Act

and

Access to Information Act

Number 28
December 2005

Canada

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A. Introduction

Note: This Bulletin is in large print to assist persons with visual disabilities.

Info Source: Access to Information Act and Privacy Act Bulletin

This annually updated *Info Source* Bulletin contains Statistical Tables reflecting the number of Access to Information and Privacy requests by institutions within the federal government on an annual basis and cumulative statistics since 1983. It also contains summaries of 2004–2005 federal court cases related to the *Access to Information Act* and the *Privacy Act*.

B. Information on the Government of Canada

The following telephone numbers are for the Government of Canada's bilingual, toll-free service. They can be used to obtain general information and referrals for programs and services.

Toll-free .....1 800 O-Canada (1-800-622-6232)
TTY/TDD 1-800-465-7735

Canada Web Site

Web site .....www.canada.gc.ca

The Canada Site provides a single electronic access point to general information about Canada, the federal government, its programs and services. The Canada Site features three gateways to quickly access information: Canadians, Canadian Business and Non-Canadians. These gateways organize content around the needs of users rather than by departmental responsibility.

C. About *Info Source*

Info Source is a series of publications containing information about and/or collected by the Government of Canada. The primary purpose of *Info Source* is to assist members of the public and federal employees in exercising their rights under the *Access to Information Act (ATIA)* and the *Privacy Act (PA)*. *Info Source* also supports the government's policy to explain and promote open and

accessible information regarding its activities. In essence, *Info Source* upholds the transparency and accountability of the federal government to Canadians.

There are four *Info Source* publications:

Info Source: Sources of Federal Government Information:

- provides information about the Government of Canada, its organization and its information holdings.
- helps individuals determine which institution to contact to make enquiries.
- provides individuals who are not, and who have never been employees of the federal government with relevant information to facilitate access to personal information held about them by any federal government institutions subject to the *Privacy Act*.

Info Source: Sources of Federal Employee Information:

- contains information to help current and former federal government employees to locate personal information held by the government.
- is intended to help former and current government employees to exercise their rights under the *Privacy Act.*

Info Source: Directory of Federal Government Enquiry Points:

- contains addresses and telephone numbers for federal departments and agencies subject to the *Access to Information Act* and/or the *Privacy Act.*
- Other institutions associated with the federal government are included to facilitate access.

Info Source: The Access to Information Act and Privacy Act Bulletin:

- provides Statistical Tables reflecting the number of Access to Information and Privacy requests on an annual basis and cumulative statistics since 1983.
- contains a summary of federal court cases related to the *Access to Information Act* and the *Privacy Act*

Info Source is distributed to libraries, municipal offices and federal government offices across Canada.

D. Roles and Responsibilities

Treasury Board Secretariat

In accordance with the *Access to Information Act*, Treasury Board is responsible for the annual creation and dissemination of a publication that provides a description of government organizations, program responsibilities and classes of records with sufficient clarity and detail to enable the public to exercise its rights under the *Access to Information Act*.

Treasury Board is also responsible for the annual publication of an index of personal information that will both serve to keep the public information of how the government handles personal information, as well as facilitating the public's ability to exercise its rights under the *Privacy Act*.

Treasury Board Secretariat fulfils these requirements through the annually updated publication of *Info Source*.

Individual Institutions

Government institutions are required to provide their updated information to Treasury Board Secretariat on an annual basis. This information is utilized in the production of the publications required by the *Access to Information Act* and *Privacy Act*. Consequently, each department and agency is completely responsible for the information it submits.

E. Additional Information

For more information about *Info Source*, the *Access to Information Act* or the *Privacy Act*, you may contact:

Treasury Board of Canada Secretariat
L'Esplanade Laurier, 8th Floor, East Tower
140 O'Connor Street
Ottawa, Ontario K1A 0R5

General Enquiries ..... (613) 957-2400
Publications ..... (613) 995-2855
Fax ..... (613) 996-0518
TTY ..... (613) 957-9090
General Library Reference ..... (613) 996-5494
E-mail ..... infosource@tbs-sct.gc.ca
Treasury Board Web Site ..... www.tbs-sct.gc.ca

If you would like a copy of *Info Source: Directory of Federal Government Enquiry Points* or the *Info Source: Access to Information Act and Privacy Bulletin*, please contact:

Treasury Board Distribution Centre
L'Esplanade Laurier, Room P-140, Level P-1W
300 Laurier Avenue West
Ottawa, Ontario K1A 0R5

Telephone ..... (613) 995-2855
Fax ..... (613) 996-0518
E-mail ..... Services-Distribution@tbs-sct.gc.ca

If you would like to purchase a copy of *Info Source: Sources of Federal Government Information* or *Info Source: Sources of Federal Employee Information*, please contact:

Publishing and Depository Services

Public Works and Government Services Canada

Ottawa, Ontario K1A 0S5

E-mail ..... publications@pwgsc.gc.ca
Telephone ..... (613) 941-5995
Telephone (toll-free) ..... 1-800-635-7943 (Canada and US)
Fax ..... (613) 954-5779
Fax (toll-free) ..... 1-800-565-7757 (Canada and US)
Web site ..... http://publications.gc.ca

All four *Info Source* publications are available free of charge at:
www.infosource.gc.ca.

STATISTICAL INFORMATION – PERSONAL INFORMATION BANKS 2004–2005

Personal Information Banks

Personal Information Banks provide a summary description of the type of information about individuals that is held by federal departments and agencies in their records and that has been used, is being used, or is available for use for an administrative purpose, or is organized or intended to be retrieved by the name of an individual or by an identifying number, symbol or other particular assigned to an individual.

Number of institutions registering new PIBs during this period	97
Number of new PIBs registered during this reporting period	809
Number of new institution-specific PIBs registered	78
Number of new standard PIBs registered	731
Number of standard PIBs revised by the Treasury Board of Canada Secretariat	4

STATISTICAL TABLES 2004–2005 ACCESS TO INFORMATION

Access to Information Requests
April 1, 2004 to March 31,2005

These figures are based on Statistical Reports provided by 148 of 151 federal institutions subject to the *Access to Information Act*. Three institutions, Gwich'in Land Use Planning Board, Nunavut Surface Rights Tribunal and Sahtu Land Use Planning Board did not submit Statistical Reports.

Requests received during this reporting period	25,207
Requests brought forward from previous reporting period	4,927
Total number of requests	30,134
Requests completed	24,709
Requests carried forward to next reporting period	5,425

Please note: These totals include transfers of requests between institutions.

Disposition of Completed requests

Requests where all information was disclosed	27.1%	6,696
Requests where information was disclosed in part	43.2%	10,667
Requests where all information was excluded	0.6%	154
Requests where all information was exempted	2.5%	612
Requests transferred to another institution	1.6%	398
Requests where information was given informally	1.0%	259
Requests which could not be processed (by reasons such as insufficient information provided by applicant, no records exist or abandonment by applicant)	24.0%	5,923
Total		**24,709**

Source of Requests

Requests received from businesses	47.2%	11,910
Requests received from the public	32.6%	8,213
Requests received from organizations	8.4%	2,107
Requests received from the media	10.6%	2,680
Requests received from academics	1.2%	297
Total Requests Received		**25,207**

Institutions ranked in order of number of requests received

1)	Citizenship and Immigration Canada	35.8%	9,034
2)	Canada Revenue Agency	7.4%	1,861
3)	Health Canada	5.4%	1,363
4)	National Defence	5.1%	1,284
5)	Royal Canadian Mounted Police	4.3%	1,085
6)	Public Works and Government Services Canada	3.5%	876
7)	Transport Canada	3.1%	779
8)	Environment Canada	2.6%	653
9)	Library and Archives Canada	2.5%	629
10)	Correctional Services Canada	2.4%	613
11)	Other Departments	27.9%	7,030
Total			**25,207**

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	61.7%	15,254
31 to 60 days	16.5%	4,067
61 to 120 days	11.0%	2,713
121 days or over	10.8%	2,675
Total		**24,709**

Extension Time Required

	30 days or less	**31 days or over**
Searching	955	1,481
Consultation	1,935	1,472
Third Party	148	1,409

Exemptions

It should be noted that a single Access Request can be indicated as being exempted for multiple reasons. All such exemptions must be reported.

Section 19	Personal information	32.1%	8,499
Section 21	Operations of government	16.1%	4,259
Section 20	Third party information	15.5%	4,099
Section 16	Law enforcement and investigations	12.7%	3,351
Section 15	International affairs and defence	7.6%	2,020
Section 13	Information obtained in confidence	4.5%	1,193
Section 23	Solicitor-client privilege	4.2%	1,111
Section 24	Statutory prohibitions	2.1%	568
Section 14	Federal-provincial affairs	2.1%	543
Section 18	Economic interests of Canada	2.0%	540
Section 22	Testing procedures	0.5%	140
Section 17	Safety of Individuals	0.3%	79
Section 26	Information to be published	0.3%	69
Total			**26,471**

Exclusions

It should be noted that a single Access Request can be indicated as being excluded for multiple reasons. All such exclusions must be reported.

Section 69(1)(*g*)	35.0%	565
Section 69(1)(*a*)	25.2%	408
Section 69(1)(*e*)	15.0%	242
Section 68(*a*)	12.0%	194
Section 69(1)(*d*)	5.5%	89
Section 69(1)(*c*)	3.6%	58
Section 69(1)(*f*)	2.3%	37
Section 68(*b*)	1.0%	16
Section 69(1)(*b*)	0.4%	6
Section 68(*c*)	0.1%	1
Total		**1,616**

Costs and Fees for Operations

Requests completed	**24,709**
Cost of operations	$26,365,456.63
Cost per completed request	$1,067.04
Fees collected	$265,381.94
Fees collected per completed request	$10.74
Fees waived	$164,832.71
Fees waived per completed request	$6.67

STATISTICAL TABLES 2004–2005 PRIVACY

Privacy Requests – April 1, 2004 to March 31, 2005

These figures are based on Statistical Reports provided by 155 of 158 federal institutions subject to the *Privacy Act*. Three institutions, Gwich'in Land Use Planning Board, Nunavut Surface Rights Tribunal and Sahtu Land Use Planning Board did not submit Statistical Reports.

Requests received during this reporting period	36,316
Requests brought forward from previous reporting period	10,760
Total number of requests	47,076
Requests completed	41,813
Requests carried forward to next reporting period	5,263

Disposition of completed requests

Requests where all information was disclosed	34.3%	14,335
Requests where information was disclosed in part	50.8%	21,248
Requests where all information was excluded	0.3%	129
Requests where all information was exempted	1.2%	508
Requests unable to be processed (Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)	13.4%	5,593
Total		**41,813**

Institutions ranked in order of number of requests received

1) Correctional Service Canada	25.6%	9,286
2) Citizenship and Immigration Canada	12.4%	4,485
3) National Defence	11.7%	4,239
4) Human Resources and Skills Development Canada	11.5%	4,189
5) Social Development Canada	8.1%	2,936
6) Other Departments	30.8%	11,180
Total		**36,315**

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	58.8%	24,590
31 to 60 days	13.5%	5,654
61to 120 days	16.0%	6,691
121 days or more	11.7%	4,878
Total		**41,813**

Exemptions

It should be noted that a single Privacy Request can be indicated as being exempted for multiple reasons. All such exemptions must be reported.

Section 26	Information about another individual	61.1%	11,686
Section 22	Law enforcement and investigation	22.1%	4,224
Section 19	Personal information obtained in confidence	7.1%	1,351
Section 24	Individuals sentenced for an offence	5.0%	951
Section 27	Solicitor-client privilige	2.1%	406
Section 21	International Affairs and defence	1.6%	308
Section 25	Safety of individuals	0.3%	65
Section 28	Medical records	0.3%	52
Section 18	Exempt banks	0.3%	48
Section 23	Security clearances	0.2%	38
Section 20	Federal-provincial affairs	0.0%	2
Total			**19,131**

Exclusions

It should be noted that a single Privacy Request can be indicated as being excluded for multiple reasons. All such exclusions must be reported.

Section 69(1)(*a*)	42.9%	3
Section 70(1)(*a*)	42.9%	3
Section 70(1)(*c*)	14.3%	1
Section 69(1)(*b*)	0.0%	0
Section 70(1)(*b*)	0.0%	0
Section 70(1)(*d*)	0.0%	0
Section 70(1)(*e*)	0.0%	0
Section 70(1)(*f*)	0.0%	0
Total		**7**

Costs for Operations

Requests completed	**41,813**
Cost of operations	$13,090,151.82
Cost per request completed	$313.06

Privacy Impact Assessments (PIA)

Number of Privacy Impact Assessments (PIA) initiated	22
Number of Preliminary Privacy Impact Assessments (PPIA) initated	61
Number of PIAs forwarded to the Office of the Privacy Commissioner (OPC)	23
Number of PPIAs forwarded to the Office of the Privacy Commissioner (OPC)	26
Number of PIA summaries posted on institutional web sites	5

STATISTICAL TABLES 1983–2005 ACCESS TO INFORMATION

Please note that the statistics reflect adjustments made throughout the years.

Disposition of Requests

Requests received	**276,614**
Requests completed	**270,547**

Disposition of completed Requests

Requests where all information was disclosed	33.1%	89,635
Requests where information was disclosed in part	37.7%	102,007
Requests where all information was excluded	0.6%	1,555
Requests where all information was exempted	3.0%	8,143
Requests transferred to another institution	1.9%	5,029
Requests where information was given informally	3.7%	9,967
Requests which could not be processed (Reasons include insufficient information provided by applicant, no records exist and abandonment by applicant)	20.0%	54,211
Total		**270,547**

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	60.2%	162,814
31 to 60 days	16.8%	45,501
61 days or more	23.0%	62,232
Total		**270,547**

Costs and Fees for Operations

Requests completed	**270,547**
Cost of operations	$231,382,509.53
Cost per request completed	$855.24
Fees collected	$3,226,014.97
Fees collected per request completed	$11.92
Fees waived	$1,482,990.88
Fees waived per request completed	$5.48

STATISTICAL TABLES 1983–2005 PRIVACY

Please note that the statistics reflect adjustments made throughout the years.

Disposition of Requests

Requests received	**925,025**
Requests completed	**923,316**

Disposition of Completed Requests

Requests where all information was disclosed	53.4%	492,637
Requests where information was disclosed in part	31.3%	288,727
Requests where all information was excluded	0.0%	397
Requests where all information was exempted	0.8%	7,331
Requests which could not be processed (by reasons such as insufficient information provided by applicant, no records exist and abandonment by applicant)	14.5%	134,224
Total		**923,316**

Time Required to Complete Requests

(including requests for which extensions were required)

0 to 30 days	57.6%	531,895
31to 60 days	18.8%	173,528
61 days or more	23.6%	217,893
Total		**923,316**

Costs for Operations

Requests completed	**923,316**
Cost of operations	$183,686,268.39
Cost per completed request	$198.94

FEDERAL COURT CASES

Prepared by the
Information Law and Privacy Section,
Department of Justice

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DAVID M. SHERMAN v. MINISTER OF NATIONAL REVENUE

INDEXED AS: SHERMAN v. CANADA (MINISTER OF NATIONAL REVENUE)

File No.:	**T-612-00**
Reference:	**2004 FC 1423**
Date of decision:	**October 14, 2004**
Before:	**Layden-Stevenson J.**
Sections of *ATIA / PA*:	**Ss. 13(1)*(a)*, 16(1)(b) and (*c*) *Access to Information Act (ATIA)***

Abstract

- Meaning of “investigation”
- Revenue’s collection actions and statistics pertaining to results of collection actions not investigative in nature
- Alleged harm to U.S. relations and, hence, to enforcement of Canadian laws not meeting injury test

Issues

(1) Is the information sought subject to paras. 16(1)(*b*) and (*c*) *ATIA*?

(2) If the exemptions under paras. 16(1)(*b*) and (*c*) do not apply, what information is and is not exempt pursuant to para. 13(1)(*a*)?

Facts

The applicant is a tax consultant and author. He sought disclosure of certain statistical information from the Canada Revenue Agency (CRA) regarding collection assistance between Canada and the United States (the U.S.) under the Protocol amending the Convention Between Canada and the United States of America with respect to Taxes on Income and on Capital (the Convention).

Revenue Canada's ministerial delegate, the Director of the ATIP Division, refused the request on May 10, 1999 on the basis that the requested information came within the exemptions

provided in paras. 13(1)(*a*), and 16(1)(*b*) and (*c*) *ATIA*. The applicant complained to the Information Commissioner, but his complaint was dismissed.

The applicant applied for judicial review of the Minister's decision. The Federal Court Trial Division (2002 FCT 586) dismissed the application on the basis that the requested information was exempt under para. 13(1)(*a*). Having so determined, the applications judge did not find it necessary to consider the Minister's position with respect to paras. 16(1)(*b*) and (*c*).

The applicant appealed the decision of the Trial Division. The Federal Court of Appeal allowed the appeal ([2003] 4 F.C. 865 (C.A.); 2003 FCA 202) and concluded that the exemption under para. 13(1)(*a*), for the most part, could not be justified. The Court of Appeal found that the para. 13(1)(*a*) exemption exists only with respect to information received by Canada from the U.S. No exemption exists with respect to all information exchanged unless that information also contains information received from the U.S. that would be revealed by the disclosure of the Canadian information. Statistics, generated by the Minister, from information received from the U.S. are not covered by the exemption unless their disclosure would reveal the contents of the confidential information itself.

However, due to a misunderstanding, the Court of Appeal did not have before it the information for which the exemptions were claimed. Consequently, the Court of Appeal was not able to determine whether the nature of the information was such that it could be readily extracted from the information that was protected from disclosure. Nor could the Court of Appeal determine, notwithstanding any disclosure that might be permitted under para. 13(1)(*a*), whether the information is nonetheless subject to exemption from disclosure under paras. 16(1)(*b*) and 16(1)(*c*) of the Act.

The issue here is whether the information, having now been examined by this Court, is subject to any exemptions from disclosure.

Decision

The application for judicial review was allowed.

Reasons

Issue 1

Para. 16(1)(*b*)

The Court remarked that the information in question must fall within the exemption. In this case, it must relate to investigative techniques or plans for specific lawful investigations. Insofar as the word "investigation" is concerned, it should be read in its ordinary and grammatical sense. Relying on the definition put forward by the Alberta Queen's Bench in *Re*

First Investors Corp., [1988] 4 W.W.R. 22 (Alta Q.B.)[1], the Court remarked that there was nothing in the information before it, confidential or otherwise, that provided so much as an inkling as to investigative techniques of specific lawful investigations. Thus, the threshold that gives rise to the exercise of discretion had not been met. Moreover, it could not be said that collection actions were investigative in nature. The Convention provides for an arrangement for the collection of money from those not within the jurisdiction. While there may be some investigation related to the whereabouts of the persons involved, the information in question does not provide disclosure of such information. The statistics sought were those that provide no more and no less than the results of the collection actions. That information could not be said to be investigatory in any sense.

Para. 16(1)(*c*)

Referring to the basic principles underlying access to information in the possession of the government, the Court indicated that the standard is probability, not possibility or speculation. There must exist, in the evidence, an explanation establishing that the injury to the enforcement of the law is reasonably probable. Here, the evidence – both confidential and otherwise – that attempted to establish that harm to U.S. relations will result from disclosure, and

1. *"Investigation" has been defined as : 'the action of investigating; the making of a search or inquiry; systematic examination, careful or minute search' (Oxford English Dictionary). A search or inquiry must be made with some object in mind. A systematic inquiry requires a guiding paradigm […]" (para. 45).*

consequently the enforcement of Canadian laws will suffer, was equivocal at best. It fell far short of meeting the para. 16(1)(*c*) threshold that the alleged injury is reasonably probable. Moreover, it is Canadian data, not U.S. data, that would be released. Hence, the generalized statements of the ministerial delegate cannot be sustained in view of the Federal Court of Appeal's determination in *Sherman*, *supra*, which limits the requested information that can be released to material based on Canadian information or U.S. statistics that do not reveal the content of confidential information. The Court was unable to conclude, on the evidence, that it could reasonably be expected that the revelation of this information will harm Canada-U.S. relations such that the U.S. will refuse to engage in further collection actions.

Issue 2

Para. 13(1)(*a*)

The respondent identified the information that is exempt from disclosure in accordance with the FCA’s determination in this matter. The Court identified an additional piece of information that is exempt because its disclosure would permit the applicant, by performing a simple calculation, to obtain disclosure of information that the Court of Appeal has determined is exempt.

The information will be disclosed with the exception of the information exempt from disclosure under para. 13(1)(*a*).

Comments

This decision has been appealed.

AVENTIS PASTEUR LIMITED v. ATTORNEY GENERAL OF CANADA

INDEXED AS: AVENTIS PASTEUR LTD. v. CANADA (ATTORNEY GENERAL)

File No.:	**T-808-02**
Reference:	**2004 FC 1371**
Date of decision:	**October 7, 2004**
Before:	**Kelen J.**
Sections of *ATIA / PA*:	**Ss. 20(1)(*b*), (*c*) and (*d*) and 44 *Access to Information Act* (*ATIA*)**

Abstract

- Information the release of which could be used to determine other information that has been exempted from release under para. 20(1)(*b*) should also be exempted from disclosure under that provision
- Government institutions should inform parties during the bidding process whether the financial terms of a contract, after it is awarded and after public funds are committed to it, will remain confidential

Issues

(1) Was the information in question exempt as confidential financial and commercial information supplied to the Department pursuant to para. 20(1)(*b*)?

(2) Was there a reasonable expectation that the disclosure of the information in question could result in material financial loss or gain or prejudice the applicant's competitive position pursuant to para. 20(1)(*c*)?

(3) Was there a reasonable expectation that the disclosure of the information in question could interfere with contractual negotiations pursuant to para. 20(1)(*d*)?

Facts

Aventis Pasteur (“the applicant”) was awarded a contract by Public Works for the supply of its influenza vaccine. The Public Works ATIP Office received a request for access under the *ATIA* to records containing the annual price per dose of the vaccine, the number of doses purchased per year from 2001 forward, and similar information. The applicant objected to the release of the unit prices per dose of vaccine, the quantities of doses and the volume ranges used to determine the price per dose, claiming that this information was exempt pursuant to paras. 20(1)(*b*), (*c*) and (*d*) of the *ATIA*. On review, the ATIP Office concluded that the unit prices per dose were exempt under paras. 20(1)(*b*) and (*c*), but that the quantities of doses and the volumes ranges were not. The applicant then sought judicial review on the ground that, because the total value of the contract was public, the release of the quantity of doses and volume ranges would allow a third party to determine the approximate unit prices of the vaccine, the very thing the ATIP Office had decided was exempt.

The only decision under judicial review was the decision to disclose the portions of the contract containing the quantity of doses and volume ranges. The decision to withhold the unit prices per dose was not before the Court.

Decision

The application was allowed on the basis of paras. 20(1)(*b*) and (*c*) *ATIA*.

Reasons

With respect to the standard of review, the Court reiterated that the standard of review under s. 44 ATIA is correctness, i.e. the Court will consider whether the information at issue ought to be disclosed on a *de novo* basis. Thus, the decision of Public Works to disclose is not owed any deference. On the question of onus, the Court referred to a number of decisions to the effect that a party seeking exemptions from disclosure bears a heavy onus to prove that the information is exempt from disclosure.

Issue 1

In order to bring the information in question within the exemption set out in para. 20(1)(*b*), the applicant must establish, on a balance of probabilities, that the information:

(1) is financial, commercial, scientific or technical information;
(2) is confidential information;
(3) was supplied to a government institution by the third party; and
(4) was treated consistently in a confidential manner by the third party.

The Court was satisfied that conditions 1 and 4 had been met. The information was undoubtedly financial and commercial. Moreover, the applicant had consistently treated the information in a confidential manner.

With respect to condition 2, the jurisprudence sets out three criteria that must be met in order for the information to be considered confidential. These were summarized by MacKay J. in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.) at para. 42[2].

The Court was satisfied that the first criterion of the *Air Atonabee* test had been met since the information in question was not available from any other source.

With respect to the second and third criteria of the *Air Atonabee* test, the Court here considered the direction given by the Federal Court of Appeal in *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99. In that case, the Federal Court of Appeal considered an application by a

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2. *(a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*

(b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

(c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for the public benefit by confidential communication.

commercial landlord to prevent the disclosure of rent being paid by the federal government for one of the landlord's buildings, as well as the option prices at which the building could be acquired. The Federal Court of Appeal had concluded, relying in part on the reasons of Strayer J. in *Société Gamma Inc. v. Canada (Department of State)* (1994), 79 F.T.R. 42 (F.C.T.D.), that the information in question was not confidential within the meaning of para. 20(1)(*b*) because the landlord could not reasonably have expected that the amounts paid by the government under the contract would be kept from the public.

While the Federal Court of Appeal relied upon *Société Gamma* for the proposition that the confidentiality of amounts paid or payable by a government pursuant to a contractual obligation with third parties is not confidential after the bidding process has been completed and the contract awarded, Kelen J. noted here that in *Société Gamma* the unit prices per word for the translation contract were not being disclosed and were not the subject of review by Justice Strayer. However, in the present case, there had been a history of confidentiality between the applicant and Public Works. Public Works had agreed in the past and in this case that the unit prices per dose were confidential financial and commercial information not to be disclosed. Accordingly, *Hi-Rise Group Inc.* did not apply here. Further, any other information in the contract which would disclose the unit price would also remain confidential. Public Works could not switch horses in midstream. It could not say the unit prices were confidential and then propose to disclose part of the contract which would enable the confidential part to be easily calculated.

With respect to the third criterion of the *Air Atonabee* test, whether the public benefit is fostered by keeping the information confidential, the Court concluded that since Public Works considered it in the public's benefit to withhold the unit prices, it followed that it was in the public's benefit to withhold information that enables a third party to calculate the approximate unit prices. Thus, the last criterion of the *Air Atonabee* test was met.

Turning to condition 3 of the para. 20(1)(*b*) test, the Court was of the view that the unit prices per dose in the different ranges of quantities and the volume ranges to which the unit prices applied were supplied by the applicant to the government and were not negotiated terms. The fact that the applicant selected one particular quantity within the volume range did not mean that that quantity was not part of the information supplied by the applicant.

The Court added in *obiter* that Public Works ought to inform parties during the bidding process whether the financial terms of a contract, after it is awarded and after public funds are committed to it, will remain confidential. The Court agreed with the Court of Appeal in *Hi-Rise Group Inc.*, that "absent special circumstances, the public ought to know how its money is being spent, including the terms of the contract". This is to ensure that the government is accountable to the public. If Public Works decides that there is a public interest in maintaining the confidentiality of certain terms of a contract, then Public Works ought to make that decision, and make it known to companies submitting tenders or proposals. It should also clearly set out how the public benefit is fostered by maintaining confidentiality. Such a determination by Public Works would not foreclose a s. 44 review by the court, but it would go a long way to clarifying the expectations of the parties and identifying the public interest considerations involved.

Issue 2

It is well established that in order to rely on the exemption under para. 20(1)(*c*), the applicant must demonstrate, on a balance of probabilities, that there is a "reasonable expectation of probable harm." In this regard, it is not sufficient for the applicant to generally speculate as to the probability of harm which the disclosure would cause; rather, the applicant must clearly show that the disclosure will probably cause it harm.

After a careful review of the confidential evidence, the Court was satisfied that the information in question fell within the exemption in para. 20(1)(*c*). The disclosure of the information could reasonably be expected to prejudice the competitive position of the applicant in upcoming bids and result in financial loss

to the applicant. Obviously, the applicant's competitors would undercut the prices charged by the applicant if at all possible. As indicated by counsel for the applicant, this prejudice would only be aggravated by the fact that the applicant would not have similar information about its competitors.

The Court further stated that whether it was in the public interest that the applicant's competitors know the price paid was a decision for Public Works to make before it called for future bids. Public Works should make clear to the parties submitting bids whether or not the ultimate contract, in all of its details, would be made public or kept confidential. If the contractor were informed in advance that the contract would be completely public, then para. 20(1)(*c*) would not apply.

Issue 3

The Court was not satisfied that the applicant has adduced any evidence of specific contract negotiations which would allegedly be interfered with if the information were disclosed. The applicant has an obligation to provide tangible evidence to discharge its burden under this exemption, which it has not satisfied.

SHELDON BLANK V. MINISTER OF JUSTICE

INDEXED AS: BLANK V. CANADA (MINISTER OF JUSTICE)

File No.:	**A-233-03**
Reference:	**2004 FCA 287**
Date of decision:	**September 8, 2004**
Before:	**Décary, Létourneau and Pelletier JJ.A.**
Sections of *ATIA / PA*:	**Ss. 13, 19, 21, 23, 25, 46 *Access to Information Act (ATIA)***

Abstract

- S. 23 ATIA solicitor-client privilege covering both legal advice and litigation privilege
- Duration of litigation privilege
- Application of s. 25 ATIA to solicitor-client privileged record
- Role of Court under s. 46 ATIA

Issues

(1) Does litigation privilege fall under s. 23 and does it end when the litigation ends?
(2) Were the other ATIA exemptions correctly applied?
(3) Does s. 25 ATIA apply to a record subject to s. 23?
(4) Does s. 46 ATIA allow the Court to order the reconstitution of a record?

Facts

The appellant had been charged on counts of alleged pollution of the Red River. The charges against Gateway related to breaches of the reporting requirements of the *Fisheries Act*. The charges against the appellant and Gateway were ultimately quashed. Both the appellant and Gateway sued the federal government in damages, It is both in the context of the criminal prosecution and the civil lawsuit that the appellant made access requests to the ATIP Office of the

Department of Justice to obtain all records pertaining to his prosecution and that of Gateway.

Some of the records sought were exempt from disclosure on the basis of subss. 13(1), 19(1), 20(1), 21(1) and s, 23 of the *ATIA*. Following the Information Commissioner's investigation, the appellant sought judicial review of the refusal by the Minister of Justice to provide the records.

The present proceedings involve an appeal and a cross-appeal against the decision of the motions judge (2003 FCT 462). The appeal questions the motions judge's decision with respect to s. 13, 19, 21, 23, the severability of information (s. 25) and puts in issue the powers of the Court under s. 46. The cross-appeal by the Minister of Justice addresses the issue of the duration of the litigation privilege. More precisely, the question is whether the motions judge erred when he decided that the litigation privilege, if it could be claimed to exclude a record from release, expires when the litigation ends with the result that the records containing information subject to the privilege must be released.

Decision

The appeal is allowed in part, on the question of severability, and the matter is referred back to the Federal Court for determination of whether the mandatory requirements of s. 25 *ATIA* have been satisfied. The cross-appeal is dismissed.

Reasons

Issue 1 – Duration of litigation privilege

The Court unanimously held that the concept of solicitor-client privilege in s. 23 *ATIA* includes the legal advice privilege branch and the litigation privilege branch. On the question of the duration of the litigation privilege, the majority of the Court (Létourneau J.A. dissenting) held that the weight of authorities favour the conclusion that litigation privilege is extinguished when the litigation which gave rise to it comes to a conclusion, subject to the possibility of defining that litigation more broadly than the particular proceedings which gave rise to the claim. On the facts of the case, this means that s. 23 does not apply to those documents

for which a claim of litigation privilege is made because the documents in respect of which the privilege is asserted lost their privileged status when the criminal prosecution ended.

In coming to this conclusion, the majority of the Court distinguished this case from the decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Big Canoe* (2002), 220 D.L.R. (4th) 467 ("*Big Canoe*") on the basis of a significant difference in the wording of s. 19 of the of the Ontario *Freedom of Information and Protection of Privacy Act*[3] (*FOIP*) and that of s. 23 *ATIA*. S. 19 *FOIP* describes two kinds of records. The first are records subject to the solicitor-client privilege; the second are records that were prepared in certain circumstances involving Crown counsel, i.e. Crown attorneys in criminal prosecutions. There is no requirement that the second kind of records be privileged, hence the finding of the Ontario Court of Appeal that the temporal limitation inherent in litigation privilege did not apply. In other words, the right to refuse disclosure of records emanating from the work of Crown counsel does not turn on the existence of any privilege, but on their creation in circumstances which would give rise to a claim of privilege, whether that privilege continued in force or not. S. 23, on the other hand, describes a single type of record only—one that *is* subject to solicitor-client privilege. In contrast to s. 19 *FOIP*, s. 23 *ATIA* requires that there be, in all cases, a subsisting solicitor-client privilege as a condition of refusal to disclose. In short, s. 23 is designed to deal with documents which are privileged, not those which were once privileged. Once the privilege is lost, then other mechanisms must be found to prevent disclosure in cases where it would be inappropriate. In some cases, a broad definition of the litigation could be used to prevent the premature release of a litigation file. In others, recourse may be had to other exemptions under the *ATIA*.

In the end result, s. 23 does not exempt from disclosure records which are not subject to the solicitor-client privilege at the time the access request is made,

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3. S. 19 of the Ontario FOIP reads as follows : "A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation."

even if those documents were the subject of the litigation privilege at some other time.

Issues 2, 3 and 4 – Application of *ATIA* exemptions, severance and role of Court

The record before the Court showed that the Winnipeg Police Services had refused to consent to a release of the material provided by it. The s. 13 exemption was therefore properly claimed and applied. The Court also found that the ss. 19 and 21 exemptions had been correctly applied.

A record subject to solicitor-client privilege is subject to s. 25 *ATIA*. The words "Notwithstanding any other provision of this Act" contained in s. 25 make it a paramount section. It follows that general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. As stated by the Court of Appeal in the previous *Blank* decision, this kind of information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more"[4].

In the absence of evidence that would give the Court reasonable grounds to believe that the integrity of the records has been tampered with, the Court's power under s. 46 to review is limited to a review of the records that are in evidence before it. The power does not extend to ordering the reconstitution of records. No evidence of tampering has been adduced and the motions judge was right to limit his review to the material that was in evidence before him.

Comments

The Attorney General of Canada has sought leave to appeal to the Supreme Court of Canada on the issue of the duration of the litigation privilege.

Leave was granted on April 21, 2005.

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4. Blank v. Canada (Minister of Environment), 2001 FCA 374, para. 23.

KEITH MAYDAK v. SOLICITOR GENERAL OF CANADA

INDEXED AS: MAYDAK v. CANADA (SOLICITOR GENERAL)

File No.:	**T-73-04**
Reference:	**2004 FC 1171**
Date of decision:	**August 24, 2004**
Before:	**Rouleau J.**
Sections of *ATIA / PA*:	**Ss. 9(1), 22(1)(*a*), (*b*), 26 *Privacy Act (PA)***

Abstract

- Meaning of “investigation”
- Institution cannot withhold entire page when only a portion thereof exempt from disclosure

Issue

Were the actions taken by the RCMP an “investigation” pursuant to para. 22(1)(*a*) of the *Privacy Act*?

Facts

The applicant made a request to the RCMP, under the *Privacy Act*, for all personal information relating to documents held by the RCMP as well as by Interpol Ottawa about his extradition to the United States to prosecute a violation of supervised released stemming from a fraud conviction.

The RCMP responded to the request by providing some of the information while withholding other information pursuant to para. 22(1)(*a*). The applicant was also advised that paras. 19(1)(*a*), (*b*) and (*c*), 22(1)(*b*) and s. 26 of the *Privacy Act* could also apply.

The applicant complained to the Privacy Commissioner who found that the complaint was not well-founded. More specifically, the latter found that para.

22(1)(*a*)[5] exempted the requested information from disclosure on the grounds that:

> The RCMP need only demonstrate that the information at issue is less than 20 years old and that it was prepared or obtained in the course of a lawful investigation by an investigative body. The RCMP is indeed an investigative body for the purposes of the *Act* and, in my view, all of the other requirements of this provision have been met as well. Therefore, I am satisfied that the RCMP had the legal authority to invoke this exemption at the time it was claimed.

The Commissioner did not comment on the validity of paras. 19(1)(*a*), 19(1)(*b*), 19(1)(*c*), 22(1)(*b*) and 26 of the *Privacy Act* as he was of the view that para. 22(1)(*a*) justified by itself the decision to withhold the requested information.

Decision

The application is allowed.

Reasons

The facts clearly showed that the RCMP simply received information from the Department of Justice to the effect that the United States, upon an extradition request, sought the applicant for a supervised release violation. The only actions taken involved placing, and subsequently removing, the applicant's name from

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5. *22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)*

   (a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

   (i) the detection, prevention or suppression of crime,

   (ii) the enforcement of any law of Canada or a province, or

   (iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act

   if the information came into existence less than twenty years prior to the request;

the CPIC, a Canadian police database, and communicating by e-mail with the Department of Justice relating to the status of the extradition proceedings. This type of activity does not constitute an investigation within the meaning of the statute exempting the information from disclosure. While there may be cases where the RCMP did conduct an investigation to assist an extradition proceeding, it appears clear that the RCMP Interpol did not do so in this case. In fact, it appears to have taken no investigatory actions.

As a result, Rouleau J. found that Privacy Commissioner had made an error in concluding that the information requested by the applicant fell within the exemption contained in para. 22(1)(*a*) of the *Privacy Act*, which error warranted the Court's intervention.

Since the decision under review was solely based on the para. 22(1)(*a*) exemption, it was not for the Court to consider the applicability of the other exemptions contained in the *Privacy Act* to the case at bar. Nonetheless, having reviewed the confidential documents, Rouleau J. took the view that none of the other exemptions alleged by the respondent seemed applicable.

Among the withheld documents, the only one that seemed remotely relevant to the possible application of an exemption was a letter from the FBI to the RCMP which contained the name of a third party. Since the *Privacy Act* deals with "information," not "documents," an agency may not withhold the entire page simply because a portion may be exempt. Thus, this document was to be communicated to the applicant once the opening paragraph of the letter had been redacted.

Comments

The RCMP's appeal has been allowed: 2005 FCA 186.

MERCK FROSST CANADA & CO. V. MINISTER OF HEALTH

INDEXED AS: MERCK FROSST LTD. V. CANADA (MINISTER OF HEALTH)

File No.:	**T-90-01**
Reference:	**2004 FC 959**
Date of decision:	**July 6, 2004**
Before:	**Harrington J.**
Sections of *ATIA / PA*:	**Ss. 20(1)(*b*), (*c*), (*d*), 25, 27, 44, 74 *Access to Information Act (ATIA)***

Abstract

- Records related to review of new drug submission
- Records consisting of third party confidential information with exception of Notice of Compliance
- Jurisdiction of Court under a s. 44 application

Issues

(1) Whether the requested information is exempt from disclosure pursuant to para. 20(1)(*b*)

(2) Whether some information may be severed pursuant to s. 25 of the *ATIA*

(3) Whether the Court can review the head of a government institution's decision to release nformation without giving a s. 27 notice to the third party

Facts

This is an application for judicial review under s. 44 of the *ATIA* following Health Canada's decision to disclose records which the applicants claim should be exempt from disclosure on the basis of paras. 20(1)(*b*), (*c*) and (*d*) of the Act.

Health Canada received a request under the *ATIA* for access to records related to the review of Merck Frosst's New Drug Submission in connection with its newly approved and marketed asthma drug known as Singulair. The requested

records consist of the Notice of Compliance, the Comprehensive Summary, the reviewers' notes and the correspondence between Health Canada and Merck Frosst regarding the review of the New Drug Submission.

The requested documents represent a total of 549 pages. Health Canada determined that 15 pages, including the Notice of Compliance, contained no confidential information (with the exception of one portion of one of these pages). Health Canada released those pages to the requester without consulting Merck Frosst.

In its review of the remaining 534 pages, Health Canada determined that there was confidential information in 32, and that there might also be other information of a confidential nature. The Department then informed the applicant about the request for information and invited it to send their written representations with respect to the reasons why the records should not be disclosed. The applicant did not convince the respondent that subs. 20(1) applied in order to allow the non-disclosure of the records. Following the Minister's decision to provide the requester with access to some of the requested information, Merck Frosst applied for a judicial review of the decision under s. 44 of the *ATIA*.

The applicant objected to the disclosure of any of the requested information except the Notice of Compliance.

Decision

The application for judicial review is allowed with costs. It is declared that with the exception of the Notice of Compliance, the Minister of Health's decision to provide the requester access to any part of the record it sought was invalid. The Minister was ordered not to disclose any other part of the requested record as the record in its entirety is exempt from disclosure pursuant to subs. 20(1) of the *ATIA*.

Reasons

Issue 1 Whether the requested information is exempt from disclosure pursuant to para. 20(1)(*b*)

In the first part of his analysis, Justice Harrington looked at the issue of whether the requested information consisted of third party information. He determined that all the information requested, including the notes of reviewers either in the employ of Health Canada or retained as outside experts, was third party information.

In the second part of his analysis, the judge looked at whether the requested information was confidential. With respect to the Notice of Compliance, he decided that Health Canada was entitled to release the document to the requester without consulting Merck Frosst. In the Court's view, the Notice of Compliance is not a confidential document because everyone, competitor or not, is entitled to know whether a drug which is on the market has been approved.

Justice Harrington decided that the Comprehensive Summary is entirely exempt from disclosure because "in pith and substance" it is third party confidential information. Also, with respect to the Comprehensive Summary, the reviewers' notes and the correspondence, the Court ruled that the contents, purpose and circumstances under which the documents were compiled and communicated show that they are confidential.

Finally, the Court held that while some of the information appears to be in the public domain, the question is not really whether or not there is information in the public concerning Singulair, the question is whether the information *as presented in the New Drug Submission* is in the public domain. Justice Harrington decided that since the information in the records as presented was not in the public domain, confidentiality had not been lost.

Issue 2 Whether some information may be severed pursuant to s. 25 of the *ATIA*

Although Justice Harrington acknowledged that some of the requested information was non confidential information, he decided that there could not be a reasonable severance of the non-exempt material from the exempt material. All that would remain would be portions of sentences which are incomprehensible.

Issue 3 Whether the Court can review the head of a government institution's decision to release information without giving a s. 27 notice to the third party

Merck Frosst requested that Health Canada's decision to disclose 15 pages without giving a s. 27 notice be also reviewed by the Court. Health Canada objected to this decision being reviewed on the ground that a s. 44 application is triggered by notice given by the head of a government institution to a third party. The judge did not agree with Health Canada and held that the Department should not have disclosed part of the requested records without first giving a s. 27 notice to Merck Frosst. In Justice Harrington's view, s. 44 cannot be ousted because a notice which was not given should have been given.

Comments

The decision was reversed by the Federal Court of Appeal: 2005 FCA 215.

TUNIAN V. CHAIRMAN OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA

INDEXED AS: TUNIAN V. CANADA (CHAIRMAN OF THE IMMIGRATION AND REFUGEE BOARD)

File No.:	**T-691-03**
Reference:	**2004 FC 849**
Date of decision:	**June 10, 2004**
Before:	**Martineau J.**
Sections of *ATIA / PA*:	**Ss. 12(1), 22(1)(*b*) *Privacy Act* (*PA*)**

Abstract

Draft reasons/notes made by member of IRB in his adjudicative capacity not under control of Board

Issue

Did the Immigration and Refugee Board err by concluding that it did not have control for the purposes of subs. 12(1) *PA* of draft reasons/notes prepared by one of its members?

Facts

The applicants sought review of the decision by the respondent not to disclose draft reasons (the "notes") prepared by a member of the Immigration and Refugee Board who made the decision determining that the applicants were not Convention refugees.

After the hearing of the applicants' refugee claims, the Board Member dictated the notes using the same equipment that was also used to record the proceedings. The dictation was transcribed but the Board did not retain a copy of the transcription as it was of the opinion that it belonged to the Board Member and, accordingly that it was not part of the official record of the Board. Therefore, relying on *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*

(2000), 257 N.R. 66 (F.C.A.), aff'g [1996] 3 F.C. 609 (T.D.), the request made by the applicants to obtain the notes was denied.

The respondent's decision not to disclose the notes was the subject-matter of a complaint to the Privacy Commissioner of Canada, who determined that the notes were not under the Board's "control", and therefore were not subject to disclosure.

The present application was made pursuant to s. 41 of the *PA*.

Decision

The application was dismissed.

Reasons

The Court found that the underlying reasoning in both the trial and appeal decisions in *Canada (Privacy Commissioner)*, *supra,* applied here: deference should generally be accorded to the independence of decision-makers exercising an adjudicative function. Like the Canada Labour Relations Board, the IRB is a quasi-judicial tribunal. Its members are Governor in Council appointees, not employees of the Board. They exercise an independent adjudicative function. The Board does not require its Members to keep draft reasons or notes from a hearing on the official record, as it is part of the decision-making process associated with an independent adjudicative function and, as such, should not be under the control of the Board. Rather, the Board's policy is that Board Members are encouraged to keep notes to the extent that notes are an aid in the decision-making process. Accordingly, all notes, including draft reasons, prepared by Board Members are considered to belong to the Board Member.

The mere fact that the Board Member has used the Board's equipment to record the notes does not make them part of the official record of the proceedings before the Board. The notes were dictated after the hearing had been adjourned. Clearly, they were intended for the eyes of the Board Member only. The act of dictating the notes was a private act of the Board Member which could have been otherwise done in the Board Member's chamber. Further, considering that

no final decision had been made at the time the notes were prepared, it cannot be said that the Board Member had relinquished to the Board the control he legally had over the notes, or that he had otherwise waived any right he has under the common law or the *PA* to resist any request to communicate the notes.

Taking into account the quasi-judicial nature of the Board and the context in which the notes were made, the Court found that the notes were not under the control of the Board as to come within the ambit of para. 12(1)(*b*) of the Act. The Court added that, even if the notes were under the Board's control, they would likely be exempt from disclosure under para. 22(1)(*b*) of the Act, as their disclosure would compromise the operation of the Board.

BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITY MANAGEMENT SERVICES AND MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

INDEXED AS: BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITY MANAGEMENT SERVICES V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES)

File No.:	**A-164-03**
Reference:	**2004 FCA 214**
Date of decision:	**May 31, 2004**
Before:	**Stone, Sexton, and Evans JJ.A.**
Sections of *ATIA / PA*:	**Ss. 20(1)(*c*), 44 *Access to Information Act* (*ATIA*)**

Abstract

- Paragraph 20(1)(*c*) is to be read disjunctively
- Having established a reasonable expectation that disclosure will probably prejudice its competitive position, an applicant does not also have to prove "harm"

Issues

(1) Has the Applications Judge misinterpreted para. 20(1)(*c*) *ATIA* when she decided that the records at issue were not covered by that provision?

(2) Is para. 20(1)(*c*) *ATIA* to be read disjunctively, and does it require proof both that disclosure will probably prejudice the applicant's competitive position and also harm?

Facts

The applicant had sought an order prohibiting the respondent from disclosing certain documents which the applicant had submitted to the respondent as part of its bid in response to requests for proposals to provide property management services for properties belonging to the Government of Canada. The Applications

Judge denied the application (2003 FCT 254). Before the Court of Appeal the applicant challenged the Applications Judge's conclusion that disclosure was not prohibited by para. 20(1)(*c*) on the grounds that she had misinterpreted that provision when she decided the records in question were not covered by it. The applicant pointed to the following sentence in the Applications Judge's decision (para. 22) to support its challenge: "At its highest, it can only be said that the competitive position of the application will be prejudiced."[6]

Decision

The application was dismissed with costs.

Reasons

The two limbs of para. 20(1)(*c*) (financial loss or gain on the one hand, and competitive prejudice on the other) are disjunctive. Thus, an applicant who establishes a reasonable expectation of probable competitive prejudice is entitled to require that the records in dispute not be disclosed. Having established a reasonable expectation that disclosure will probably prejudice its competitive position, an applicant does not also have to prove "harm". However, this may be no more than a matter of semantics, because the concept of prejudice itself implies harm.

The Court found that counsel for the applicant had not discharged the onus of establishing that it should be inferred from the disputed sentence that the Applications Judge misinterpreted the Act or the jurisprudence in the ways alleged. The sentence must be read in the entire context of the Judge's discussion of para. 20(1)(*c*). The reasons indicate that the Applications Judge meant to conclude that, on the basis of the evidence, there was no reasonable expectation of probable prejudice to BLJC's competitive position as a result of

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6. *The Applications Judge went on to state that: "There exists, here, insufficient evidence to conclude that there is a basis to establish financial loss or prejudice to BLJC, or financial gain to a competitor" (para. 22 of the decision).*

disclosure. Nor do they support the view that the Applications Judge misinterpreted the Act or the relevant jurisprudence.

While the Court could not be sure what the Judge did mean by the one sentence in question, this was not enough to justify allowing the appeal given that the Court was not satisfied that it showed that the Applications Judge must have erred in law in dismissing the application. Judges are surely to be given credit for not intending to contradict themselves in consecutive sentences, especially when, in all other respects, their reasons, including those dealings with para. 20(1)(*c*), are cogent and careful and, apparently, not thought by experienced counsel to provide any basis for an appeal.

Comments

Brookfield Lepage's application for leave to appeal to the Supreme Court of Canada was denied on January 21, 2005.

ROBERT GILLES GAUTHIER AND NATIONAL CAPITAL NEWS V. MINISTER OF JUSTICE AND PRIVACY COMMISSIONER OF CANADA

INDEXED AS: GAUTHIER V. CANADA (MINISTER OF JUSTICE)

File No.:	**T-653-02**
Reference:	**2004 FC 655**
Date of decision:	**May 5, 2004**
Before:	**Mosley J.**
Sections of *ATIA / PA*:	**Ss. 27, 41 *Privacy Act* (*PA*)**

Abstract

- Standard of review for decisions regarding applicability of s. 27 PA exemption is correctness
- S. 27 PA including both solicitor-client communications as well as litigation privilege
- Notes and recommendations prepared by DOJ counsel as government's response to decision of international rights body fall within litigation privilege

Issues

(1) What is the appropriate standard of review with respect to a decision to exempt documents under the s. 27 *PA* exemption for solicitor-client privilege?

(2) Did the Minister's delegate err in determining that the records in question were exempt from disclosure to the applicant due to solicitor-client privilege under s. 27 *PA*?

Facts

The applicant, founder of the National Capital News ("NCN"), had sought unsuccessfully to obtain full membership in the Parliamentary Press Gallery. Among other actions, the applicant had appealed to the United Nations' Human Rights Committee ("UN Committee") for the International Covenant on Civil and

Political Rights, arguing that his right to freedom of expression had been violated through his denial of access to the Press Gallery. The Committee found in his favour. The applicant believed that certain misrepresentations and prejudicial or inaccurate information about him contained in files held by the Department of Justice ("DOJ") had affected the manner in which the government had responded and continued to respond to his inquiries in regards to Press Gallery access. Consequently, he made a request for access to information related to him and NCN that was held by DOJ, pursuant to his right under s. 12 *PA*.

The DOJ ATIP office provided the applicant with a preliminary package of 531 pages of information, and a final package of 154 additional pages. Some pages and portions thereof were exempted from release on the grounds of ss. 26 (another individual's personal information) and 27 (solicitor-client privilege) *PA*.

The applicant complained to the Privacy Commissioner ("Commissioner"). The Commissioner's investigation concluded that the ATIP Office had failed to provide the requested information within the statutory time limit and had failed to provide notice of extension of the time limit. The Commissioner, upon a review of those pages of information that were partly or completely exempted from access, concluded that the Director of the ATIP Office was authorized to refuse disclosure pursuant to s. 27 but requested that DOJ reconsider the exercise of its discretion, which request resulted in the disclosure of some additional pages.

Although the applicant originally sought review of both the decision of the DOJ and the findings of the Commissioner, at the outset of the hearing the applicant conceded that the Commissioner's findings were not reviewable by the Court. Further, the propriety of the s. 26 exemption was not argued, counsel confining themselves to the s. 27 exemption.

Decision

The application was allowed in part. Certain records were ordered released.

Reasons

Issue 1

The appropriate standard of review here is correctness, based on an assessment of the factors under the pragmatic and functional approach.

First, the s. 41 *PA* right of review points to a minimal degree of deference to the ATIP Office's decision.

Second, the decision-maker, the Director of the ATIP Office, does not have a greater amount of expertise relative to the Court on the issue of whether documents are subject to solicitor-client privilege, a matter clearly within the particular expertise of the Court. Further, in the context of a s. 41 application for review, the government institution is regarded as having lesser expertise regarding the interpretation of legal questions in comparison to the Court. Further, while the s. 27 exemption has an element of discretion in determining whether a document found to be solicitor-client privileged may nonetheless be disclosed, the determination of whether the document is so privileged is not discretionary.

Third, the purpose of s. 27 must be regarded as fundamental to our society. Shielding information developed in the solicitor-client relationship from disclosure is a central underpinning within the administration of justice and the functioning of the rule of law. The balancing of these interests points to a less deferential standard of review, in that an independent review by the court will be required when such important interests are at stake.

Finally, the question at issue is one of mixed fact and law; here, the question concerns the application of the legal definition of solicitor-client privilege to the information in dispute.

Issue 2

As the term "solicitor-client privilege" as used in s. 27 is not defined in the *PA*, common law principles recognizing the term as a fundamental and substantive

rule of law in Canada are applicable. There are only a few, clearly defined exceptions to this privilege, including the two raised here by the applicant: (1) communications between solicitor and client which are directed towards an unlawful purpose, such as facilitation of a crime or fraud; and (2) the issue of the existence of a client who may have waived the privilege.

The solicitor-client privilege in s. 27 *PA* includes both the solicitor-client communications as well as the litigation privilege. The Court was satisfied that, with a few specific exceptions, the records in issue contained information which involved solicitor-client advice or notes and recommendations prepared in contemplation of litigation, that is, the government's response to the UN Committee's decision and also its response to a variety of other legal proceedings initiated by the applicant. The Court was also satisfied that the records in issue did not contain advice directed towards an unlawful purpose or end. The applicant's argument that DOJ had "minimized" the UN Committee's Views on the applicant's case and were thus attempting to avoid compliance with Canada's international obligations is not akin to a situation where a lawyer provides advice to a client that would facilitate a crime or fraud; therefore, an exception to solicitor-client privilege is not warranted on this ground.

With respect to the second issue, the applicant argues, first, that the solicitor-client privilege cannot apply in the absence of an "owner" of the privilege. The Court rejected that argument. It held that, following *R. v. Campbell*, [1999] 1 S.C.R. 565, *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.) and *Weiler v. Canada (Minister of Justice)*, [1991] 3 F.C. 61 (T.D.), solicitor-client privilege attaches to legal advice provided by "in-house" lawyers to their client(s) in various departments of the government, as well as to documents prepared in anticipation of litigation. In the present case, a client clearly existed, namely the Government of Canada as represented by the Department of Justice.

The applicant's second argument that the failure by DOJ counsel to consult with their client as to whether the client would waive the privilege invalidates the privilege, was also dismissed. Solicitor-client privilege exists whether or not the

client is aware of the exact parameters of such obligation of confidentiality, and until instructions to waive the privilege have been received from the client, a lawyer must maintain the privilege. Difficulties in determining whether the privilege has been waived in cases where the government is the client do not lead to a presumption that a government solicitor has acted without instructions from his client and has failed to keep his client informed of the ongoing developments in a case, even where there is no explicit evidence of the government having turned its mind to the possibility of waiving the privilege. Unless clear evidence to the contrary is shown, a solicitor is presumed to have relayed all information about a particular case to his or her client. If the client had desired to waive its privilege, then the DOJ solicitors would be obliged to carry out their client’s wishes. The lack of reference to waiver in the respondent’s affidavit must be regarded as the client failing to assert the waiver.

The Court concluded that certain pages that had been withheld were not exempt as they did not contain solicitor-client privileged information.

ATTORNEY GENERAL OF CANADA AND H.J. HEINZ CO. OF CANADA LTD. AND THE INFORMATION COMMISSIONER OF CANADA

INDEXED AS: CANADA (ATTORNEY GENERAL) V. H.J. HEINZ CO. OF CANADA LTD.

File No.:	**A-161-03**
Reference:	**2004 FCA 171 April 30, 2004**
Date of decision:	**Nadon, Desjardins, Pelletier JJ.A.**
Before:	**Mosley J.**
Sections of *ATIA / PA*:	**Ss. 19, 20(1), 24, 27, 28, 44, 49, 51 *Access to Information Act* (*ATIA*)**

Abstract

- Siemens stands for proposition that third party applications under s. 44 ATIA are not restricted to subs. 20(1) ATIA
- Siemens cannot be overturned by Court of Appeal as it was not "manifestly wrong"

Issues

(1) Does the decision of the Federal Court of Appeal in *Siemens* decide the substantive issue in this case?

(2) Should the decision in *Siemens* be overturned?

Facts

The Canadian Food Inspection Agency ("CFIA") received a request for access under the *Access to Information Act* (*ATIA*) to information relating to H.J. Heinz ("the respondent"). CFIA asked the respondent pursuant to s. 27 *ATIA* why the requested records should not be disclosed. CFIA reviewed the respondent's reasons for opposing disclosure and determined that it would go ahead with disclosure subject to certain redactions. CFIA so informed the respondent of its

decision to proceed, in response to which the respondent commenced judicial review proceedings pursuant to s. 44 *ATIA*.

In its application for judicial review, the respondent raised a number of issues concerning the application of subs. 20(1) *ATIA*. Later, in its written and oral arguments, the respondent raised the application of s. 19 *ATIA*.

The application judge (2003 FCT 250) concluded that certain records or parts thereof which fell within subs. 20(1) *ATIA* should be severed; this is not appealed here. The applications judge also concluded that the respondent could invoke the exemption set out in s. 19 *ATIA* and consequently ordered the severance of certain passages in the records which fell within s. 19. In reaching this conclusion, the application judge relied on *Siemens Canada Ltd. v. Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575, 2002 FCA 414 for the proposition that the respondent could, on a s. 44 application, invoke exemptions other than those set out in subs. 20(1) *ATIA*.

Heinz argued that *Siemens* was determinative of the matter; the Attorney General argued that the Court should overturn the *Siemens* decision as the Court in that case did not give full consideration to the arguments concerning the appropriate interpretation of the notice scheme set out in the *ATIA*.

Decision

The application was dismissed with costs.

Reasons

Issue 1

The Court agreed with the respondent that it was not possible to distinguish *Siemens* from the present case on any ground, including the one that the exemption at issue in *Siemens* was not s. 19, but s. 24. Both sections provide that the head of a government institution must refuse to disclose records which fall within the wording of these sections; in the case of s. 19, the head of the institution is not to disclose records that contain personal information as defined

in s. 3 of the *Privacy Act* and, in the case of s. 24, the head of the institution is not to disclose records that contain information, the disclosure of which is restricted by or pursuant to any provision set out in Schedule II. Consequently, in *Siemens*, the Court of Appeal decided that a party could, on a s. 44 application, seek to prevent the disclosure of records on the basis of exemptions other than those contained in subs. 20(1) *ATIA*. This issue before this Court was thus clearly decided by the Court of Appeal in *Siemens*.

Issue 2

In a number of recent decisions, the Court of Appeal has clearly stated that it will not overrule prior decisions of that Court unless the decision is manifestly wrong, i.e. that the Court overlooked a relevant statutory provision or a case that ought to have been followed. Although the Court found very appealing the appellant's forceful arguments that, in a s. 44 application, a third party's objection to disclosure of records is limited to the records found in subs. 20(1) of the Act, the Court was of the view that it could not overturn the decision rendered in *Siemens* as it was not "manifestly wrong". The Attorney General did not make any submissions to the contrary.

Comments

The Attorney General of Canada was granted leave to appeal before the Supreme Court of Canada.

MAMIDIE KEÏTA AND BERNARD MICHAUD V. MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA AND PRIVACY COMMISSIONER OF CANADA

INDEXED AS: KEÏTA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.:	**T-676-03**
Reference:	**2004 FC 626**
Date of decision:	**April 28, 2004**
Before:	**Tremblay-Lamer J.**
Sections of *ATIA / PA*:	**Ss. 26 and 41 *Privacy Act (PA)***

Abstract

- The only power the Court has in a review under s. 41 of the PA is to order the disclosure of information when access has been refused contrary to the provisions of the Act
- The Privacy Commissioner's findings and recommendations are not subject to review by the Court

Issues

(1) What are the limits of the Court's jurisdiction in a review under s. 41 of the *PA*?

(2) Does the Court have jurisdiction to review the Privacy Commissioner's recommendations?

Facts

On June 26, 2001, the applicants filed access requests for some personal information. On August 16, 2001, the Minister gave the applicants some of the records requested. Additional information was subsequently provided to the applicants.

Not satisfied with the information provided by the Minister, the applicants filed a complaint with the Privacy Commissioner. At the end of his investigation, the Commissioner informed the applicants that their complaints were well founded, but since the Minister provided them with the missing personal information following the filing of the complaint he considered the matter resolved. Regarding certain information that was requested but not disclosed by the Minister, the Commissioner informed the applicants that this information involved other individuals and that it was therefore exempt from disclosure in accordance with s. 26 of the *PA*. The Commissioner also informed them that the embassies in Abidjian and Conarky did not have any other personal information about them as the records had been destroyed at the end of the maximum two-year retention period.

After they received the Commissioner's report, the applicants sent a letter to him asking that he reply to some questions. The Commissioner refused to reopen his investigation.

On November 17, 2003, the applicants filed an application for judicial review pursuant to s. 41 of the *PA*. This application requested the review of the decision of the Minister of Citizenship and Immigration Canada to refuse the disclosure of certain information and, among other things, a review of the Privacy Commissioner's recommendations. The applicants sought several remedies including damages, letters of apology from the Minister and the Commissioner, and the modification of the content of Citizenship and Immigration Canada files.

Decision

The application for judicial review was dismissed.

Reasons

Issue 1

Tremblay-Lamer J. first noted that the only power the Court has in a review under s. 41 of the *PA* is to order the disclosure of information when access has been refused contrary to the provisions of the Act. The applicants requested

several remedies that cannot be given in the context of this judicial review. This includes the request for damages, the request for a letter of apology from the Minister, the request to meet someone with “sufficient authority” and the request to have the content of the files at Citizenship and Immigration Canada modified.

Regarding the disclosure of certain personal information about other individuals, the Court was of the opinion that s. 26 of the Act applies and that the Minister acted in good faith and in accordance with the Act in handling the access request.

Issue 2

Based on the statements of Noël J. in *Canada (Attorney General) v. Bellemare* (2000), 270 N.R. 269 (F.C.T.D.), the Court concluded that the merits of the Commissioner’s recommendations are not open to review by the Court.

CLAYTON RUBY v. SOLICITOR GENERAL OF CANADA

INDEXED AS: RUBY v. CANADA (SOLICITOR GENERAL)

File No.:	**T-638-91**
Reference:	**2004 FC 595**
Date of decision:	**April 20, 2004**
Before:	**von Finckenstein J.**
Sections of *ATIA / PA*:	**Ss.8(2)(m)(i), 16, 19, 21, 22(1)(*a*), 26, 41, 47, 52(2) *Privacy Act* (*PA*)**

Abstract

- Standard of review (reasonableness) and burden of proof on government institutions
- Determination of whether exemption properly applied a two-step process
- Discretion to be exercised at time of decision
- Reasonable efforts to seek consent of foreign government
- No public interest in disclosure clearly outweighing privacy in broad sense of term

Issues

(1) What is the standard of review with respect to the exemptions claimed and what is the burden of proof?

(2) Was the exemption claimed pursuant to s. 22(1)(*a*) with respect to bank 040 of the DEA properly applied?

(3) Was the exemption claimed pursuant to s. 19 with respect to banks 010 and 015 of CSIS properly applied?

(4) Was the exemption claimed pursuant to s. 26 with respect to banks 010 and 015 of CSIS properly claimed?

Facts

In June 1988, the applicant requested that the Department of External Affairs (DEA) provide him with his information held in bank 040, which bank contains personal information about certain individuals disclosed to DEA by federal bodies about their ongoing investigations. DEA refused to disclose that information on the basis of ss. 16(2) and 22(1)(*a*) *PA*. Prior to that, the applicant had sought information contained in two banks held by the Canadian Security Intelligence Service (CSIS): bank 010 which relates to CSIS' most current and sensitive investigations and bank 015 which relates to its older and less sensitive investigations. CSIS refused to disclose the information with respect to bank 010 on the basis of ss. 16(2) and 22(1)(*a*) and refused to disclose part of bank 15 on the basis of ss. 19, 21, 22(1)(*a*)(iii), 22(1)(*b*) and 26 *PA*.

The applicant sought judicial review of the refusals to disclose. The Trial Division ([1998] 2 F.C. 351 (T.D.)) rejected the applications on the ground that the exemptions had validly been claimed by the DEA and CSIS. On appeal, the FCA was not satisfied that the trial judge had "gone to the second step of reviewing the exercise of discretion" by DEA and CSIS ([2000] 3 F.C. 589 (C.A.)). It therefore referred the matter back to the Trial Division for a new determination of whether the exemptions with respect to banks 010 and 015 were properly applied by CSIS, and whether the DEA properly applied the exemptions it claimed with respect to bank 040. Parallel decisions on the constitutional validity of s. 51(2)(*a*) and 51(3) *PA* and on s. 22(1)(*b*) *PA* were appealed to the Supreme Court of Canada ([2002] 4 S.C.R. 3). The SCC restored the ruling of the FCTD to the effect that CSIS was authorized to refuse to disclose on the basis of s. 22(1)(*b*).with the result that this exemption is not an issue here.

Decision

The application is denied.

Reasons

Issue 1 – Standard of review and burden of proof

The motions judge reiterated with approval the ruling of the FCA to the effect that s. 47 of the *PA* puts on the head of the institution both the burden of proving that the conditions of the exemptions are met and that the discretion conferred on the head of a government institution was properly exercised. The judge found that the appropriate standard of review is reasonableness and that the burden of proof is on the party invoking an exemption to justify its actions when faced with a request for disclosure.

The determination whether a discretionary exemption has been properly invoked involve a two-stage process. The first question that needs to be answered is whether it was reasonable for the head to conclude that the information fell within the exemptions invoked. The second question is whether the head properly exercised his discretion given all the circumstances of the case.

Issue 2 – S. 22(1)(*a*) *PA*

Given the nature of the information contained in bank 040, the sources from which such information is obtained and the compelling logic of the DEA's consistent policy to refuse to disclose whether information is contained in that bank, the Court found that it was reasonable for the head of the DEA to invoke the exemption set out in s. 22(1)(*a*).

In reviewing the exercise of the discretion (the second stage of the process), the Court considered

- Whether the information came from an investigative body specified in the regulations;
- Whether it meets the three criteria set out in clauses (i) to (iii) of s. 22(1)(*a*) and
- The age of the information.

After reviewing the evidence put forward by the DEA, the Court concluded that nothing in the evidence indicated that the three criteria had not been met. With respect to the age of the information, it ruled that the head can only exercise his discretion on the facts and circumstances that are known to him as of the date he makes his decision.

Issue 3 – S. 19 PA

The Court of Appeal had interpreted subs. 19(2) of the *PA* as requiring the trial judge to ensure that CSIS had made reasonable efforts to seek the consent of the other government who provided the information. The Court reviewed the public affidavits of CSIS to the effect that some of the information contained in bank 015 was obtained in confidence from the government or institutions of a foreign states and that these bodies were consulted in a manner consistent with established protocols but had refused disclosure. The Court also reviewed a confidential affidavit which confirmed the names of the bodies in question and set out the nature of the consultations which occurred. On that basis, the Court was satisfied that reasonable efforts had been made to seek consent.

Issue 4 – S. 26 *PA*

Ss. 26 and 8 of the *PA* prohibit the disclosure of personal information relating to a third party unless that party consents to the disclosure or such disclosure is otherwise justified under subs. 8(2) of the *PA*.

The Court of Appeal found that s. 26 and s. 8(2)(*m*)(i) require the head of a government institution to engage in a discretionary balancing of the public interest and privacy. Given the sensitivity of the information contained in bank 010, which sensitivity was not questioned by the trial judge nor by the Court of Appeal, the Court herein held that it would be illogical if not perverse to conclude that the public interest in disclosure clearly outweighed any invasion of privacy (in the sense of a general, broadly conceived policy goal). With respect to bank 015, the Court came to the conclusion that the public interest in disclosure did not clearly outweigh the privacy interests (in the sense of the general, broadly conceived policy goal). The Court based this conclusion on the respondent’s

secret affidavit, which included statements of correlation between the documents not disclosed and the injury anticipated if disclosure of the documents occurred as well as an explanation as to why the information was exempt from disclosure.

NASH V. SOLICITOR GENERAL OF CANADA

INDEXED AS: NASH V. CANADA (SOLICITOR GENERAL)

File No.:	**T-1050-03**
Reference:	**2004 FC 576**
Date of decision:	**April 16, 2004**
Before:	**Kelen J.**
Sections of *ATIA / PA*:	**Ss. 3, 8, 26 *Privacy Act* (*PA*)**

Abstract

- Personal information about third parties
- Non-existence of information

Issue

Has CSC properly withheld the information requested pursuant to s. 26 *PA*?

Facts

The applicant, a parole officer, sought access to information held by the Correctional Service Canada (CSC) regarding a “threat risk assessment” investigation conducted by CSC following information it received from an informant about an alleged threat made by an inmate against the applicant. More specifically, the applicant sought a copy of the draft and final reports of the assessment, and of all information received and used to complete the assessment. Based on the evidence it gathered, the CSC concluded that it was unlikely that the alleged threat would be carried out against the applicant or his family.

CSC redacted certain information from the documents it released to the applicant on the basis of s. 26 *PA*. The redacted information comprised the identification of inmates, inmates’ Finger Print Section numbers, their criminal histories and other personal data about individuals other than the applicant. The applicant submits that he is not seeking access to the identity of the informant but seeks the

substance of the informant’s interviews conducted by CSC in order to determine if the conclusions reached by the latter are justified.

Decision

The application for judicial review was dismissed.

Reasons

Upon a detailed review of the evidence on record, the Court held that CSC properly withheld information about individuals other than the applicant. In addition, the Court was satisfied, based on the evidence, that the applicant had received all the interview notes that existed, and that the notes the applicant was seeking in his s. 41 application were non-existent.

NICK FORSCH v. CANADIAN FOOD INSPECTION AGENCY, DOLORES NEILSON, BOB JACKSON AND BARB LONG

INDEXED AS: FORSCH v. CANADIAN FOOD INSPECTION AGENCY

File No.:	**T-405-03**
Reference:	**2004 FC 513**
Date of decision:	**April 2, 2004**
Before:	**Mosley J.**
Sections of *ATIA / PA*:	**Ss. 3(j), 8(2)(*a*), 73 *Privacy Act (PA)***
Other statute:	**Ss. 7, 12 and 13 *Canadian Food Inspection Agency Act***

Abstract

- Complaint concerning staffing competition process within CFIA
- Jurisdiction of internal staffing tribunal to order disclosure of successful candidates' applications to the complainant
- Procedural fairness requiring disclosure of successful candidates' applications
- Purpose of disclosure consistent with purpose for which the information was obtained

Issues

(1) Given the appropriate standard of review, did the tribunal err in concluding that it had no jurisdiction to order the CFIA to disclose documents to the unsuccessful candidate in a staffing competition?

(2) Given the appropriate standard of review, did the tribunal err in determining that it had no jurisdiction to offer an interpretation of the *Privacy Act*?

(3) Do the principles of procedural fairness apply to the tribunal established under the CFIA Staffing Complaint Policy? If so, did the tribunal breach the duty of fairness in refusing to order the production of the information

evaluated by the selection board and reviewed by the tribunal in relation to the successful candidates?

Facts

The applicant, a veterinarian, was an unsuccessful candidate in a staffing competition by the respondent Canadian Food Inspection Agency ("CFIA"). The advertisement announcing the competition stated that the screening criteria for the Regional Operations Coordinator ("ROC") positions included experience "in the delivery of two or more CFIA programs".

The selection process included three phases: a screening of the applicants' résumés for minimum qualifications, a written examination and an interview. The selection board consisted of two Regional Directors and a Human Resources Manager. The applicant was one of 16 candidates invited to write the examination. He was not among the seven candidates who proceeded to the interview stage.

The applicant raised concerns about the staffing competition process and the experience of the successful candidates in an e-mail to the Regional Director, a member of the selection board. The applicant subsequently requested copies of the three successful candidates' applications, résumés and examinations. The Regional Director informed the applicant that he was satisfied that CFIA staffing policies had been followed and, in particular, that the "criteria specified for 'Experience' was clearly applied fairly and consistently for all candidates". The Regional Director refused to disclose to the applicant the requested records on the grounds that they contained personal data regarding the candidates' education and employment history whose release would breach the *Privacy Act*. However, one of the three winning candidates did consent to the disclosure of his personal information to the applicant.

The applicant appealed to an internal tribunal established under a CFIA-approved Staff Complaint Policy ("the Policy"). This internal tribunal is the final level of recourse within CFIA and may, *inter alia*, dismiss the complaint or direct the delegated manager to take certain corrective measures. The internal

tribunal may not substitute CFIA's opinion of an employee's qualifications with its own or direct that the CFIA appoint another person.

The internal tribunal, comprised of a representative each of the employer and of the collective bargaining unit and a third person chosen by the other two, was asked prior to the hearing and at its first sitting to order CFIA to disclose the applications of the two successful candidates in the competition who had not consented to disclosure. The tribunal declined, concluding that it neither had legal authority to challenge the selection board's interpretation of the *Privacy Act* nor the authority to compel the production of evidence. The tribunal stated that since it did not exercise a "quasi-judicial administrative function, the notion of fairness, as that term is applied in the law of judicial review, simply has no place in our deliberations".

The internal tribunal found that the successful candidates met the experience criteria set out in the advertisement for the ROC positions. The tribunal noted that it had viewed the successful candidates' applications and was satisfied that they met the required qualifications for the positions and that the definition of the required experience had been applied consistently. The tribunal decided that the competition should stand as conducted, but recommended that CFIA review its position on disclosure under the *Privacy Act*.

The applicant seeks judicial review of the tribunal's decision.

Decision

The application was allowed.

Reasons

Issue 1

Applying the pragmatic and functional approach, the Court ruled that the standard of review with respect to whether the internal tribunal properly interpreted its jurisdiction to compel disclosure is correctness.

The tribunal's decision with respect to its jurisdiction to compel disclosure of information is incorrect. While the tribunal does not have any explicit, legislated grant of power to order disclosure, such as that possessed by an appeal board appointed under the *Public Service Employment Act* ("*PSEA*"), such power exists, in a general sense, as part of the basic principles of procedural fairness. Those principles apply to the tribunal; the tribunal erred in determining that such principles play "no part" in its deliberations. Although the tribunal does not have the powers vested in the *Inquiries Act*, as do appeal boards under the *PSEA*, the power to ensure that an individual, who is part of a hearing process created by virtue of a general statutory mandate, has a meaningful ability to know of evidence relevant to his complaint, upon which both the employer and tribunal rely, exists as part of the common law of procedural fairness. The Policy explicitly recognizes that the tribunal is to act in accordance with procedural fairness. The fact that the Policy explicitly recognizes that the tribunal "must give the other party to the complaint the time to and opportunity to review and respond to the evidence" supports the finding that the tribunal has jurisdiction to order disclosure of evidence in proceedings before it.

Issue 2

The correct standard of review on this question is correctness, given that the question is one of mixed fact and law requiring the interpretation of the Policy and the analysis of the *Privacy Act*, regarding which questions the Court has greater expertise than the tribunal.

The president of the CFIA has authority, under s. 7 of the *CFIA Act*, to delegate to "any person any power, duty or function conferred on the President under this Act or any other enactment", including authority to make decisions related to disclosure requests on *Privacy Act* grounds. The tribunal has authority pursuant to the Policy to review the actions of CFIA managers in a competition and generally, as well, the application of the delegated authority to make *Privacy Act* determinations related to disclosure requests.

The tribunal's finding that the Policy did not permit it to interpret the *Privacy Act* was incorrect, given that, as a specialized board established to provide directions with respect to any corrective action that the CFIA should undertake in the implementation of its staffing policies, it could have and should have provided its own analysis of whether the selection board properly refused the applicant's request for disclosure pursuant to the *Privacy Act*.

Issue 3

In light of the fact that CFIA has determined in the Policy to discharge its authority pursuant to s. 13 of the *CFIA Act* "in accordance with the rules of procedural fairness", and the fact that the applicant's interests are affected by the tribunal's decision, the duty of procedural fairness is engaged in this administrative context and the tribunal erred in finding that procedural fairness had "no place" in its deliberations. The scope of procedural fairness owed in this case must be determined in light of the principles set out by L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

The selection board and the tribunal incorrectly determined that the successful candidates' applications were protected by the *Privacy Act*. Further, the tribunal, and CFIA in its submissions in this proceeding, erred in assuming that simply because an applicant is told that a successful candidate meets the required experience, that this negates any obligation to allow the complainant to review the information that supports this assertion and is relevant to the applicant's complaint. However, the tribunal was correct to conclude that disclosure of the successful candidates' examination answers was not relevant to the applicant's complaint and therefore disclosure was not required.

As is clear from CFIA's own explanation of its Policy, the procedure to be followed in disclosing information to a complainant is a two-step process. First, the requested documentation is to be examined by CFIA to determine if it contains "personal information" as defined in the *Privacy Act*. If so, CFIA is directed to determine if the disclosure of such information would be consistent

with the purpose for which it was obtained. Such direction is in line with subsection 8(2)(*a*) of the *Privacy Act*. Second, the information must be assessed for relevancy to the complaint.

CFIA has established this procedure for determining whether documents should be disclosed in the complaint process and stipulated that the rules of procedural fairness are to apply to the tribunal. That procedure was not correctly reviewed by the tribunal. While the respondent noted at the hearing that the impact of the decision on the applicant Forsch is not akin to the impact of the decision on the applicant in *Baker*, *supra*, the complaint has a medium impact on the applicant, who believes that he may have unfairly lost the opportunity for advancement within CFIA through the ROC competition.

Balanced with the fact that the nature of the decision being made is not designed to be adversarial, and that the process is not intended to resemble the judicial process, these factors led the Court to determine that the tribunal's decision not to disclose the successful candidates' applications violated the principles of procedural fairness. The applicant could not fully and fairly present his complaint without this information, and the privacy rights of the successful candidates protected by the *Privacy Act* would not have been infringed by the disclosure, as the CFIA could have provided the information in a manner that did not violate the *Privacy Act*. The fact that the employer and the tribunal reviewed the information does not alleviate this breach, as the applicant's participation in the process was impugned by not being able to review, for himself, the exact nature of the experience claimed by the successful candidates. This information was also relevant to his staffing complaint.

The disclosure of the successful candidates' applications within the staffing complaint process is a purpose consistent with the purpose for which the information was obtained, that is, in seeking an appointment within CFIA through a staffing competition. Personal information found in the successful candidates' applications that did not relate to their past employment positions and duties related thereto while employed at a "government institution" is beyond the scope

of permissible disclosure set out in para. 3(j) of the *Privacy Act*, and would not be relevant to the applicant's complaint, and thus would have to be severed from the requested records.

Procedural fairness did not require CFIA or the tribunal, in accordance with the Policy, to provide the applicant with the successful candidates' examination answers and the selection board's related notes of assessment as they were not relevant to the applicant's *original complaint* and thus their non-disclosure did not violate the applicant's ability to state his case.

GARDINER V. ATTORNEY GENERAL OF CANADA

INDEXED AS: GARDINER V. CANADA (ATTORNEY GENERAL)

File No.:	**T-865-00; T-1488-00**
Reference:	**2004 FC 483**
Date of decision:	**March 29, 2004**
Before:	**Campbell J.**
Sections of *ATIA / PA*:	**Ss. 8(2)(m), 22(1)(*a*)(ii), 26, 27, 41, 46(2) and 67 *Privacy Act (PA)***

Abstract

- Application of discretionary exemption requires two decisions, one factual and one discretionary
- Review of documents under s. 41 PA including search for evidence of commission of offence
- Court's discretion under subs. 46(2) to disclose information relating to commission of offence to appropriate authorities where evidence thereof
- Burden to provide evidence of Charter breach resting upon the party alleging the violation

Issues

(1) Did the Justice and Revenue Canada ATIP offices err in applying the exemptions found at ss. 22(1)(*a*)(ii), 26 and 27 of the *Privacy Act*?

(2) Can a s. 41 review be interpreted so as to include a search for evidence of the commission of an offence? Can the information relating to the commission of an offence be disclosed to the appropriate authorities under subs. 46(2)?

(3) Has the applicant's rights been violated under the *Canadian Charter of Rights and Freedoms*?

Facts

Alan Gardiner, the applicant, seeks judicial review of decisions made by the ATIP office of the Department of Justice and the ATIP office of Revenue Canada to refuse to disclose personal information. The information in question was exempted pursuant to ss. 22(1)(*a*)(ii), 26 and 27 of the *PA*. The Privacy Commissioner concluded that the information withheld was properly exempted.

The applicant is seeking disclosure of the information found in his files from 1982 to present. The Department of Justice ATIP office located documents relevant to the applicant's access request that concerned a prosecution conducted in the late 1980s and early 1990s. The Revenue Canada ATIP office located relevant documents that had been provided by the RCMP to the Special Investigations Unit of Revenue Canada, and other documents concerning an investigation of the applicant regarding income tax offences.

The applicant (1) seeks a review of the ATIP offices' decisions to exempt the information; (2) asks that subs. 46(2) of the *Privacy Act* be interpreted so as to open up the review process to an inquiry of alleged criminal conduct in the course of events related to the documents under review; and (3) contends that the exemptions invoked, in addition to ss. 41 and 67(1), offend the *Charter*.

Decision

The application for judicial review was dismissed.

Reasons

Issue 1

All three exemptions are discretionary in nature. Following the approach adopted by Strayer J., in *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147 (F.C.T.D.), Justice Campbell explained that when a head of a government institution is in the process of determining whether an discretionary exemption should be applied, two decisions have to be made. Firstly, a factual determination is to be made as to whether the documents fall within the parameters of the exemption in question. Secondly, a discretionary decision is

required in order to determine whether the documents should nevertheless be disclosed. Although the first type of decision is reviewable by a Court, who can substitute its own conclusion, the second type is purely discretionary and the Court must not attempt to exercise the discretion *de novo*. It must simply consider whether the discretion was exercised in good faith and rationally connected to the purpose for which the discretion was granted.

Justice Campbell concluded that subpara. 22(1)(*a*)(ii) had been properly claimed. As a result of this ruling, the respondent did not ask for a determination on the other exemptions claimed and the applicant abandoned his application for the release all other documents.

Justice Campbell noted that consideration must be given to subpara. 8(2)(*m*)(i) when applying the exemption found at s. 26. A government institution must therefore conduct a discretionary balancing of the public interest in disclosure and/or the benefit of the applicant in disclosing the information, against the right to privacy of third parties.

Issue 2

The applicant argues that subs. 46(2) of the *Privacy Act* gives the Court "quasi-criminal discretional jurisdiction" to investigate alleged criminal conduct of any government employee involved in the creation or processing of the information sought, including the conduct of the Attorney General, the Minister of Justice, the RCMP, and the Privacy Commissioner of Canada. The Court held that a s. 41 PA review includes a search for evidence of the commission of an offence and that, if during the review such evidence came to light, subs. 46(2) conferred on the Court the discretion to refer it to the appropriate authorities. No such evidence was found in the case at bar.

The applicant further argued that the provisions found in the *Crimes Against Humanity Act* were helpful in permitting him to gain access to justice. The Court determined, however, that this criminal legislation did not provide investigative jurisdiction, as purported by the applicant.

Issue 3

The applicant had served notice of three constitutional questions, stating that: (1) the government's reliance on ss. 22(1)(*a*)(ii), 26, 27 contravened his rights under ss. 2(b), 7, 10, 11(b), 12 and 15 of the *Charter*; (2) ss. 41 and 67(1) contravened his rights under ss. 7 and 15 of the *Charter*; and (3) s. 41contravened his rights under ss. 7, 12 and 15 of the *Charter*.

The applicant abandoned the third constitutional question. With respect to the other two questions, Justice Campbell found that the applicant had failed to discharge the evidentiary burden which rested on him. The *Charter* arguments were therefore dismissed.

ATTORNEY GENERAL OF CANADA AND BRUCE HARTLEY V. INFORMATION COMMISSIONER OF CANADA

INDEXED AS: CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER)

File No.:	**T-582-01, T-606-01, T-1640-00, T-1641-00, T-792-01, T-877-01, T-878-01, T-883-01, T-892-01, T-1047-01, T-1254-01, T-1909-01, T-684-01, T-763-01, T-880-01, T-895-01, T-896-01, T-1049-01, T-1255-01, T-1448-01, T-1910-01, T-2070-01, T-801-01, T-891-01, T-1083-01**
Reference:	**2004 FC 431**
Date of decision:	**March 25, 2004**
Before:	**Dawson J. (F.C.T.D.)**
Sections of *ATIA* / *PA*:	**Ss. 4, 34, 35, 36, 46, 62, 63, 64, 65 *Access to Information Act* (*ATIA*)**
Other statutes:	**S. 18.1 *Federal Court Act*; ss. 1, 2 *Canadian Charter of Rights and Freedoms***

Abstract

- Records in a Minister's office
- Confidentiality orders made by the Information Commissioner
- Copies of records made by the Information Commissioner
- Production to the Information Commissioner of records protected by solicitor–client privilege
- Propriety of questions asked by the Information Commissioner
- Standard of review

Issues

(1) Whether records in a Minister’s office are subject to the ATIA

(2) Whether the Commissioner can place a confidentiality order on all witnesses and related personnel (in this case, the Commissioner wanted to force, among others, the Prime Minister and his Chief of Staff to give a confidentiality undertaking not to share information even within Cabinet);

(3) Whether the Commissioner can make copies of records he has obtained during his investigation;

(4) Whether the Commissioner can ask any question he wants of witnesses;

(5) Whether the Commissioner can obtain records protected by solicitor-client privilege

Facts

In 2000, the Office of the Information Commissioner began an investigation into a complaint made under the *ATIA* relating to requests made to several government institutions:

- requests to PCO for the daily agendas of the Prime Minister covering the period 1994 to 1999 and for records relating to the appointment of Conrad Black to the British House of Lords;
- requests made to DND for the minutes of meetings between the Minister of National Defence, the Deputy Minister of National Defence and the Canadian Forces Chief of Staff; and
- a request to Transport Canada for the daily agendas of the Minister of Transport between June and November 1999.

All government institutions took the position during the Commissioner's investigation that they had no records relevant to the requests. The Information Commissioner sought to interview the Prime Minister's Executive Assistant and exempt employees of the Minister of National Defence's office. He issued them *subpoenas duces tecum* ordering these individuals to appear before him with documents relevant to his investigation. The Government sought a declaration

from the Federal Court that the requested records are not subject to the *ATIA* and *certiorari* to quash the *subpoenas.* It also presented a motion for interim relief prohibiting the Commissioner from enforcing the *subpoenas duces tecum* until the final determination of the judicial review application, which was denied by the FCA in March 2001 (*Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25).

While the case on the substantive issue was awaiting to be heard by the FCTD, the Commissioner's investigation thus proceeded. During that investigation, several issues relating to the Commissioner's investigative powers arose and were the subject of additional judicial review applications by the Government which were heard at the same time as the original application for declaration.

Decision

Dawson J. made the following orders:

(1) The Court agreed with the Information Commissioner that it was premature to adjudicate on the issue of whether records held exclusively in Ministers' offices are subject to the *ATIA* and that such a decision must await the completion of the Information Commissioner's investigation and final report.

(2) The Court found that the confidentiality undertakings ordered by the Information Commissioner violated the *Charter* and could not be saved by s. 1 as they were overbroad; however, the Court gave the Commissioner 30 days to reissue new, tailored confidentiality undertakings.

(3) The Court agreed with the Information Commissioner that the *ATIA* authorizes him to make copies of documents provided to him pursuant to his subpoena power and that he does not have to return such copies when asked to return the documents themselves.

(4) The Court refused to rule on the propriety of questions asked by the Commissioner on the ground of mootness.

(5) The Court agreed with the Information Commissioner that he can require production of specific documents protected by solicitor-client privilege.

Reasons

Preliminary question

With respect to issues 2, 3, and 5 the Court made the findings that the appropriate standard of review to be applied to the Commissioner's decision, based on the pragmatic and functional approach, was correctness.

Issue 1

The Court characterized the issue of whether records in a Minister’s office are subject to the Act as an issue of control under s. 4 of the *ATIA* and thus as a mixed question of law and facts. The importance given by Parliament and the Courts to the Commissioner’s investigation and to the independent review role he is playing, led the Court to conclude that it should have the benefit of his views before making a decision on the issue. The Commissioner had, in the Court’s view, taken the legitimate position that he was unable to take a position on the merits of the control issue in the ongoing litigation because to do so was to impair his role as a neutral fact-finder in the not yet completed investigations. The Court found no prejudice to the Government in waiting, since no documents would be released until after the Court review, and the Court of Appeal had already concluded in an earlier appeal that the Government suffered no harm by providing documents and information to the Information Commissioner, since they could not be released. The Court’s conclusion was buttressed by the fact that it was clear from the evidence that ministerial staff frequently did things within the purview of the Department, and jurisprudence from the provinces said that the subject-matter of the documents in issue was one of the factors to be considered in determining whether any particular document was under the control of the department. The Court made clear that that factor was not determinative, but said that until the court saw the documents in issue, as it would in a review of a refusal to disclose following the Commissioner’s investigation, it could not apply this factor.

The Court therefore ruled that it was premature to make a decision on the issue

Issue 2

Each of the witnesses who gave evidence before the Information Commissioner was the subject of a confidentiality order which required the witness to keep confidential all information disclosed during the testimony with the only exception being the ability to disclose that information to four specified lawyers, once each lawyer had executed an undertaking to not reveal that information to anyone else. Specific requests for individual exemptions were made, but were denied.

The Court quashed the confidentiality orders made by the Information Commissioner on the grounds that they offended the *Charter* in that they breached s. 2(b) and were not saved by s. 1. The Court specifically found that the Act did not require the orders to be made, as the Act's provisions on the confidentiality of investigations are meant to ensure the confidentiality of information provided to the Commissioner, and do not impose any confidentiality obligations on anyone else. The Court, however, recognized that the Commissioner could make such orders pursuant to s. 34 of the *ATIA* which confers upon him the discretion to determine, in appropriate circumstances, that some form of confidentiality order should be invoked and imposed upon a witness.

The Court summarily concluded that the orders offended s. 2(b) of the *Charter* and then examined this violation under s. 1. According to the Court, there was a valid purpose for the orders, in that they were designed to protect the integrity of the investigations by promoting the seeking of truth, and preserved the confidentiality of government information. Furthermore, the objectives sought to be achieved related to pressing and substantial concerns in a free and democratic society and were sufficiently important, in some circumstances, to override the constitutionally protected freedom of expression. Furthermore, there was a rational connection between the imposition of a confidentiality order and the purposes. They failed, however, on the minimal impairment test. The Commissioner failed to demonstrate why less restrictive confidentiality orders would not have been equally effective in achieving the purposes. The Court held that the Commissioner effectively reversed the onus by requiring each witness to

prove why an order should not be issued. There was no evidence as to why the orders were of unlimited duration in time. The evidence did not establish that there was any concern that the evidence of a witness would be tainted if it was disclosed, nor was there evidence that the witnesses would disclose confidential information.

On this issue the Court concluded that to the extent that confidentiality orders restricted communications where there was no reasonable concern that such communication would impair the investigation or would result in the improper disclosure of confidential information, the orders were an impermissible restriction on the witnesses' freedom of expression. It also held that as the Commissioner is not entitled to put before a witness information which may be exempted from disclosure under the Act, his concern about the improper disclosure of government information was not warranted. Further, as many of the witnesses who appeared before the Commissioner were subject to confidentiality obligations independent of any imposed by the Commissioner, the need to protect information would not arise in every examination. Thus, in the Court's view, a confidentiality order would be justified with respect to that specific information so long as the order went no further than is reasonably required to protect the confidential information.

Finally, the Court held that the order quashing the confidentiality orders should be suspended for 30 days to permit the Commissioner to consider the need for confidentiality orders and, if still required, to issue orders which are not overbroad in scope and demonstrably justified.

Issue 3

All of the documents sought by the Commissioner were provided to him during his investigation. Copies were made of those documents and retained by the Information Commissioner's Office and originals were returned by him. Applications were brought in respect of all documents turned over to the Information Commissioner, seeking declarations that the Information

Commissioner's Office had no jurisdiction to make or keep copies of those documents, and *mandamus* compelling him to return them.

The Court found that the Commissioner may only exercise powers granted to him expressly or impliedly by the Act. As the purpose of the Commissioner's investigation is to enable him to provide his statutorily mandated report and that he must, to do so, conduct a thorough investigation, the issue to be decided is whether the power to photocopy documents is required as a matter of practical necessity in order for the Commissioner to conduct his investigation and further his functions effectively and efficiently. According to the Court, the power to photocopy documents is required as a matter of practical necessity for the accomplishment of the Commissioner's responsibility and does not constitute an unduly broadening of the Commissioner's powers.

The Court further ruled that subs. 36(5) of the *ATIA* did not require the Commissioner to return copies he may have made of documents provided to him because those copies were not "produced" pursuant to s. 36. Only the version of documents produced to him must be returned under this provision. The copies made by the Commissioner continue to be protected by the Act's provision preserving the confidentiality of documents provided to the Commissioner.

Issue 4

During the course of the evidence, questions were put by the Commissioner to two witnesses to which objections were taken. One witness refused to answer the questions put to him. The Information Commissioner subsequently decided that it was unnecessary for that witness to answer those questions. The second witness answered the questions.

The Court ruled that as the questions asked by the Commissioner which were the subject of this application had either been withdrawn by the Commissioner or had been answered by the witness and that any ruling on the propriety of these questions would not be determinative or applicable in future cases, the Court should exercised its discretion not to determine these applications on the merits. With respect to the questions that had been answered, the Court ruled that the

applicant would have grounds for a new judicial review application, should the Commissioner rely on the answers to reach a conclusion.

Issue 5

The subpoena served on the Clerk of the Privy Council required him to bring with him documents that included a memorandum prepared by a PCO counsel that related to the subject-matter of the complaint which the Commissioner was investigating. The Clerk objected to the disclosure of this document by invoking solicitor-client privilege, but the Commissioner overruled the objection and it was thus provided to him.

The Court ruled that subs. 36(2) of the *ATIA* should not be interpreted in a restrictive fashion, and that it entitled the Commissioner to compel the production of records protected by solicitor-client privilege. It rejected the applicant's argument that the principles developed by the Supreme Court of Canada in the *Lavallée* decision (*Lavallée, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209) limited the Commissioner's power to compel the production of documents, given the words used by Parliament in subs. 36 (2) that the Commissioner is to have access to any records "notwithstanding any other Act of Parliament or any privilege under the law of evidence" and that "no such record may be withheld from the Commissioner on any grounds". The Court further rejected the applicant's position that the Commissioner could only compel the production of solicitor-client material where it is "absolutely necessary". The Court found that the Commissioner's power to compel production of records protected by solicitor-client privilege is entirely consistent with the scheme of the Act which requires him to protect privileged information communicated to him under that provision.

The Court also noted that subs. 36(2) mirrored subs. 46(2) of the *ATIA*, which had already been interpreted similarly and that disclosure of solicitor-client material to the Commissioner and to the Court under these two provisions did not meant that the privilege had been lost.

Comments

The decision of Dawson J. on the powers of the Information Commissioner to compel production of the documents protected by solicitor-client privilege was reversed: 2005 FCA 199.

CANADIAN PACIFIC HOTELS CORPORATION V. ATTORNEY GENERAL OF CANADA

INDEXED AS: CANADIAN PACIFIC HOTELS CORP. V. CANADA (ATTORNEY GENERAL)

File No.:	**T-616-01**
Reference:	**2004 FC 444**
Date of decision:	**March 25, 2004**
Before:	**Russell J.**
Sections of *ATIA / PA*:	**Ss. 2(1), 6, 20(1)(*c*) and (*d*), 44 *Access to Information Act* (*ATIA*)**

Abstract

- Standard of review
- No exemption based on relevancy available to s. 44 ATIA applicant
- More competitive environment not giving rise to a reasonable expectation of material financial loss or prejudice to third party's competitive position under para. 20(1)(*c*) ATIA
- Short and long term impact of disclosure upon on-going contractual negotiations

Issues

(1) Can a third party on a s. 44 application raise relevance and scope of request objections to forestall disclosure?

(2) Would release of the Crown leases give rise to a reasonable expectation of harm to the applicant under para. 20(1)(*c*)?

(3) Would release of the Crown leases impact upon on-going contractual negotiations under para. 20(1)(*d*)?

Facts

The applicant, now FHR Real Estate Corporation, received a letter from the respondent, advising that the respondent had received a request under the *ATIA* for a copy of all agreements signed with Jasper Park Lodge since April 1, 1997. Attached to the letter were several documents the respondent was considering releasing, including commercial retail leases between tenants at Jasper Park Lodge and the applicant ("retail leases") and two agreements from 1969 and 1982 between Her Majesty the Queen in Right of Canada and Canadian National Railway Company ("Crown leases") in respect of lands in Jasper National Park on which Jasper Park Lodge is located.

In a letter to the respondent, the applicant opposed the disclosure of both the retail and Crown leases. In reply, the ATIP Coordinator advised the applicant of the respondent's decision to disclose the retail leases with certain key, confidential terms removed. This was acceptable to the applicant. The ATIP Coordinator also indicated that the respondent intended to release the Crown leases in their entirety. This decision is the subject of the applicant's s. 44 application. Amongst the arguments invoked by the applicant is that the Crown leases do not come within the scope of the request because they are not agreements signed since April 1997. The respondent is of the view that the leases should be disclosed because they are referenced in other documents that come within the request and because they carry a historical and contextual relevance for agreements signed since April 1997.

Decision

The application was allowed in part.

Reasons

Preliminary issue

The Court held that the appropriate standard of review applicable to the issues raised was that of correctness.

Issue 1

Parliament's intention as embodied in subs. 2(1) is that government information should be available to the public, and that any exception to this right of access should be limited and specific. Such limited and specific exceptions must be specifically set out in the Act. There is no exception based upon scope and relevance that a third party can rely upon when seeking review under s. 44.

The only place where relevance and scope come into play is in the context of s. 6 and the procedure for making a request for access. This is a facilitating provision. Sufficient detail is required to permit identification of a record and adequate response to the request. The wording of s. 6 contains no prohibition against disclosing documents that are not relevant to the request. In fact, s. 6 does not even address the concept of relevancy. It merely stipulates that a request must be made in writing and must provide sufficient detail to allow the identification of the record requested. It would take a substantial amount of reading in to conclude that this imposes an obligation on the government institution to refrain from disclosing information that is not relevant to the request. Bearing in mind the underlying objectives of Parliament in enacting the Act, there is no exemption available to the applicant based upon relevancy.

Issue 2

In order to invoke para. 20(1)(*c*), the applicant bears the burden of demonstrating, on a balance of probabilities, that there is a reasonable expectation of probable harm to the applicant's competitive or financial position that would result from disclosure. The evidence required to justify an exemption under this provision must be detailed and convincing and must demonstrate a direct link between disclosure and the alleged harm. Speculation is not sufficient. The applicant must demonstrate a reasonable expectation of harm.

The evidence brought forward by the applicant on this ground remains in the realm of speculation. The applicant's argument is, essentially, that disclosure of the key terms of the Crown leases could subject the applicant to a much more competitive environment concerning the Jasper Park Lodge than it has had to

content with in the past. However, a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to the applicant's competitive position within the meaning of para. 20(1)(*c*) and its interpretive jurisprudence. The connection is too tenuous and not sufficiently proven in this case.

Issue 3

Taking into account the legal burden on the applicant to establish real, as opposed to speculative, interference with contractual negotiations, and the need for a direct link between disclosure and the harm envisaged, the applicant has met the burden on this ground. However, the harm referred to is temporary and not perpetual; it arises out of the exigencies of a particular situation faced by the applicant.

With these factors in mind, the Court took the view that the Crown leases should be disclosed but in a redacted form to ensure that the harm envisaged by the applicant under para. 20(1)(*d*) does not materialize. Once the dangers of the immediate situation have passed, the Court took the view that the policy and specific wording of the Act required the terms of the Crown leases to be disclosed in their entirety.

MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA AND THE HI-RISE GROUP INC.

INDEXED AS: CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA) V. HI-RISE GROUP INC.

File No.:	**A-225-03**
Reference:	**2004 FCA 99**
Date of decision:	**March 12, 2004**
Before:	**Rothstein, Noël and Sharlow JJ.A**
Sections of *ATIA / PA*:	**Ss. 20(1(*b*), 73 *Access to Information Act (ATIA)***

Abstract

- Request for access to bidding documents respecting proposals to provide office accommodations
- No reasonable expectation of confidentiality when contract granted
- Public benefit not fostered by maintaining confidentiality of amounts paid out of public funds

Issues

(1) Can a reasonable expectation of confidentiality be found following a successful bid for a government contract?

(2) Is public interest fostered if amounts paid out of public funds are exempt from disclosure?

Facts

This is an appeal from a decision of the Federal Court (2003 FCT 430) allowing the application for judicial review by The Hi-Rise Group Inc. (the respondent) of a decision of the Minister of Public Works and Government Services Canada (the appellant) to release certain records.

Following a request for proposal in November 1999 to provide leased office accommodation for various federal government departments, the respondent received a number of proposals. All the proposals (including the respondent's) were submitted to a third party consultant for analysis. This consultant provided financial evaluations to the appellant (in the form of Net Present Value figures) based on information supplied by the bidders. The respondent was ultimately awarded the contract.

In May 2001, the appellant received a request for access to a copy of records containing "information on the bidding process". Since the records relevant to the request contained third party information, The Hi-Rise Group was asked to make submissions with respect to disclosure. The Hi-Rise Group objected to disclosure pursuant to paras. 20(1)(*b*), (*c*) and (*d*). When the appellant disagreed, the respondent sought judicial review.

The Federal Court Judge agreed with The Hi-Rise Group regarding para. 20(1)(*b*) and concluded that the documents in issue were exempt from disclosure. The Judge held, however, that the reasonable expectation of harm within the meaning of paras. 20(1)(*c*) or (*d*) had not been met.

The Minister of Public Works appeals the decision of the Federal Court on the ground that the Court erred in finding that the documents were "supplied" to a government institution by a third party. As well, the appellant alleges that the information is not "confidential information" within the meaning of para. 20(1)(*b*).

The respondent takes the position that the Trial Judge did not err in his analysis of para. 20(1)(*b*) and that findings of fact cannot be overturned in the absence of palpable and overriding error.

Decision

The appeal is allowed; the decision of the Federal Court is set aside.

Reasons

The burden of showing that a record falls within an exempted class lies upon the party seeking to prevent disclosure. In order for information to be exempt pursuant to para. 20(1)(*b*), the respondent must demonstrate, on a balance of probabilities, that the information falls within the following requirements:

(1) The information must relate to financial, commercial, scientific or technical matters. The appellant concedes that the information falls within this requirement.

(2) The information must be confidential in nature. This can be broken down further, as per *Air Atonabee*[7]:

    (a) Whether the information content is already available to the public. There was no proof here that the information was publicly available.

    (b) Whether the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed. Based on two pieces of evidence, the Federal Court Judge determined that the information in issue had been communicated in a reasonable expectation of confidence and that this set of facts could be distinguished from *Société Gamma*[8]. The Federal Court of Appeal concluded that the Federal Court Judge had erred in his reasoning and that the decision in *Société Gamma* needed to be followed. When a would-be contractor sets out to win a government contract through a confidential bidding process, he or she cannot expect that the monetary terms, in the event that the bid succeeds, will remain confidential.

7. Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 (F.C.T.D.).

8. *Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 56 C.P.R. (3d) 58 (T.D.).*

(c) Whether the relationship between the government institution and the third party would be fostered for the public benefit in keeping the information confidential: The Federal Court Judge distinguished this set of facts with the ones found in *Société Gamma* and concluded that it was in the public interest to maintain the confidentiality of the information. The Federal Court of Appeal disagreed with the Federal Court Judge: (1) it was not open to the Judge to base his assessment of public interest on the opinion expressed by an official of PWGSC who was not the official to whom the head of PWGSC had delegated his powers (i.e. the ATIP Coordinator); (2) absent special circumstances (such as national security), public benefit is not fostered by maintaining confidentiality. In the context of contractual obligations with third parties, public benefit is generally not fostered by maintaining confidentiality. The public has a right to know how the government spends public funds and thereby holds the government accountable for its expenditures.

(3) The information must be supplied to a government institution by a third party: The appellant maintains that, although some of the variables used in the calculations were provided by the respondent, the information as such was developed by a third party consultant. The Federal Court Judge accepted the evidence before him that the release of the evaluations would allow a third party to calculate with reasonable certainty the annual rents and option prices and therefore held that the raw data supplied by the respondent and the evaluations prepared by the third party consultant were in fact one and the same record. The Federal Court of Appeal determined that it was open to the Federal Court Judge to make this finding based on the evidence before him. The information is therefore “supplied” by the respondent to the appellant within the meaning of para. 20(1)(*b*).

(4) The information must be consistently treated as confidential by the third party. The appellant conceded that the information fell within this requirement.

CANADA POST CORPORATION V. MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

INDEXED AS: CANADA POST CORP. V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES)

File No.:	**T-1265-02**[9]
Reference:	**2004 FC 270**
Date of decision:	**February 24, 2004**
Before:	**Heneghan J.**
Sections of *ATIA / PA*:	**Ss. 20(1)(*b*), (*c*) and 25 *Access to Information Act (ATIA)***

Abstract

- Standard of review is correctness for a s. 20 ATIA analysis
- Objective standard required to determine if information is "confidential" pursuant to para. 20(1)(*b*)
- Para. 20(1)(*c*) requires more than mere speculation that probable harm would result if records were released.

Issues

(1) Are the documents exempt from disclosure pursuant to para. 20(1)(*b*) of the *Access to Information Act*?

(2) Are the documents exempt from disclosure pursuant to para. 20(1)(*c*) of the *Access to Information Act* in that their disclosure could reasonably be expected to prejudice the applicant's competitive position or result in material financial gains for its competitors?

9. Appeal and leave to appeal to the Supreme Court of Canada dismissed—see Comments.

Facts

Canada Post (the applicant) seeks judicial review of the decision of the Minister of Public Works and Government Services Canada (the respondent) to release portions of certain records, in a severed form. According to the applicant, the two documents in question (a letter and a strategy document) are exempt from disclosure pursuant to paras. 20(1)(*b*) and (*c*) of the *Access to Information Act*.

The applicant argues that the information is exempt from disclosure pursuant to para. 20(1)(*b*) since (1) the information is of a commercial nature; (2) the information is of a confidential nature since there is no proof that it is in the public domain, it relates to a major business venture and concerns have been previously expressed regarding public disclosure; (3) the records were supplied to a government institution by the applicant; and (4) the information was consistently treated in a confidential manner as demonstrated by mutual non-disclosure agreements executed with other parties.

The applicant further argues that the information is exempt from disclosure pursuant to para. 20(1)(*c*) and that the filed affidavit meets the evidentiary burden.

The respondent argues that simply asserting that the information is confidential is insufficient; it must be established objectively. The information in question is not confidential since it was communicated to the government within a bidding process whereby the applicant was successful. Relying on *Société Gamma*[10], the respondent takes the position that generally, such a proposal for a contract is not immune from disclosure once the contract is granted. Furthermore, the respondent relies on the fact that the applicant had been advised that this information would not be kept confidential.

As to para. 20(1)(*c*), the respondent states that the applicant has failed to show on a balance of probabilities that a reasonable expectation of probable harm will flow from disclosure. Mere possibility of harm is insufficient.

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10. Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 79 F.T.R. 42 (F.C.T.D.).

Decision

The application for judicial review was dismissed.

Reasons

Preliminary issue

As per *Wyeth-Ayerst*[11], in a case involving the applicability of s. 20 of the Act, the standard of review is correctness. The burden of showing that a record falls within an excepted class lies upon the party seeking to prevent disclosure, here the third party. That burden is proof on the balance of probabilities.

Issue 1

Paragraph 20(1)b)

Justice Heneghan, in her analysis of para. 20(1)(*b*), relied heavily on the criteria set out in *Air Atonabee*[12] and *St. Joseph Corp*.[13] The analysis is broken down into three components:

(1) The information must relate to financial, commercial, scientific or technical matters : Justice Heneghan was satisfied that the information in question was “commercial information”.

(2) The information must be confidential in nature, assessed against an objective standard that takes into account the context of the information, its purpose and the conditions under which it was prepared and communicated. Relying on the indicia of confidentiality set out in *Air Atonabee*, Heneghan J. held as follows:

   (a) Whether the information content is already available to the public: There was no proof here that the information was publicly available.

   (b) Whether the information originated and was communicated in a reasonable expectation of confidence that it would not be disclosed:

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11. Wyeth-Ayerst Canada Inc. v. Canada (Attorney General) (2003), 305 N.R. 317 (F.C.A.).

12. Air Atonabee Limited v. Canada (1989), 27 F.T.R. 194 (F.C.T.D.).

13. St. Joseph Corp. v. Canada (Public Works and Government Services) (2002), 218 F.T.R. 41 (F.C.T.D.).

Justice Heneghan concluded that the manner in which the information was communicated to the government did not show that the applicant held a reasonable expectation of confidence. Furthermore, the disputed letter indicated that the respondent had clearly said that it could provide no guarantee of non-disclosure.

(c) Whether the relationship between the government institution and the third party would be fostered for the public benefit in keeping the information confidential: Justice Heneghan concluded that there would be no benefit to the public in not disclosing this type of information.

(3) The information must be supplied to a government institution by a third party: The information was indeed supplied by the applicant to the respondent.

(4) The information must be consistently treated as confidential by the third party. Justice Heneghan concluded that the applicant failed to “consistently” treat the information as confidential, by providing the information to the respondent despite its knowledge that it was not subject to any confidentiality agreement or undertaking from the respondent. The Court applied the reasoning in *Société Gamma*. In so doing it discussed briefly the policy rationale behind the Act, stating that disclosure of information is the rule, not the exception. This includes the tendering process for government contracts. Potential bidders should know that when submitting documents as part of a bidding process, those documents could not be insulated from the government’s obligation to disclose, as part of its accountability for the expenditure of public funds.

Severance argument

The applicant argued that the fact that the respondent had severed parts of the documents in question was an implicit recognition that the records in total contained confidential information. Justice Heneghan who applied the *Rubin*

decision[14] did not retain this argument. In *Rubin*, the Federal Court of Appeal had concluded that the delegate of the institution is required to examine the documents in order to decide what does or does not fit into para. 20(1)(*b*). The onus is therefore still on the applicant to prove that the non-severed part of the document also falls under para. 20(1)(*b*).

Issue 2

According to caselaw, an exemption to access pursuant to para. 20(1)(*c*) requires proof, on a balance of probabilities, of a reasonable expectation of probable harm. While the applicant's affidavit contained a good deal of information about the applicant's unique position in the market place and the alleged uniqueness of its product, the Court held that "this does not indicate that disclosure would likely result in a reasonable expectation of probable harm to its competitive position or financial gain to its competitors". It was only mere speculation.

Comments

The appeal filed by Canada Post Corp. was dismissed (2004 FCA 395). With respect to para. 20(1)(*b*), the Court held that the evidence allowed Heneghan J. to conclude that the relevant information had not been treated consistently in a confidential manner by CPC. In addition, Heneghan J. made no overriding error in not finding that keeping the information confidential would foster the relationship between the third party and the government institution for the public benefit. As to para. 20(1)(*c*), the Court was of the view that Heneghan J. applied the proper test despite her use of the word "would" rather than "could"[15] in her analysis of para. 20(1)(*c*).

Canada Post was denied leave to appeal to the Supreme Court of Canada on May 17, 2005.

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14. Rubin v. Canada (Canada Mortgage and Housing Corp.), [1989] 1 F.C. 265 (C.A.).

15. See paras. 50 and 51 of Justice Heneghan's reasons.

STEPHEN M. BYER v. THE HON. JOHN M. REID, J.G.D. (DAN) DUPUIS, DONNA BILLARD, THE HON. LUCIENNE ROBILLARD, JOYCE SABOURIN, THIERRY TERRACOL, THE HON. MARTIN CAUCHON, AND ROBERT L. BYER

INDEXED AS: BYER v. CANADA (INFORMATION COMMISSIONER)

File No.:	**T-1221-02**
Reference:	**2004 FC 119**
Date of decision:	**January 26, 2004**
Before:	**Tabib Prothonotary.**
Sections of *ATIA / PA*:	**Ss. 41, 69(1)(*a*), (e), (g), (3)(*b*) *Access to Information Act* (*ATIA*)**
Other statutes:	**S. 18.1, *Federal Court Act*; Rules 317 and 318, *Federal Court Rules, 1998***

Abstract

- No authority under s. 41 ATIA to review Commissioner's findings and recommendations
- Mandamus cannot be issued against Commissioner
- Federal Court Rule 317 not applicable to permit Court to order Commissioner to disclose information sought
- Confidential affidavit justified

Issues

(1) the Court review the findings and recommendations of the Commissioner in a s. 41 *ATIA* review?

(2) the Court order the Commissioner to disclose to the applicant the information he sought from the government institution?

(3) Should the government institution be permitted to file a confidential affidavit in these circumstances?

Facts

The applicant commenced an application against various representatives of the Treasury Board Secretariat ("TBS") and of the Office of the Information Commissioner ("Commissioner") seeking the review of their decisions in relation to the partial refusal of the applicant's request for access to TBS minutes #816967 and 816968 concerning Treasury Board's Policy on Claims and *Ex gratia* Payments, and all discussion papers, including background explanations, analysis of problems or policy options, presented for consideration in adopting this policy. TBS refused to provide access to all but 6 of the 96 pages of relevant material on the basis that they fell within subs. 69(1) *ATIA*. The applicant complained to the Commissioner, who investigated the complaint and concluded that it was not well founded because the applicant had been provided with all of the records to which he was entitled. The applicant claimed that neither TBS nor the Commissioner had taken into account the principles set out in *Canada (Information Commissioner) v. Canada (Minister of Environment)*, [2001] 3 F.C. 514 (T.D.) ("*Ethyl* ") and thus had acted in bad faith. The claim of bad faith with respect to the Commissioner was based largely on a letter of the Commissioner to the applicant in which the Commissioner seemed to acknowledge a failure to apply the principles in *Ethyl* in the conduct of his investigation of the applicant's complaint.

The applicant, the Commissioner and TBS each brought motions before the prothonotary. The applicant sought to amend his notice of application to include references to a number of documents and records pertaining to the Commissioner's alleged bad faith to consider the principles outlined in *Ethyl* in arriving at his decision. The applicant also sought a ruling on the Commissioner's objections to the applicant's request for production pursuant to Rules 317 and 318 of the *Federal Court Rules, 1998*. The Commissioner brought a motion for an order striking out the notice of application or ordering that it proceed as two separate applications. TBS sought leave to file a confidential affidavit and to amend the designation of the responding parties to include only the "President of the Treasury Board".

Decision

The applicant's motions were denied. The motions of the Commissioner and TBS were allowed.

Reasons

Issue 1

The sole relief sought as against the Commissioner was a review of its "decision" and an order that the Commissioner disclose to the applicant the information requested. It is abundantly clear from the *ATIA* and from the jurisprudence of the Federal Court that the Court does not have jurisdiction to review the Commissioner's findings and recommendations pursuant to s. 41 *ATIA*, and that a motion to strike an application seeking such a review must be granted: *Canada (Attorney General) v. Bellemare* (2000), 270 N.R. 269 (F.C.A.) at para. 13.

The case law does recognize that the conduct of the Commissioner's investigation remains, in appropriate cases, subject to judicial review under s. 18.1 *Federal Court Act*. However, in this case, notwithstanding the allegation that the Commissioner acted in bad faith in conducting its investigation, the application seeks only to review the decision of the Commissioner and to obtain communication of the information. Indeed, as the application is also clearly framed as a review of the TBS decision to refuse access pursuant to s. 41 *ATIA*, judicial review of the Commissioner's investigation or report would serve no useful purpose.

Issue 2

Applying the principles expressed in *Karavos v. Toronto (City)*, [1948] 3 D.L.R. 294 (Ont. C.A.) and *Rubin v. Canada (Privy Council)*, [1994] 2 F.C. 707 (C.A.), a *mandamus* cannot be issued against the Commissioner to give access to or disclose a document which is the object of a request for access, since there is no "clear, legal right" to have the information disclosed to the applicant by the Commissioner. Any duty of disclosure or of providing access to information under

the *ATIA* is clearly a duty owed by the head of the government institution concerned, not by the Commissioner.

Rule 317 of the *Federal Court Rules, 1998* contemplates only the communication of material in the possession of the tribunal "whose order is the subject of the application". Since the application, as it relates to a judicial review of the Commissioner's "decision", is to be struck, it follows that there can be no valid request for communication of any material from the Commissioner under Rule 317.

Issue 3

The sole argument advanced by the applicant was that any right to privacy or non-disclosure established by the *ATIA* is lost when the party seeking to rely on the right of privacy was acting in bad faith. Without even considering whether the argument is founded in law, it is clear that to order production of material that would otherwise be protected before the alleged bad faith has been proved would be to rob the protection of any practical effect. TBS' request meets the criteria developed in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. As the TBS has further undertaken to provide access to the confidential material to counsel for the parties upon a proper undertaking by them being signed, the TBS motion should be granted.

Comments

This decision is under appeal.

CANADA POST CORPORATION V. MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

INDEXED AS: CANADA POST CORP. V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES)

File No.:	**T-1900-00**
Reference:	**2004 FC 2**
Date of decision:	**January 6, 2004**
Before:	**Lemieux J.**
Sections of *ATIA / PA*:	**Ss. 20, 27, 28 and 44 *Access to Information Act (ATIA)***

Abstract

- Failure to provide proper s. 27 notice
- No harm to third party
- Third party had opportunity to object to disclosure and made use of that opportunity

Issue

Does the failure to give the third party proper notice under s. 27 *ATIA* a ground for allowing a s. 44 application for judicial review?

Facts

Canada Post is seeking a s. 44 judicial review of a decision by the Access to Information Coordinator in Public Works to release five documents in response to two requests for access. (Five documents were said to be relevant to the first request while one of the five was relevant to the second request.) Two of the issues raised in the s. 44 application have been dealt with in 2004 FC 1. The question at issue here turns on the alleged failure by the respondent to give proper s. 27 notice to the applicant.

The facts are the following. The Access Coordinator had advised Canada Post of the request for disclosure of five documents but had mistakenly identified the wording of one of the request. In addition, the letter sent by the respondent referred to an older request. The letter did not refer to the second request. The Access Coordinator had, however, appended the five documents to the letter. Upon receipt of this letter, Canada Post informed the Access Coordinator of the mistake, but nevertheless made brief submissions against the disclosure of the five appended documents. A meeting was held between the two parties in order to discuss the disclosure of the five documents. The Access Coordinator later wrote to Canada Post, advising the Corporation that the documents would be disclosed in part.

Decision

The application for judicial review was dismissed.

Reasons

The Access Coordinator breached the *Access to Information Act* by (1) providing a defective notice, (2) not respecting the statutory time limit for the issuance of the notice, and (3) not providing a notice for the second request.

However, since Canada Post suffered no harm, the application for review was dismissed without costs. The Court, relying on *Cyanamid Canada Inc. v. Minister of National Health & Welfare* (1992), 45 C.P.R. (3d) 390 (F.C.A.), held that to allow the application would only cause the filing of new requests which would not promote the main object of ss. 27 and 28. Even with the confusion, Canada Post had had the opportunity to make objections to the disclosure, both in writing and at the meeting where it was acknowledged that CPC officials had the five documents with them. While the breach by Public Works did not enable CPC to comment on whether the documents fell within the scope of the requests, CPC had not seriously contended that this was the case. The Court noted that a s. 44 review by the Court is a review *de novo*.

CANADA POST CORPORATION v. MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA AND PETER HOWARD

INDEXED AS: CANADA POST CORP. v. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES)

File No.:	**T-2117-00**[16]
Reference:	**2004 FC 1**
Date of decision:	**January 6, 2004**
Before:	**Lemieux J**
Sections of *ATIA / PA*:	**Ss. 3, 4, 5, 20(1)(*b*), 44, 73 *Access to Information Act (ATIA)***

Abstract

- Record “under the control” of a government institution
- Minister’s dual responsibility as head of department and Minister responsible for Crown corporation not removing record from scope of ATIA
- Record in possession of department thereby under its control
- Reasons justifying disclosure not required

Issues

(1) Was the document requested under the control of Public Works and Government Services Canada?

(2) Was the Access Coordinator obligated to give reasons for rejecting Canada Post’s objections to release?

Facts

A request for access to a report prepared by TD Securities and Dresden-Kleinworth Benson on the Canada Post Mandate Review was made to the Access to Information and Privacy (ATIP) Office of Public Works and

16. Appeal and leave to appeal to the Supreme Court of Canada dismissed—see Comments.

Government Services Canada (PWGSC). At the time, the Corporate Implementation Group (CIG), a branch of PWGSC, had physical possession of the document in question and proceeded to transmit it to the ATIP office. The ATIP office gave third party notice to the applicant, Canada Post Corporation (CPC), pursuant to s. 27 of the *Access to Information Act*. Submissions were made but the ATIP office determined nevertheless that the document should be disclosed with appropriate severances.

CPC argues that the report sought is under the control of Office of the Minister responsible for CPC, which office is not subject to the *ATIA*. In support of this argument, CPC contends (1) that the *Canada Post Corporation Act* creates an Office of the Minister responsible for the CPC; (2) notwithstanding the fact that at the time of the request for access the Minister responsible for CPC was also the Minister responsible for PWGSC and thereby exercised dual responsibility, historically that was not always the case; (3) the CIG was assigned by the Minister responsible for CPC to administer all matters relating to CPC and other Crown Corporations; (4) while the CIG is made up of public servants employed by PWGSC, the CIG does not perform any duties relating to the departmental responsibilities of PWGSC; (5) the document is a secret report addressed to the Minister responsible for CPC and (6) documents provided by CPC to the Minister were kept separate from documents relating to the departmental activities of PWGSC.

The respondent, PWGSC, argues that the CIG is a departmental branch of PWGSC responsible for supporting the Deputy Minister in his role as principal policy advisor to the Minister of PWGSC, and that the support provided by the CIG to the Deputy Minister and the Minister of PWGSC forms part of the departmental responsibilities of PWGSC.

Decision

The application for judicial review was dismissed.

Reasons

Issue 1

Justice Lemieux comes to the conclusion that the applicant has failed to establish the existence of an Office of the Minister responsible for Canada Post for the following five reasons:

(1) the applicant failed to establish that such an office was created by legislation or regulation, unlike other offices found in Schedule I of the *ATIA*;

(2) officials and personnel in CIG were appointed to their positions by the Public Service Commission to postings approved in the Department of Public Works by Treasury Board and whose staff relations under the *Public Service Staff Relations Act* are within the departmental structure of PWGSC. The CIG could therefore not be said to be exclusively dedicated to the Minister responsible for Canada Post. Justice Lemieux reiterated that it was a fundamental principle that Ministers need to be supported by responsible officials in order to carry out their statutory duties and functions;

(3) the Minister operated through PWGSC's ATIP Office to whom the request was directed, and that office identified CIG as the appropriate branch within PWGSC holding the requested document. CIG is part of this institutional structure for processing access request; it therefore cannot be carved out of the departmental structure of PWGSC;

(4) a deputy ministers in addition to his/her role as manager of the department acts as the principal policy advisor to the Minister by giving advice to the Minister on matters within the Minister's responsibility and authority. That includes advice with respect to a Minister's portfolio which, in the case at bar, includes advice with respect to the CPC;

(5) the Minister is constitutionally responsible for his department as well as for his portfolio for Agencies and Crown Corporations. In terms of the *ATIA*, this means that he must rely on the support of his departmental officials to discharge his responsibilities under that Act.

Justice Lemieux concludes by relying on the decision of the Federal Court Trial Division in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.) (aff'd (1995), 60 C.P.R. (3d) 441 (F.C.A.)), that stands for the proposition that control normally means possession. CIG was in possession of the report when the request was made and the document was therefore under the control of PWGSC.

Issue 2

The applicant argues that the ATIP office's decision to disclose should be quashed due to a lack of issuance of reasons, as required in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Justice Lemieux, however, agreed with the respondent's propositions that:

(1) the *Baker* decision does not stand for the proposition that reasons for decisions are invariably required. Lemieux J. referred to Justice L'Heureux-Dubé's reasons to the effect that "where the decision has important significance for the individual, or where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required". Lemieux J. noted that s. 44 review is a review *de novo*;

(2) based on *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.), a distinction must be made between a decision to disclose and a decision not to disclose. Since the *ATIA* requires disclosure, no reasons need be specified in such a case;

(3) *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 (C.A.) (the *Telezone* decision) was also distinguished as, unlike the case at bar, the Federal Court of Appeal had dealt, in the *Telezone* case, with a refusal to disclose and had concluded that Industry Canada had, in fact, provided reasons;

(4) in *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403, the Court determined that generally, if reasons are not required by statute, administrative decision makers have no duty to issue them.

Comments

The appeal filed by Canada Post Corp. against this decision was dismissed (2004 FCA 286). The records at issue were clearly under the control of the Corporate Implementation Group, a departmental branch of the Department of Public Works and Government Services and thus, under the control of that Department.

CPC’s leave to appeal to the Supreme Court of Canada was dismissed March 17, 2005.

ROBERT J. RICHARDS AND SANDRA L. RICHARDS V. MINISTER OF NATIONAL REVENUE

INDEXED AS: RICHARDS V. CANADA (MINISTER OF NATIONAL REVENUE)

File No.:	**T-636-02**
Reference:	**2003 FC 1450**
Date of decision:	**December 12, 2003**
Before:	**Lemieux J**
Sections of *ATIA / PA*:	**Ss. 6, 12 and 41 *Privacy Act* (*PA*)**

Abstract

- S. 41 *PA* review is a *de novo*
- Jurisdiction of Court to entertain s. 41 review when records do not exist or are missing
- Insufficient evidence to prove existence of documents or personal information on missing documents
- No further search ordered

Issues

(1) Were the applicants denied access to their personal information, giving rise to a s. 41 *PA* review of the decision of the MNR because certain documents which the Minister said did not exist or were missing were not disclosed to the applicants?

(2) Is a s. 41 review in the nature of a *de novo* review?

(3) Is a further search of records justified?

Facts

Mr. and Mrs. Richards (“the applicants”) sought access to their personal information under the control of the Minister of National Revenue (“MNR”). The Minister and his officials granted the applicants access to thousands of pages of documents containing the applicants’ personal information. The MNR alleges

that certain requested documents were not disclosed on the basis that they either did not exist because they had never been created (two documents), or were missing through no fault of the Minister or his officials (two documents). In the case of the last two documents, the bottom of a T20ST Reconciliation form had been torn away under unknown circumstances, and information on a Post-it note affixed to a T2020 document and covered by a second Post-it note was lost and only a photocopy of the T2020 existed.

The applicants complained to the Privacy Commissioner. In his findings on November 15, 2001, the Privacy Commissioner found that access had in some cases been denied (other than those mentioned above) but as access had by the time of his report been granted, no further action was warranted. With respect to the T20ST Reconciliation form, the Commissioner found that there was no evidence on which to conclude that the missing portion contained any personal information about the applicants.

Decision

The application was dismissed.

Reasons

A s. 41 review is a *de novo* review, which requires the Court to determine, on a balance of probabilities, based on the evidence before it, whether the applicants had been refused access to personal information.

With respect to the documents that the Minister claimed did not exist, the Court concluded that in both cases there was uncontradicted evidence that they did not exist. The Court did not order a further search of records, as it was satisfied with the Commissioner's finding, made after a thorough investigation, that there was no evidence that the documents existed.

With respect to the T20ST Reconciliation form, the Court concluded that the evidence did not permit any conclusion as to what caused the missing portion to be absent, the same conclusion at which the Commissioner arrived. The Court found that, on the balance of probabilities, the missing part of the form did not

contain any personal information about Mr. Richards, particularly after examining a blank T20ST form as well as the T20ST form prepared when Mrs. Richards' taxes were reviewed.

Finally, the Court held that there was insufficient evidence upon which to conclude that the missing Post-it notes contained personal information about Mrs. Richards, and that to conclude otherwise would be pure speculation on the Court's part.

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