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Info Source

Privacy Act

and

Access to Information Act

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This document is also available in alternate formats on request.

Table of Contents

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 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

There are currently 13 centres that provide bilingual, toll-free information about business, starting a business, or programs, services, or regulations related to business. These centres are able to answer questions relating to both federal and provincial jurisdiction.

Canada Business Service Centres

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Web site..... www.cbsc.org

Canada Web Site

The Canada site provides Internet users with a single electronic access point to general information about Canada, the federal government, and 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.

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

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; and
- 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; and
- is intended to help former and current government employees to exercise their rights under the *Privacy Act*.

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; and
- contains a summary of federal court cases related to the *Access to Information Act* and 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*; and
- other institutions associated with the federal government are included to facilitate access.

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

D. Roles and Responsibilities

Treasury Board of Canada Secretariat

In accordance with the *Access to Information Act*, the 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*.

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

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

Individual Institutions

Government institutions are required to provide their updated information to the Treasury Board of Canada Secretariat on an annual basis. This information is used 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, East Tower
140 O'Connor Street, 8th Floor
Ottawa, Ontario K1A 0R5

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Publications ..... (613) 995-2855
Fax..... (613) 996-0518
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E-mail ..... infosource@tbs-sct.gc.ca
Treasury Board of Canada Secretariat 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 Act *Bulletin*, please contact:

Treasury Board of Canada Secretariat Distribution Centre
L'Esplanade Laurier, Room P-140, Level P-1W
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STATISTICAL INFORMATION – PERSONAL INFORMATION BANKS 2003-2004

Personal Information Banks

Personal Information Banks (PIBs) 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

- Discipline (PSE 911)
- Employee Personnel Record (PSE 901)
- Pay and Benefits (PSE 904)
- *Values and Ethics Code for the Public Service* – formerly titled the *Conflict of Interest and Post-Employment Code* (PSE 915)

STATISTICAL TABLES 2003-2004 ACCESS TO INFORMATION

Access to Information Requests – 2003-2004

Requests received during this reporting period	25,234
Requests brought forward from previous reporting period	5,102
Total number of requests	30,336
Requests completed	25,367
Requests carried forward to next reporting period	4,969

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

Access to Information – 2003-2004

Disposition of completed requests

Requests where all information was disclosed	28.2%	7,142
Requests where information was disclosed in part	41.9%	10,632
Requests where all information was excluded	0.9%	220
Requests where all information was exempted	3.1%	798
Requests transferred to another institution	2.2%	555
Requests where information was given informally	1.0%	255
Requests that could not be processed (for reasons such as insufficient information provided by applicant, no records exist, or abandonment by applicant)	22.7%	5,765
Total		**25,367**

Access to Information – 2003-2004

Source of Requests

Requests received from businesses	41.9%	10,567
Requests received from the public	34.2%	8,634
Requests received from organizations	11.7%	2,963
Requests received from the media	11.2%	2,835
Requests received from academics	0.9%	235
Total requests received		**25,234**

Access to Information – 2003-2004

Institutions ranked in order of number of requests received

1) Citizenship and Immigration Canada	31.2%	7,876
2) National Defence	7.0%	1,768
3) Health Canada	6.8%	1,708
4) Canada Revenue Agency	6.6%	1,668
5) Library and Archives Canada	3.8%	954
6) Royal Canadian Mounted Police	3.4%	855
7) Public Works and Government Services Canada	3.3%	831
8) Environment Canada	2.9%	742
9) Fisheries and Oceans Canada	2.7%	691
10) Correctional Services Canada	2.3%	570
11) Other departments	30.0%	7,571
Total		**25,234**

Access to Information – 2003-2004

Time Required to Complete Requests
(including requests for which extensions were required)

0 to 30 days	63.9%	16,217
31 to 60 days	15.7%	3,976
61 to 120 days	12.0%	3,032
121 days or over	8.4%	2,142
Total		**25,367**

Access to Information – 2003-2004

Extension Time Required

	30 days or under	**31 days or over**
Searching	1,098	1,286
Consultation	2,013	1,581
Third-party	279	1,287

Access to Information – 2003-2004

Exemptions

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

Section 19 – Personal information	32.3%	7,877
Section 21 – Operations of government	17.8%	4,339
Section 20 – Third party information	15.4%	3,751
Section 16 – Law enforcement and investigations	9.9%	2,418
Section 15 – International affairs and defence	6.5%	1,596
Section 13 – Information obtained in confidence	5.1%	1,240
Section 23 – Solicitor-client privilege	4.3%	1,052
Section 24 – Statutory prohibitions	3.1%	754
Section 18 – Economic interests of Canada	2.5%	618
Section 14 – Federal-provincial affairs	2.1%	518
Section 22 – Testing procedures	0.4%	93
Section 26 – Information to be published	0.4%	88
Section 17 – Safety of Individuals	0.3%	62
Total		**24,406**

Access to Information – 2003-2004

Exclusions

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

Section 69(1)(*g*)	29.4%	541
Section 69(1)(*a*)	28.7%	527
Section 68(a)	15.0%	276
Section 69(1)(*e*)	12.1%	222
Section 69(1)(*d*)	6.2%	114
Section 69(1)(*c*)	4.5%	82
Section 69(1)(*f*)	2.7%	49
Section 68(b)	0.8%	14
Section 69(1)(*b*)	0.4%	8
Section 68(c)	0.3%	5
Total		**1,838**

Access to Information – 2003-2004

Costs and Fees for Operations

Requests completed	**25,367**
Cost of operations	$24,167,847.21
Cost per completed request	$952.73
Fees collected	$330,350.45
Fees collected per completed request	$13.02
Fees waived	$170,595.12
Fees waived per completed request	$6.73

STATISTICAL TABLES 2003-2004 PRIVACY

Privacy Requests – 2003-2004

Requests received during this reporting period	54,377
Requests brought forward from previous reporting period	4,511
Total number of requests	58,888
Requests completed	47,847
Requests carried forward to next reporting period	11,041

Privacy – 2003-2004

Disposition of Completed Requests

Requests where all information was disclosed	34.8%	16,664
Requests where information was disclosed in part	42.9%	20,522
Requests where all information was excluded	0.1%	53
Requests where all information was exempted	1.1%	506
Requests that could not be processed (for reasons such as insufficient information provided by applicant, no records exist, or abandonment by applicant)	21.1%	10,102
Total		**47,847**

Privacy – 2003-2004

Institutions ranked in order of number of requests received

1) Correctional Service Canada	47.2%	25,677
2) Citizenship and Immigration Canada	10.1%	5,515
3) Social Development Canada	8.7%	4,711
4) National Defence	7.6%	4,117
5) Canada Revenue Agency	5.0%	2,705
6) Other departments	21.4%	11,652
Total		**54,377**

Privacy – 2003-2004

Time Required to Complete Requests
(including requests for which extensions were required)

0 to 30 days	65.7%	31,440
31 to 60 days	15.2%	7,283
61 to 120 days	14.2%	6,810
121 days or over	4.8%	2,314
Total		**47,847**

Privacy – 2003-2004

Exemptions

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

Section 26 – Information about another individual	60.2%	10,843
Section 22 – Law enforcement and investigation	21.0%	3,783
Section 19 – Personal information obtained in confidence	9.1%	1,643
Section 24 – Individuals sentenced for an offence	4.5%	817
Section 27 – Solicitor-client privilige	2.4%	437
Section 21 – International Affairs and defence	1.8%	325
Section 23 – Security clearances	0.3%	52
Section 25 – Safety of individuals	0.3%	47
Section 28 – Medical records	0.2%	44
Section 18 – Exempt banks	0.1%	24
Section 20 – Federal-provincial affairs	0.0%	1
Total		**18,016**

Privacy – 2003-2004

Exclusions

It should be noted that a single 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*)	28.5%	2
Section 70(1)(*e*)	14.3%	1
Section 70(1)(*d*)	14.3%	1
Section 70(1)(*c*)	0%	0
Section 70(1)(*f*)	0%	0
Section 69(1)(*b*)	0%	0
Section 70(1)(*b*)	0%	0
Total		**7**

Privacy – 2003-2004

Costs and Fees for Operations

Requests completed	**47,847**
Cost of operations	$13,796,557.89
Cost per request completed	$288.35

STATISTICAL TABLES 1983-2004 ACCESS TO INFORMATION

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

Access to Information – 1983-2004

Disposition of Requests

Requests received	**251,407**
Requests completed	**245,838**

Access to Information – 1983-2004

Disposition of Completed Requests

Requests where all information was disclosed	33.9%	83,219
Requests where information was disclosed in part	37.0%	91,019
Requests where all information was excluded	0.6%	1,401
Requests where all information was exempted	3.1%	7,531
Requests transferred to another institution	1.9%	4,631
Requests where information was given informally	3.9%	9,709
Requests that could not be processed (for reasons such as insufficient information provided by applicant, no records exist, or abandonment by applicant)	19.7%	48,328
Total		**245,838**

Access to Information – 1983-2004

Time Required to Complete Requests
(including requests for which extensions were required)

Requests completed	**100%**	**245,838**
0 to 30 days	59.8%	147,095
31 to 60 days	17.0%	41,695
61 days or more	23.2%	57,048

Access to Information – 1983-2004

Costs and Fees for Operations

Requests completed	**245,838**
Cost of operations	$205,017,052.90
Cost per request completed	$833.95
Fees collected	$2,960,592.58
Fees collected per request completed	$12.04
Fees waived	$1,318,158.17
Fees waived per request completed	$5.36

STATISTICAL TABLES 1983-2004 PRIVACY

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

Privacy – 1983-2004

Disposition of Requests

Requests received	**982,747**
Requests completed	**881,503**

Privacy – 1983-2004

Disposition of Completed Requests

Requests where all information was disclosed	54.3%	478,302
Requests where some information was disclosed	30.3%	267,479
Requests where all information was excluded	0.0%	268
Requests where all information was exempted	0.8%	6,823
Requests that could not be processed (for reasons such as insufficient information provided by applicant, no records exist, or abandonment by applicant)	14.6%	128,631
Total		**881,503**

Privacy – 1983-2004

Time Required to Complete Requests
(including requests for which extensions were required)

Requests completed	**100%**	**881,503**
0 to 30 days	57.6%	507,305
31 to 60 days	19.0%	167,874
61 days or more	23.4%	206,324

Privacy – 1983-2004

Costs and Fees for Operations

Requests completed	**881,503**
Cost of operations	$170,595,916.58
Cost per completed request	$193.53

Index of Court Cases

These cases are ordered by the most recent date of decision.

FEDERAL COURT CASES

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

THE BLOOD BAND V. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
INDEXED AS: BLOOD BAND V. CANADA

File No.:	**T-1140-01**
References:	**2003 FC 1397; [2003] F.C.J. No. 1794 (QL)**
Date of decision:	**November 28, 2003**
Before:	**Lemieux J.**
Sections of ATIA / PA:	**Ss. 20(1)(*b*), (*c*), (*d*), 23, and 44 *Access to Information Act* (ATIA)**
Other statute:	**S. 18.1 *Federal Court Act***

Abstract

- Settlement negotiations privilege protected by para. 20(1)(*d*) ATIA but not by s. 23 ATIA
- To assert the settlement negotiations privilege under para. 20(1)(*d*) ATIA, applicant must bring evidence that the disclosure of the requested records could reasonably be expected to interfere with settlement negotiations

Issue

Do settlement negotiations fall within the purview of para. 20(1)(*d*) ATIA?

Facts

The Blood Band ("Band") objected to a decision of the Department of Indian Affairs and Northern Development (DIAND) Access Coordinator to sever and release parts of documents to which a requestor sought access from DIAND under the rubric "Land Claim of the Blood Indian Band." The Access Coordinator had determined that parts of the requested documents qualified for exemption under certain paragraphs of s. 20 of the ATIA. These documents included:

(1) a 1994 historical report by a consultant to the Band; (2) a 1996 land claim submission to DIAND prepared by solicitors retained by the Band; and (3) a 1998 confirmation report prepared by a DIAND official assessing and summarizing the position of the parties. The Access Coordinator gave the Band a s. 27 ATIA notice stating the Department's intention to release the documents in severed form.

The Band objected to the release of the first two documents, saying that they were prepared in contemplation of litigation by the Band and were placed in DIAND's hands in without prejudice settlement negotiations of its legal action which included negotiations related to the acceptance of the Band's claim for negotiation as a specific claim. The Band argued that their release would interfere with settlement efforts, as well as with the specific claims eligibility negotiations between the Band and the federal government. The Band objected to the release of the third document on the grounds that it was prepared in contemplation of or was relevant to ongoing litigation between the parties and its disclosure might well interfere with the Band's prosecution of its action against Canada, as well as any future settlement negotiations.

The Access Coordinator argued in response that portions of each of the documents consisted of historical or factual data whose disclosure would not prejudice the Band's position. This was communicated to the Band by letter on June 16, 2001. The Band then initiated an action under s. 18.1 of the *Federal Court Act*, a procedure to which the federal Crown objected.

In oral argument, counsel for the Band argued that documents provided to the government in the context of settlement negotiations are privileged and are not covered by the Act – they are not within the control of a government institution and this is why he argued that his s. 18 *Federal Court Act* proceeding was well-founded. Counsel for the Band argued in the alternative that if the ATIA applied then paras. 20(1)(*b*), (*c*), and (*d*) provided appropriate exemptions. Counsel for the Band argued there was a crossover between these sections and s. 23 of the Act which specifically deals with solicitor-client privilege.

Decision

The application was allowed. The documents are protected from disclosure in their entirety on the basis of para. 20(1)(*d*).

Reasons

Settlement negotiations privilege attaches to documents created or exchanged during negotiations carried on for the purpose of settling an action or avoiding litigation. Settlement negotiations are within the purview of para. 20(1)(*d*) ATIA and are not covered by the solicitor-client exemption stated in s. 23 ATIA. Consequently, the Court was able to avoid deciding whether a third party could raise an exemption outside s. 20 and concluded that the matter must be heard under s. 44 ATIA and not under s. 18.1 of the *Federal Court Act*.

In the context of the ATIA, unlike the situation which prevails in civil litigation, it is insufficient simply to assert the privilege of settlement negotiations to fit within para. 20(1)(*d*). Parliament framed the third-party exemptions in paras. 20(1)(*c*) and (*d*) in terms of what "could reasonably be expected to" result in material financial loss or to prejudice the competitive position or to interfere with contractual or other negotiations of a third party. Thus, the applicant must bring evidence that the disclosure of the requested records could reasonably be expected to interfere with settlement negotiations.

On reviewing the three documents in question, the Court concluded that the entire documents qualified for exemption under para. 20(1)(*d*) and that severance was inappropriate. The Court found first that the documents had arisen in the context of settlement negotiations. Second, while some of the events referred to in the documentation necessarily were in the public domain, what the Access Coordinator had coined as historical facts were in reality the very evidence which the Band asserted is needed to prove its Federal Court action and could not but prejudice the Band vis-à-vis a third party.

The Court rejected arguments that the settlement negotiations were off and therefore there could not be any interference with them within the meaning of para. 20(1)(*d*). First, what DIAND had decided is that it would not recognize the Band's claim as being eligible for negotiation within the specific claims process. That is the very issue that is being reviewed by the Indian Land Claims Commission. Second, the Board's action in the Federal Court was still alive and, if it were to go forward after discovery were to take place, settlement discussions would take place as mandated by Rule 257 of the *Federal Court Rules, 1998*.

Finally, disclosure of these documents, in this context, would result in both the Band and DIAND losing control of the prevailing circumstances (the action and settlement efforts) by opening up the process to outside intervention, a process which heretofore has been carefully managed by the Band and DIAND. Such a consequence, in the Court's view, could not but interfere with the realities of settlement negotiations of an action.

DYANE DUSSAULT V. CANADA CUSTOMS AND REVENUE AGENCY AND CANADA POST CORPORATION
INDEXED AS: DUSSAULT V. CANADA (CUSTOMS AND REVENUE AGENCY)

File No.:	**T-1062-01**
References:	**2003 FC 973; [2003] F.C.J. No. 1253 (QL)**
Date of decision:	**August 25, 2003**
Before:	**Dawson J.**
Section of *ATIA / PA*:	**S. 20(1)(c) *Access to Information Act* (ATIA)**

Abstract

- Standard of review applicable to Minister's decision
- Burden of proof on party resisting disclosure
- Reasonable expectation of probable harm to competitive position met

Issue

Did the Canada Customs and Revenue Agency (CCRA) establish, on a balance of probabilities, that Canada Post Corporation (CPC) had a reasonable expectation of probable harm if the financial terms of an agreement were disclosed?

Facts

This is an application under s. 41 of the *Access to Information Act* for judicial review of the decision of CCRA refusing to disclose certain information. The applicant, Dussault, was requesting access to a memorandum of understanding between CCRA and CPC regarding the roles, responsibilities, and financial arrangements pertaining to the processing and clearance of international mail and parcels. CCRA identified the "Agreement Concerning Processing and Clearance of Postal Imports" as relevant to the request. The agreement in question is a commercial fee-for-service contract between CPC and CCRA, whereby CPC provides services that were previously carried out by CCRA.

Upon notification of the access request by CCRA, CPC identified various portions of the agreement that it believed should be exempted under para. 20(1)(*c*) of the *Access to Information Act*. CCRA agreed and a copy of the agreement was provided to the applicant, minus the exempted portions. The applicant disagreed and filed a complaint with the Office of the Information Commissioner. As a result of the Commissioner's investigation, CCRA agreed to disclose additional information to the applicant, but maintained that the remainder of the record was exempted under para. 20(1)(*c*) on the ground that its disclosure would injure the competitive position of CPC. The Commissioner agreed with this assessment.

The portions of the agreement that were not disclosed are described as the financial terms of the agreement. In an affidavit filed in confidence, the Director of Economic Strategy and Regulatory Affairs at CPC explained that, since CPC is a commercial undertaking that operates in a competitive environment, and that CPC has no statutory protection from private-sector competition, it his highly probable that the information contained in the agreement would be used by competitors to bid against CPC for the provision of CCRA services. CPC would be particularly disadvantaged in any future bidding process since it would not be able to obtain similar information with respect to its competitor's operations.

Decision

The application for judicial review was dismissed.

Reasons

The standard of review to be applied to the decision of CCRA is correctness. The person resisting disclosure must establish, on a balance of probabilities, a reasonable expectation of probable harm if the information is disclosed; this does not consist in a general assertion or speculative evidence of that harm. There must also be a direct linkage between the disclosure and the harm alleged.

The Court concluded that CCRA had indeed established, on a balance of probabilities, that CPC had a reasonable expectation of probable harm if the remaining information was disclosed. Three factors led to this conclusion:

(1) The information found in the agreement provided a fairly accurate picture of the structure and nature of the compensation negotiated between CCRA and CPC. As such, this information could be used by competitors to bid against CPC for the services provided to CCRA.

(2) The CPC director testified that if the information were disclosed, it would be highly probable that it would be used by competitors to bid against CPC. Considerations relating to the specific financial harm was provided by the director. The evidence was not contradicted or repudiated by the applicant.

(3) The applicant's employer, Global Public Affairs, is on Industry Canada's lobbyist registration as a lobbyist for UPS. In turn, UPS is involved in a NAFTA proceeding with CCRA, and UPS and other such courier companies could compete against CPC for the provision of services to CCRA.

(4) As well, the Court had regard to the report and recommendations of the Information Commissioner.

The applicant had argued that there was no evidence that the services would be performed by others, particularly since CCRA had never publicly tendered the services, that for another party to perform the services, an amendment to the *Customs Act* would be required, and that no linkage between the asserted harm and the information existed due to CPC's existing monopoly on mail delivery.

Judge Dawson disagreed with the applicant's first argument on the basis that the agreement could be terminated by either party giving 120 days' notice, and that, prior to 1992, CCRA performed the tasks now contracted to CPC. As for the argument that an amendment to the *Customs Act* would be necessary to permit a competitor to provide the services, Judge Dawson disagreed, saying that the

relevant section of the Act (s. 147.1 *Customs Act*[1]) is permissive, not mandatory. CCRA would therefore be able to contract out or even perform the functions itself upon termination of the agreement with CPC. As to the applicant's final argument that CPC has a monopoly on the services performed, the Judge determined that the exclusive privilege pertains to the collection, transmission, and delivery of letters, not the collection of duties and taxes, as described in the agreement. A number of CPC's competitors would therefore be capable of performing those services.

Comments

This decision was not appealed.

[1] Subs. 147.1(3) of the *Customs Act* provides that "The Minister and the Corporation May enter into an agreement in writing whereby the Minister authorizes the Corporation to collect, as agent of the Minister, duties in respect of mail and the Corporation agrees to collect the duties as agent of the Minister."

JEAN-PIERRE GALIPEAU V. ATTORNEY GENERAL OF CANADA AND HUMAN RESOURCES DEVELOPMENT CANADA
INDEXED AS: GALIPEAU V. CANADA (ATTORNEY GENERAL)

File No.:	**T-608-02**
References:	**2003 FCT 828 (affirmed by the Federal Court of Appeal, 2003 FCA 223 – see comments at the end of the summary)**
Date of decision:	**July 26, 2002**
Before:	**Lemieux J.**
Sections of *ATIA / PA*:	**Ss. 41, 48 and 49 *Privacy Act* (PA)**

Abstract

- Requirements to fulfil for a motion to strike to be granted
- S. 41 of the PA only applies where access is refused
- Remedies provided for in ss. 48 and 49 of the PA

Issue

Did the defendants fulfil the requirements relating to the striking-out of an application?

Facts

The defendants requested the striking-out of the judicial review application submitted by Mr. Galipeau under s. 18.1 of the *Federal Court Act* and s. 41 of the *Privacy Act*.

Following an access request by Mr. Galipeau, documents on applications for a social insurance number were disclosed to him. The applicant later submitted a complaint to the Office of the Privacy Commissioner of Canada alleging that some of the information on the copies he received of the application forms were illegible, that some forms seemed to have been falsified and that the writing on

one of them was not his. Following his investigation, the Commissioner found that the original SIN application forms no longer existed because they had been destroyed after being transferred to microfiche, that some of the details on the illegible information had been sent to the applicant, that he could examine the microfiche on site and that it was not within the Commissioner's jurisdiction to have the applicant's writing analyzed.

The aim of the judicial review application was the destruction of the false documents and the sorting of some microfiche.

Decision

The judicial review application was struck out.

Reasons

A motion to strike is granted only if the defendants demonstrate that the application is so clearly futile "that it has not the slightest chance of succeeding, whoever the judge may be before whom the case could be tried." (See *Creaghan Estate v. The Queen*, [1972] F.C. 732, (T.D.).) In the present case, the judge determined that the defendants had fulfilled all the requirements.

The text of s. 41 of the PA is clear: a judicial review application under the Act applies only where access is refused. In the present case, the Department disclosed the requested personal information to the applicant. In addition, the Court estimates that the remedies sought by the applicant exceed those provided for by Parliament in ss. 48 and 49 of the Act.

Comments

The Federal Court of Appeal confirmed this decision in a judgment dated May 14, 2003 (2003 FCA 223; [2003] F.C.J. No. 770 (QL)). The Court of Appeal found that s. 41 of the PA could not be applied in this case because the provision grants a right of review to the person who is refused access to the personal information requested under subs. 12(1) of the Act. However, the appellant had access to all the documents in his file; it was therefore not a

refusal of access. In addition, the power of intervention attributed to the Court in s. 48 of the PA is in accordance with the nature of the remedy under s. 41 and is therefore limited to an order to disclose the requested information. It does not include its destruction.

Leave to appeal to the Supreme Court of Canada was dismissed on October 16, 2003.

GEOPHYSICAL SERVICE INC. V. CHAIRMAN, CANADA-NOVA SCOTIA OFFSHORE PETROLEUM BOARD; GEOPHYSICAL SERVICE INC. V. CHAIRMAN, CANADA-NEWFOUNDLAND OFFSHORE PETROLEUM BOARD; GEOPHYSICAL SERVICE INC. V. CHAIRMAN, NATIONAL ENERGY BOARD INDEXED AS: GEOPHYSICAL SERVICE INC. V. CANADA-NEWFOUNDLAND AND OFFSHORE PETROLEUM BOARD

File Nos.:	**T-2101-00, T-2102-00, T-2100-00**
References:	**2003 FCT 507; [2003] F.C.J. No. 665 (QL)**
Date of decision:	**April 25, 2003**
Before:	**Gibson J.**
Sections of *ATIA / PA*:	**Ss. 19, 20(1)(c) and 24 *Access to Information Act* (ATIA)**

Abstract

- Application of exemptions after Information Commissioner's investigation not permitted
- General policy of non-disclosure insufficient evidence to warrant application of para. 20(1)(c)
- Section 119 *Canada-Newfoundland Atlantic Accord Implementation Act* and s. 122 *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, incorporated into s. 24 of the ATIA, do not prevent release of requested information
- Personal information not including the names, positions, or titles of individuals that are acting only as employees of corporations

Issues

Can government institutions apply mandatory exemptions after the Information Commissioner has completed his investigation?

Can the government institutions' policy of non-disclosure be sufficient evidence to warrant the application of para. 20(1)(*c*)?

Does s. 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act* or s. 122 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* both of which are incorporated into s. 24 of the ATIA, apply to exempt the names of the people who request information from a facility in the nature of a library maintained in accordance with those Acts?

Are the names, positions, and titles of individuals acting only in their capacity as employees of corporations personal information for the purpose of s. 19?

Facts

The applicant is required to deposit with the appropriate respondent geophysical seismic data it collects in accordance with a licence issued by the appropriate respondent Board. Which respondent receives which data is determined by the physical jurisdiction that the seismic data concern. In turn, the respondents make the seismic data available to third parties, after the expiry of a certain amount of time set by law or by policy, without consultation with or consent of the applicant.

The applicant made three requests for information – one to each of the three respondents. Each request was similar. The requests were for the names and addresses of all third parties who had, within a certain period of time, requested and been granted access to information concerning or provided by the applicant to the respondent, together with details of the information provided.

The Canada-Newfoundland Board applied the exemptions contained in ss. 19, 20(1), and 24 of the ATIA. Section 24 incorporates s. 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act*, which provides that information provided to the Board for certain purposes is privileged and shall not

be disclosed without the consent of the person who provided it except under certain specified conditions.

The National Energy Board applied only the exemption found in para. 20(1)(c) of the ATIA.

The Canada-Nova Scotia Board applied the exemptions found in para. 20(1)(*c*) and s. 24 of the ATIA. Section 24 of the ATIA incorporates s. 122 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* which essentially contains the same terms as subs. 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act.*

The applicant complained to the Information Commissioner, who, after his investigation, found that the exemptions had been properly applied. The applicant then filed, pursuant to s. 41 of the ATIA, to have the Federal Court review the matter.

Decision

The application was allowed. The records were ordered released.

Reasons

Issue 1

Once all three Court applications were consolidated, the two respondents who had not relied on s. 19 attempted to rely on the application of this exemption by virtue of the fact that the Canada-Newfoundland Board had relied on it. Similarly, the National Energy Board also attempted to rely on the application of s. 24 (which incorporates s. 101 of the *Canada Petroleum Resources Act*). However, these exemptions were not before the Information Commissioner when he enquired into the applicant's complaints in relation to those respondents.

The general principles cited in *Rubin v. Canada (Minister of Health)* (2001), 14 C.P.R. (4th) 1 (F.C.T.D); aff'd, [2003] F.C.J. No. 103 (QL) (F.C.A) required that exceptions to the right of access should be limited and specific and that the burden lies on the party opposing disclosure. Further, in *Rubin*, the

Court indicated that the specific provision which will be relied upon by the institution must be indicated to the requester before the complaint is made to the Information Commissioner. For these reasons, and on the facts of this case, the Court found that the applicant was denied the right of complaint to the Information Commissioner in respect of a range of bases of exemption from disclosure that the National Energy Board and the Canada-Nova Scotia Board now attempt to rely on. Therefore, the additional reliance on those exemptions, being claimed after the Information Commissioner's investigation, must be dismissed. Similarly, a late additional request by the applicant for supplemental information is similarly dismissed for the same reasons. If the access request was not and could not have been before the Information Commissioner, then the Court is precluded from considering that request on an application under s. 41 of the ATIA.

Issue 2

It is not sufficient for an institution from which the names of third parties who request or borrow information and the description of requested or borrowed information are sought to rely upon a general assertion that disclosure of such information could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party. Exemption from disclosure should be justified by affidavit evidence explaining clearly the rationale exempting each record. In this case, one of the respondents' evidence indicated that it was a policy decision that it will not release the requested information because it could result in financial loss or gain to another party. Further, the evidence indicated that one of the respondents relied upon its general knowledge of the oil and gas industry and the secretive nature of participants in that industry to speculate, rather than to demonstrate, probable harm as a reasonable expectation. This evidence indicates an error on the part of the respondent in failing to examine each request on an individualized basis, and an error in relying on a generalized policy to withhold information.

Issue 3

Section 24 of the ATIA incorporates, by reference, s. 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act*. Together, these sections work to exempt from release information or documentation provided for the purposes of Part II or Part III, or any regulation made under either of those Parts, of the *Canada-Newfoundland Atlantic Accord Implementation Act.*

The exact same analysis would be applicable with respect to the analogous provision (s. 122) found in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act.* The analogous claim being raised late by the National Energy Board was dismissed because of its late application (see Issue 1).

The information requested by the applicant, namely, the names of those who had borrowed information from the respondents along with a description of the borrowed information, is not information provided to the respondents for the purposes of Part II or III of the *Canada-Newfoundland Atlantic Accord Implementation Act* or any regulation made under either of those parts. Rather, the requested information was information provided for the purposes of the maintenance and operation of a facility in the nature of a library as required by s. 22 of the *Canada-Newfoundland Atlantic Accord Implementation Act.*

The types of people who borrow information can be from academic institutions, private individuals, or exploration companies. Indeed, it is entirely possible that they might be institutions that were neither academic in nature nor exploration companies. Their names, as borrowers of documentation, and the link of their names to the borrowed information, could hardly be said to be information provided for the purpose of management of petroleum resources, of administration or enforcement of the statutory scheme, or for the safe and prudent conduct of petroleum operations. By contrast, s. 22 of the *Canada-Newfoundland Atlantic Accord Implementation Act* obliges the respondent to establish, maintain, and operate a facility in the nature of a library. The collection of the names of those who borrow the documentation within the

library is part of the obligation under s. 22. Thus, the requested information was not subject to s. 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act* and it cannot be exempt from disclosure by virtue of s. 24 of the ATIA.

Issue 4

Section 19 of the ATIA operates to exempt from release "personal information" as defined in the *Privacy Act*. However, the respondent cannot succeed on its claim for an exemption from disclosure on the basis of s. 19. First, *Tridel Corp v. Canada Mortgage and Housing Corp.* (1996), 115 F.T.R. 185 (F.C.T.D.) is the authority for the proposition that a corporation cannot be an "identifiable individual" for the purposes of the definition of "personal information." Further, there was no basis to conclude that the names of requesters linked to the information requested would constitute "personal information." If the requesters are corporations or unincorporated bodies, they are not "identifiable individuals." If the requesters are "identifiable individuals" and are acting only as employees of corporations or the like, and nothing more than their position or title with the corporation is identified, then the disclosure of their names together with that information alone does not constitute disclosure of "personal information."

INFORMATION COMMISSIONER OF CANADA V. ATTORNEY GENERAL OF CANADA AND BRUCE HARTLEY INDEXED AS: CANADA (INFORMATION COMMISSIONER) V. CANADA (ATTORNEY GENERAL)

File Nos.:	**A-82-02, A 374-02**
References:	**2003 FCA 285; [2003] F.C.J. No. 1006 (QL)**
Date of decision:	**June 25, 2003**
Before:	**Richard C.J., Linden and Rothstein JJ.A.**
Sections of *ATIA / PA*:	**Ss. 4, 35, 36, 62, 63, 64, 65 *Access to Information Act* (ATIA)**

Abstract

- Transcripts of *in camera* proceedings before the Deputy Information Commissioner

Issue

Did the Trial Division Judge err when he ordered that the transcripts of the proceedings before the Deputy Information Commissioner be filed, on a confidential basis, on the judicial review applications?

Facts

These were two appeals brought by the Information Commissioner from two interlocutory decisions ordering the Commissioner to file, on a confidential basis, transcripts with the Federal Court and with opposing counsel.[2]

Decision

The appeals were dismissed.

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[2] See *Canada (Attorney General) v. Canada (Information Commissioner)*, 2002 FCT 129 and 2002 FCT 624.

Reasons

The Trial Division Judge did not err in concluding that Rules 317 and 318 of the *Federal Court Rules, 1998,* do not conflict with the ATIA. Also, the applicants in these proceedings have requested that the material be filed with the Court and with counsel on a confidential basis pursuant to Rule 152 of the *Federal Court Rules, 1998*, and the very matter under review in these applications are the investigatory processes of the Information Commissioner. Without access to the transcripts, it would be difficult, if not impossible, for the applicants to put forward their case. The Trial Judge therefore properly distinguished this case from the *Rubin* and *Petzinger* decisions.[3]

[3] *Rubin v. Canada (Clerk of the Privy Council)*, [1994] 2 F.C. 707 (C.A.); *Canada (Attorney General) v. Canada (Information Commissioner)*, [1998] 1 F.C. 337 (T.D.)

DAVID M. SHERMAN V. MINISTER OF NATIONAL REVENUE
INDEXED AS: SHERMAN V. CANADA (MINISTER OF NATIONAL REVENUE)

File No.:	**A-387-02**
References:	**2003 FCA 202; [2003] F.C.J. No. 710 (C.A.) (QL)**
Date of decision:	**May 6, 2003**
Before:	**Létourneau, Desjardins, Evans JJ.A.**
Sections of the *ATIA / PA*:	**Ss. 13(1)(a); 53(2) *Access to Information Act* (ATIA)**

Abstract

- Extent to which para. 13(1)(*a*) ATIA applies to statistics generated by Minister and derived from confidential information obtained from the United States
- Exchange of tax information under the Canada-U.S. Tax Convention
- Self-represented litigant's entitlement to costs under s. 53(2) ATIA

Issues

To what extent, pursuant to para. 13(1)(a) of the ATIA and clause 1 of Article XXVII relating to Article XXVIA of the Protocol amending the *Convention Between Canada and the United States of America with respect to Taxes on Income and on Capital*, can the Minister of National Revenue deny the applicant access to information in the hands of Canada Customs and Revenue Agency (CCRA) relating to tax collection assistance sought from and provided to the U.S. Internal Revenue Service (IRS)?

Facts

The access request was for some statistical information compiled by the Minister of National Revenue relating to tax collection assistance sought from and provided to the IRS.

More specifically, the appellant wanted to know:

- the number of requests made by CCRA and by the IRS;
- the amount of dollars claimed by CCRA and by the IRS;
- the level of acceptance by each agency and the success rate in collecting monies due;
- the amount of dollars effectively collected and remitted by the CCRA and by the IRS; and
- the yearly breakdown of the statistics covering the above-noted information.

CCRA exempted the information pursuant to paras. 13(1)(*a*) and 16(1)(*b*) and (*c*) ATIA.

The appellant filed a complaint with the Information Commissioner. The Commissioner dismissed the complaint as not being substantiated. The appellant then made an application for judicial review. The Trial Division agreed with the institution that the requested information had to be protected under para. 13(1)(*a*) and dismissed the application ((2002), 222 F.T.R. 145; 2002 FCT 586) (F.C.T.D.)). In light of his finding and of the fact that consent to disclosure had been refused by the U.S., the Trial Division Judge refrained from considering paras. 16(1)(*b*) and (*c*).

Decision

The appeal is allowed and the matter referred back to the Trial Division for a new determination of the appellant's right to access the records in light of the Court of Appeal's interpretation of 13(1)(*a*) and of clause 1 of Article XXVII of the Convention and, if need be, paras. 16(1)(*b*) and (*c*). The Court allows the appellant his disbursements and costs.

Reasons

The Court of Appeal had to determine the scope of paragraph 13(1)(*a*) in relation to clause 1 of Article XXVII relating to Article XXVIA of the Protocol amending the *Convention Between Canada and the United States of America with respect to Taxes on Income and on Capital* (the "Convention"). This clause is relevant to the interpretation of para. 13(1)(*a*) as it determines the conditions under which information exchanged under the Convention is confidential.

Paragraph 13(1)(a) of the ATIA mandates the non-disclosure of records which contain information that was obtained in confidence from, in this case, the United States. The Court first determined that it is not necessary for this exemption to apply that the record itself be provided by a foreign state. A record created by Canadian authorities that contains information obtained in confidence from a foreign government falls under the scope of the exemption in paragraph 13(1)(*a*). In other words, what is significant for the purpose of this exemption is not so much the source of the record to which access is sought as both the confidential nature and the source of the information it contains.

The Court then looked at the issue of whether the Minister can, in the context of the Convention, reveal the very fact of the existence of information obtained in confidence from the United States, as well as the volume, in terms of statistical numbers, of such information without revealing the contents of the information itself.

Justice Létourneau, writing for the unanimous Court, found that the very existence of such information is not caught by para. 13(1)(*a*) on the grounds that the Convention allowing for the exchange of confidential information and the laws implementing it are public documents. The public expects that confidential information necessary to collect taxes will be exchanged and to merely confirm what is common knowledge is not a disclosure within the terms of para. 13(1)(*a*).

With respect to clause 1 of Article XXVII of the Convention,[4] the Court held that it applies only to information received by Canada and does not require that statistical information compiled by the Minister be treated as secret, provided that the statistics contain no information received under the Convention by Canada.

With respect to the volume of information obtained in confidence, the Court determined that:

- statistics obtained by the Minister in confidence from the IRS under the Convention is secret information under clause 1 of Article XXVII of the Convention to which para. 13(1)(a) of the Act applies; and
- statistics generated by the Minister and derived from information obtained in confidence from the IRS are not information falling within the parameters of clause 1 of Article XXVII of the Convention and to which para.13(1)(*a*) of the Act applies, unless their disclosure would reveal the contents of the confidential information itself. Such a determination is consistent with the specific and narrow interpretation that should be afforded to exemptions, particularly mandatory class exemptions such as s. 13, which presume disclosure of information to have a detrimental effect.

Applying these principles to the appellant's request, the Court of Appeal came to the following conclusion:

The number of requests made by CCRA and by the IRS:

The record containing information coming from Canada which reveals the number of requests made by CCRA to the IRS is not exempt from disclosure under para. 13(1)(*a*) of the Act, nor is the record that contains information as to the number of requests made by the IRS to CCRA when such information comes from Canada, even though the statistics are derived from the information

[4] Clause 1 of Article XXVII of the Convention provides that "any information received by a Contracting State shall be treated as secret [...] and shall be disclosed only to persons or authorities ... involved in the assessment or collection of, the administration and enforcement in respect of [...] the taxes covered by the Convention."

obtained in confidence from the IRS. Statistical information prepared by the Minister that reveals the number of requests made by the IRS to CCRA is not disclosure of information itself obtained in confidence from the U.S.

The amount of dollars claimed:

Information prepared by the Minister about the total amount of dollars involved in IRS requests to CCRA falls under para. 13(1)(*a*) because it is a Canadian information that contains aggregated U.S. confidential information. The aggregation of the individual amounts of dollars specified by the IRS in its requests for collection assistance does not result in those amounts losing their confidentiality. However, para. 13(1)(a) does not apply to the total amount of dollars involved in the requests made by CCRA to the IRS.

The level of acceptance by each agency and the success rate in collecting monies due:

The percentage of requests accepted for action and the rate of success are not exempt from disclosure. The reasoning applied with respect to the number of requests (see above) governs the answer to these questions.

The percentage of dollars collected and remitted by CCRA and by the IRS:

The amount of money collected on behalf of and remitted to the IRS is exempt from disclosure pursuant to para. 13(1)(a). To disclose the percentage collected is to reveal the aggregate of the dollars claimed by the IRS, an information that was obtained by CCRA in confidence from a Contracting State. However, notwithstanding that the aggregate of dollars claimed by CCRA falls outside the ambit of the exemption rule, the statistic in terms of percentage and amount of monies collected and remitted by the IRS is confidential information within the meaning of para. 13(1)(*a*). The statistic is Canadian information about U.S. information, but the nature of the Canadian information is such that it is actually the U.S. information itself obtained in confidence from the IRS.

The yearly breakdown

This issue was disposed of on the basis of the respondent's statement that no such breakdown existed and the appellant's acceptance of this response.

Costs

Relying upon subs. 53(2) of the ATIA, the appellant sought to be awarded costs. The Court allowed the appellant his disbursements and costs on the ground that the appeal raised new issues of public interest as regards the interpretation of clause 1 of Article XXVII of the Convention and the extent to which para. 13(1)(*a*) of the Act applies, in the context of that Convention, to material generated and derived by the Minister from confidential information obtained from the United States.

The Court rejected the respondent's argument that as a self-represented litigant, the appellant is at best entitled only to disbursements. In the Court's view, one of the functions of an award of costs is to indemnify the successful party who has incurred large expenses to vindicate its rights. Justice Létourneau referred to recent cases in which self-represented litigants were awarded costs (*Fong et al. v. Chan et al.* (1999), 46 O.R. (3d) 330 (C.A.); *Canada (Attorney General) v. Kahn* (1998), 160 F.T.R. 83 (F.C.T.D.); *Coath v. "Bruno Gerussi" (The)*, 2002 FCT 385 (Hargrave P.); *Desjarlais v. Canada*, 2002 FCT 95).

SNC LAVALIN INC. V. MINISTER FOR INTERNATIONAL CO-OPERATION AND MINISTER OF FOREIGN AFFAIRS
INDEXED AS: SNC LAVALIN INC. V. CANADA (MINISTER OF INTERNATIONAL CO-OPERATION)

File No.:	**T-387-01**
References:	**2003 FCT 681; [2003] F.C.J. No. 870 (QL)**
Date of decision:	**May 30, 2003**
Before:	**Gibson J.**
Sections of *ATIA / PA*:	**Ss. 19, 20, 27, 28 and 44(1) *Access to Information Act* (ATIA)**

Abstract

- Representations made pursuant to subs. 28(1) can be made only with respect to an exemption arising under s. 20 ATIA
- Information not confidential
- Description of harm in conditional language and speculative nature thereof not meeting test of paras. 20(1)(*c*) and (*d*)

Issues

(1) Can the third party, in the course of a s. 44 application for judicial review, claim an exemption pursuant to s. 19 of the ATIA and, if so, has it met the burden placed on it in respect of that exemption?

(2) Has the third party met the burden placed on it in respect of the exemption claimed pursuant to s. 20 of the ATIA?

Facts

SNC Lavalin (the "applicant") was advised as a third party that the Access to Information Coordinator for CIDA had received a request under the ATIA for auditors' working papers related to the Comprehensive Audit of the River Nile Protection and Development Project and intended to disclose some records in response. The records proposed to be disclosed were made available to the applicant. The applicant made representations to the head of CIDA as to why the records or parts thereof should not be disclosed, as contemplated in subs. 28(1) of the ATIA. The head of CIDA made a decision to disclose the records, or parts thereof, and gave notice of his or her decision to the applicant, once again as provided in subs. 28(1) of the ATIA.

The applicant sought an order exempting the records concerned from disclosure or, in the alternative, further severance of the records to be disclosed. After the hearing of the application by the Federal Court, Trial Division, the respondent Ministers agreed to further severance pursuant to s. 19 of the ATIA, but not to a degree that rendered the application moot.

Decision

The application was dismissed.

Reasons

Issue 1

Subsection 27(1) of the ATIA requires the head of a government institution, subject to subs. 27(2), to provide written notice to a third party where a requester seeks access to records that are, in the reasonable belief of the head of the government institution, within the scope of the mandatory exemptions described in subs. 20(1) of the ATIA.

The Court found particularly significant the fact that the ATIA contains no equivalent obligation to notify a third party and to provide an opportunity to make representations where a record requested might be the subject of another mandatory exemption such as ss. 13, 19, or 24 ATIA.

Thus, unless the opportunity to make representations provided by s. 28 of the ATIA is restricted to representations as to the grounds for exemption set out in s. 20 of the ATIA, a third party to whom notice is given as required by s. 27 of the ATIA would be provided with an opportunity to make representations as to exemptions beyond the scope of s. 20 in circumstances where no equivalent opportunity to make representations would be extended to a third party in relation to a record that might fall within a mandatory exemption such as is provided by ss. 13, 19, or 24.

The words of the ATIA are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the ATIA, the object of the ATIA, and the intention of Parliament. To read the words of subs. 28(1) of the ATIA to confer on a third party a right to make representations beyond the scope of exemptions provided by s. 20 of the ATIA would require the "reading in" of words into that subsection. Given that the purpose of the ATIA, as clearly enunciated by Parliament, is to facilitate access to government information and that the provision of independent review of proposed disclosure is only a "fairness" adjunct to that purpose and, given the entire context of the ATIA, and the somewhat ambiguous tenor of the grammatical and ordinary sense of the words of subss. 27(1) and 28(1), the Court found that the applicant was not entitled to rely on the s. 19 exemption in its subs. 28(1) representations.

Issue 2

The basic purpose of the ATIA is to provide the public with a right of access to information in records under government control. Exceptions to that right of access should be limited and specific. Public access ought not be frustrated except in the clearest of circumstances. A heavy burden of persuasion rests upon the party resisting disclosure.

Exemptions provided by s. 20 of the ATIA are mandatory. At the same time they are forward looking and thus the harm contemplated by them is, of necessity, not realized but rather potential. The applicant here fails to meet the criteria for obtaining an exemption under paras. 20(1)(*b*), (*c*), or (*d*). Under para. 20(1)(*b*),

the applicant failed to show that the information supplied to CIDA was confidential in nature by an objective standard, taking into account its substance and the purposes for which and the conditions under which it was prepared or provided. Nothing on the record indicated that the information was ever considered by CIDA to be confidential, nor that the applicant at any time before it was consulted pursuant to s. 27 of the ATIA communicated to the respondents its view that the information it had supplied to CIDA was confidential, this notwithstanding the applicant's sophistication and experience.

Under para. 20(1)(*c*), the applicant's speculative statement of expectation of loss, using conditional language, failed to meet the standard of reasonable expectation of material financial loss or prejudice to its competitive position. It is simply not sufficient for the applicant to establish that harm might result from the disclosure. Similarly, the applicant failed to meet the heavy burden on it to demonstrate under para. 20(1)(*d*) the negative impact it could reasonably expect to have regarding contractual or other negotiations, given that its claim was couched largely in conditional language.

Comments

This case is being appealed.

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, A AND B (CONFIDENTIAL) V. MINISTER OF NATIONAL REVENUE; INFORMATION COMMISSIONER OF CANADA AND ROBERT CUNNINGHAM (ADDED PARTIES) INDEXED AS: CANADIAN TOBACCO MANUFACTURERS' COUNCIL V. CANADA (MINISTER OF NATIONAL REVENUE)

File No.:	**T-877-00**
References:	**2003 FC 1037; [2003] F.C.J. No. 1308 (QL)**
Date of decision:	**September 8, 2003**
Before:	**Russell J.**
Sections of *ATIA / PA*:	**Ss. 2, 6, 20(1) and 44 *Access to Information Act* (ATIA)**

Abstract

- Relevancy is not a ground for exemption from disclosure available to a third party on a s. 44 application
- Analytic know-how gleaned over years of experience not strong enough to suggest proprietary methodology
- The test for whether information provided by a third party is confidential is an objective one
- While confidentiality agreements may be taken into account, they cannot override or trump the express statutory provisions of the ATIA

Issues

(1) Is relevancy a ground for exemption from disclosure available to a third party on a s. 44 application?

(2) Are the reports in question trade secrets of a third party and thus entitled to exemption under para. 20(1)(*a*)?

(3) Do the reports in question contain financial and commercial information supplied to a government institution by a third party that has been treated consistently in a confidential manner by the third party, thus entitling the applicants to exemption under para. 20(1)(*b*)?

(4) Would the disclosure of the reports in question result in material financial losses to or prejudice the position of the applicants, entitling them to exemption under para. 20(1)(*c*)?

(5) Would the disclosure of the reports in question interfere with contractual or other negotiations of the applicants, thus entitling them to exemption under para. 20(1)(*d*)?

Facts

The applicant, Canadian Tobacco Manufactures' Council (CMTC), met with the respondent, CCRA, to discuss how the applicant and its member companies could help to deter and reduce tobacco smuggling and contraband activities. CMTC agreed to commission two consulting firms, A and B, to conduct studies and prepare reports on contraband tobacco. A was to study trends in tobacco consumption in Ontario, Quebec, and British Columbia. B was to provide a summary of the current smuggling situation as it related to distribution and sale of contraband products in Canada, particularly in Quebec, Ontario, Manitoba, and British Columbia. Draft copies of the reports were delivered to CCRA on August 11, 1998, along with transmittal letters.

On October 8, 1998, the added party, Robert Cunningham, on behalf of the Canadian Cancer Society made a request under the *Access to Information Act* (ATIA) for "[r]ecords sent to and received from the tobacco industry...or their representatives, including the Canadian Tobacco Manufacturers' Council since February 1, 1998 with respect to marking/stamping on packages of tobacco products." CCRA advised that the information was exempted under para. 20(1)(*b*). Mr. Cunningham complained to the Information Commissioner on February 10, 1999, who then commenced an investigation.

On December 6, 1999, CCRA told the Information Commissioner that it would disclose, with CMTC's agreement, those portions of Report B specifically pertaining to the subject of Mr. Cunningham's request and noted that it agreed with CMTC that Report A was not relevant.

On March 30, 2000, CCRA gave the applicants notice under s. 28 of the intention to release the reports. Notice was given under s. 28 on April 14, 2000, to the President of CMTC of the intention to release the transmittal letters. Notice was then given the applicants on April 28, 2000, under para. 29(1)(*a*) that it had decided to release the transmittal letters and reports. The applicants commenced this proceeding under s. 44 on May 17, 2000.

On July 5, 2000, the Information Commissioner reported the results of his investigation to the head of CCRA, concluding that the records identified by CCRA (i.e. the reports and transmittal letters) were relevant to the request and should not have been exempted under subs. 20(1) or s. 16 and that they should be released to the requester, Mr. Cunningham.

Decision

The s. 44 application was denied.

Reasons

Issue 1

The wording of s. 6 contains no prohibition against disclosing documents that are not relevant to the request. In fact, s. 6 does not address the concept of relevancy. It merely stipulates that the request must be made in writing and must provide sufficient detail to allow 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 objective of Parliament in enacting the Act, as embodied in s. 2, there is no exemption available to the applicants based upon relevancy. Exceptions to disclosure under

the Act should be strictly construed: *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430 (F.C.A.) at para. 23 per McDonald J.A.

The fact that there is no obligation on an institution to disclose irrelevant information to a requester does not give third parties a right to prevent disclosure on the grounds of irrelevancy. Further, what the parties themselves may have said and done from time to time on the issue of relevancy is not determinative.

In any event, the records sought in this case under the ATIA do fall within the scope of the request. The level of tobacco demand and supply and a report on contraband are intimately related to the need for enhanced tax-paid markings, an anti-contraband measure.

Issue 2

Recognition of the discrete category of trade secret information, as defined in *Société Gamma Inc.* would not lead to the kind of blanket exemption alleged by the requester. The only issue on the present facts is whether the applicants have shown that the information contains "something of a technical nature...which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure" (per Strayer J. in *Société Gamma Inc. v. Canada (Department of Secretary of State)* (1994), 79 F.T.R. 42 at 45; 27 Admin L.R. (2d) 102 (F.C.T.D.).

In order to bring the information within the narrow technical sense of "trade secret" postulated by Strayer J. in *Société Gamma Inc.*, it is not sufficient to show, as did the applicants here, that the methodology was a way of handling data gained over years of experience. In coming to this conclusion, it is assumed that the word "technical" as used by Strayer J., has a meaning close to "of or involving or concerned with the mechanical arts and applied sciences." Wider definitions of "technical" exist; Campbell J. appears to have taken a much broader approach in *Pricewaterhouse Coopers, LLP v. Canada (Minister of Canadian Heritage)* (2002), 211 F.T.R. 206; [2001] F.C.J. No. 1439 (QL) (F.C.T.D.), where he dismisses any distinction between methodology and the work product and finds the work done in that case to be "something of a

technical nature" within Strayer J.'s definition of a trade secret in *Société Gamma Inc.* The Trial Judge here did not find himself at odds with the decision of Campbell J. in *Pricewaterhouse*. In the case at bar, the evidence is more suggestive of analytic know-how gleaned over years of considerable experience and is not strong enough to suggest a proprietary methodology that might fit within some extended definition of "technical."

Issue 3

According to the decision of the Federal Court in *Air Atonabee Limited v. Canada (Minister of Transport)* (1987), 27 F.T.R. 194 (F.C.T.D.), in order for para. 20(1)(*b*) of the Act to apply, the information in question must be:

(1) financial, commercial, scientific, or technical information as those terms are commonly understood; and

(2) confidential information, objectively confidential in a way that takes account of the information itself, its purposes, and the conditions under which it was prepared and communicated; and

(3) supplied to a government institution by a third party; and

(4) treated consistently in a confidential manner by the third party.

The data in Reports A and B were found not to be primarily commercial in nature, but the analytic methodology used to treat the data and draw the conclusions can be regarded as commercial information that is being used to produce the Reports. The issue is whether the analytic methodology can be regarded as confidential within the meaning of the Act.

In *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services*, 2003 FCT 254; [2003] F.C.J. No. 348 (QL) (F.C.T.D.), Layden-Stevenson J. cited the summary of authorities provided by MacKay J. in *Air Atonabee*:

> ...[W]hether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely that:
>
> a) 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) the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) 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 public benefit by confidential communication.

Layden-Stevenson J. in *Brookfield*, at para. 16, held that whether information provided by a third party is confidential "must be established objectively." She further held:

> The fact that the information has, to date, been kept confidential, is merely one aspect of the test. While there exists some inconsistency in the case law as to whether an express undertaking of confidentiality by government is determinative, the weight of judicial authority is to the effect that it is not possible to contract out of the Act [...].
>
> In the final analysis, while confidentiality agreements may be taken into account, they cannot override or trump the express statutory provisions of the Act.

Here, the Trial Judge accepted the applicants' evidence that the analytic methodology had been treated consistently as confidential by both the third party and by the Minister. However, it is not possible to contract out of the Act. So it is difficult to see how a request that confidentiality be observed and the behaviour of the parties can be determinative in this case. The interests of the government

and its need to nurture working relationships with organizations such as the CTMC are not necessarily coterminous with the interests of the public. The Act is there to ensure public access, subject to narrow exceptions. This may make life more difficult for parties such as CCRA, but this is not an argument for denying access. For reasons of public policy, this information cannot be treated as confidential within the measure of para. 20(1)(*b*). The records have been submitted to the government with a view to addressing issues that may well affect, or may already have affected, government policy on tobacco. Not to allow the public access would leave the public with no means to respond and would completely thwart the whole purpose of the Act.

Issue 4

The applicants' evidence on the reasonable expectation of financial loss or gain, notwithstanding that such evidence was not the subject of cross-examination, remains speculative. The applicants, at best, merely express their fears of what could happen. They did not establish a reasonable expectation of probable harm. In addition, if the applicants' assertions that the records and the relationship between the CTMC and CCRA are not an exercise in lobbying are taken at face value, it is difficult to see what loss of reputation they might suffer from disclosure of materials aimed at improving law enforcement and deferring smuggling activities. If the records were partisan efforts at lobbying, this might be another matter, but the applicants say that the purpose of the Report was "to give CTMC and the governments involved in tax collection and enforcement the best possible independent overviews of contraband tobacco activity."

Issue 5

An examination of the evidence put forward by the applicants in this regard reveals that their fears are, once again, speculative in nature and this does not discharge the burden required to show that para. 20(1)(*d*) should be applied in their favour.

Comments

This decision was not appealed.

JOAN VAN DEN BERGH v. NATIONAL RESEARCH COUNCIL
INDEXED AS: VAN DEN BERGH v. CANADA (NATIONAL RESEARCH COUNCIL)

File No.:	**T-121-02**
References:	**2003 FC 1116; [2003] F.C.J. No. 1407 (QL)**
Date of decision:	**September 29, 2003**
Before:	**O'Reilly J.**
Sections of *ATIA / PA*:	**Ss. 3(j) and (l), 8(2)(m)(i) *Privacy Act* (PA); s. 19(1), (2)(a) and (c) *Access to Information Act* (ATIA)**

Abstract

- Names of recipients of performance bonuses falling within the broad definition of "personal information" in the *Privacy Act*
- However, para. 3(l) *Privacy Act* excluding from definition names of recipients of discretionary performance bonuses as, in this case, there was not necessarily a link between individual performance ratings and attribution of bonus
- The mere assertion of a lack of public interest in subpara. 8(2)(*m*)(i) of the *Privacy Act* falls far short of justification by appropriate reasons

Issues

(1) Can the names of persons who receive performance bonuses be disclosed on the basis of an exception in the *Privacy Act*?

(2) Can the head of the National Research Council (NRC) disclose the names under the *Access to Information Act*?

Facts

In 1999, NRC began awarding performance bonuses to its hardest-working and most talented employees. The applicant, a Senior Labour Relations Officer with the Research Council Employees' Association (the union representing administrative, secretarial, and technical staff at NRC) requested in 2000 that NRC provide the names of all employees who had been awarded performance bonuses that year. The president of NRC refused on the grounds that the information requested was personal information protected under the *Privacy Act.*

The applicant complained to the Information Commissioner on the basis that the information sought fell under the exception in para. 3(l) of the *Privacy Act* and was thus releasable. NRC released the names of individuals who had received performance bonuses for being part of a team or group, but withheld those awarded on the basis of individual efforts because this would disclose their personal performance ratings.

The applicant sought judicial review of NRC's refusal to release the other names. The Information Commissioner agreed with the position taken by the respondent.

Decision

The application was allowed.

Reasons

Issue 1

The *Access to Information Act* allows individuals access to government records, but prohibits disclosure of "personal information" (subs. 19(1)), defined generally in the *Privacy Act* as "information about an identifiable individual that is recorded in any form" (s. 3). Clearly, information about a person's job performance is personal information and, as such, is generally confidential.

However, the information sought here is not very specific. Further, the general criteria developed by NRC for granting performance bonuses were altered or supplemented by individual branches. Various performance levels were used, and in some cases individuals were eligible without achieving any particular performance rating so long as they satisfied other criteria instead. Branch managers established and published the guidelines that applied to their respective employees. Accordingly, if NRC were to identify the persons who achieved bonuses, one could merely deduce that, in certain branches, the named individuals had achieved performance ratings at the upper end of the spectrum and, in others, that they must have made some kind of special contribution to their workplace. Nevertheless, the general information that the applicant requested from NRC comes within the broad definition of "personal information" in the *Privacy Act*.

However, the *Privacy Act* declares that information relating to "any discretionary benefit of a financial nature...including the name of the individual and the exact nature of the benefit" is not "personal information"(para. 3(l)). Clearly, the employees who received bonuses from NRC obtained a financial benefit. The only question is whether that benefit was "discretionary."

Here, the entire bonus program was discretionary. NRC had no obligation to establish it. Senior managers evaluated their employees' contributions to the workplace and assigned performance ratings accordingly. Where other factors played a role, senior managers had to weigh them. In turn, they determined the amount given to each recipient. Everything about the program was discretionary.

Paragraph 3(j) does not preclude the disclosure of the information here. The Supreme Court of Canada has held that personal information about public employees that is not specifically mentioned in para. 3(j), including performance appraisals, cannot be disclosed: see *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8. Similarly, because para. 3(j) refers specifically to the "salary range" of a public employee, the parallel exception for discretionary financial benefits in para. 3(l)

does not permit disclosure of a person's specific salary or daily fee: see *Rubin v. Canada (Clerk of the Privy Council)* (1993), 62 F.T.R. 287 (F.C.T.D.). Still, neither of these cases suggests that the information the applicant seeks cannot be disclosed. According to the *RCMP* case, the personal performance evaluations of public employees should remain confidential, even though other details about their employment can be disclosed. However, NRC would not be revealing the performance evaluations simply by naming those who received bonuses.

Further, there is no tension here between para. 3(j) and para. 3(l) as there was in *Rubin*, *supra*. There, one provision specifically permitted disclosure of a public employee's salary range, while the other dealt generally with financial benefits. The Court simply concluded that the specific provision should prevail over the general one. Here, the applicant asks NRC to disclose the names of employees who received a bonus – not their salary, nor even the amount of the bonus. There is no tension between the two exceptions at issue here, and no basis for concluding that para. 3(l) cannot apply to public employees.

Therefore, the information sought by the applicant is not "personal information" according to the *Privacy Act* for the purposes of s. 19 of the *Access to Information Act*.

Issue 2

(This question was not necessary to the disposition of the case, but was nevertheless addressed because it was argued before the Trial Judge.)

The head of NRC had a discretion whether to release the names, and his decision is entitled to deference: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

Under the ATIA, the head of a government institution May disclose personal information if the "individual to whom it relates consents" (para. 19(2)(*a*)). When NRC announced its program, it informed employees that the "names of performance bonus recipients may be made public by NRC, but other

information will be kept private." In due course, bonus recipients were asked if they consented to having their names made public. Many said yes. The NRC president decided that the consents were not clear. However, the Trial Judge found that the consent forms used by each of the branches (they differed from branch to branch) were clear enough to constitute consent for the purpose of para. 19(2)(*a*), particularly when NRC had already informed its employees that the names might be made public.

The head of a government institution may also disclose personal information where "the public interest in disclosure clearly outweighs any invasion of privacy that could result" (ATIA, para. 19(2)(*c*); *Privacy Act*, subpara. 8(2)(*m*)(i)). According to the Information Commissioner, NRC duly weighed the public interest and the privacy of its employees and concluded that the public interest override was not justified in this case. However, the mere assertion of the result falls far short of justification by appropriate means: *Bland v. National Capital Commission*, [1991] 3 F.C. 325 (T.D.) at 341 per Muldoon J. Given that the information sought by the applicant here was of a general nature and the purpose for which she was seeking it was to undertake a legitimate analysis of the expenditure of public funds, a serious weighing of the public and private interests at stake might well have justified disclosure.

Comments

This decision was not appealed.

PRIVACY COMMISSIONER OF CANADA V. ATTORNEY GENERAL OF CANADA, SOLICITOR GENERAL OF CANADA, COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE
INDEXED AS: CANADA (PRIVACY COMMISSIONER) V. CANADA (ATTORNEY GENERAL)

File No.:	**S57566**
Reference:	**2003 BCSC 862***
Date of decision:	**June 5, 2003**
Before:	**Metzger J.**
Sections of *ATIA / PA*:	**Ss. 29(1), (3), 34(1), (2), 35, 36, 37, 42, 43, 53(1), 54(4) *Privacy Act* (PA)**

Abstract

- *Privacy Act* not conferring legal capacity to sue on Privacy Commissioner of Canada
- Legal capacity to sue not obtained by ombudsman-like nature of Privacy Commissioner's role, nor by prior granting of intervenor status, nor by virtue of appointment under the Great Seal of Canada
- Legal capacity to sue not obtained by virtue of the "quasi-constitutional" status of the *Privacy Act* alone nor by an interpretation of the long title of the Act
- Court's residual discretion to consider merits of a case where plaintiff's standing is unclear does not extend to remedy of lack of jurisdiction

Issue

Does the Privacy Commissioner of Canada have legal capacity to sue?

* The abbreviation "BCSC" refers to the British Columbia Supreme Court.

Facts

The plaintiff, the Privacy Commissioner of Canada, sought a declaration that the Kelowna RCMP detachment's video surveillance (1) violated the plaintiff's and the public's rights under ss. 2(d), 6, 7, and 8 of the *Canadian Charter of Rights and Freedoms*; and (2) breached the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. The defendants applied to have the action struck out on two grounds: (1) that the Privacy Commissioner lacks legal capacity to sue; (2) that under Rule 19(24)(*a*) of the *Supreme Court Rules*, B.C. 221/90 as am., the Privacy Commissioner lacks standing.

Decision

The application to strike was allowed. The Privacy Commissioner's statement of claim was declared a nullity.

Reasons

The lack of standing and other objections raised by the Attorney General of Canada are not appropriate for an application under Rule 19(24)(*a*), as there are not plain and obvious answers to the questions raised. These defences are appropriate matters for a trial judge.

The Privacy Commissioner lacks legal capacity to sue. First, to liken the Privacy Commissioner to an ombudsman, as the Supreme Court of Canada did in *Lavigne v. Canada (Office of the Commissioner of Official Languages)* (2002), 214 D.L.R. (4^{th})1; 2002 SCC 53, does not imply a capacity to sue, since an ombudsman must assess both sides of a complaint and does not act as counsel for the complainant.

Second, the granting of intervenor status to the plaintiff in other cases does not change the Privacy Commissioner's statutory makeup and thus bestows no capacity to sue.

Third, since the *Privacy Act* provides the necessary powers for the Privacy Commissioner to effect its purpose and fulfill his obligation, the Court has no authority to add to these powers by resort to an interpretation of the long title of the Act.

Fourth, the fact that the Supreme Court in *Lavigne*, *supra*, referred to the *Privacy Act* as "quasi-constitutional" does not, in itself, imply the bestowal of additional powers not conferred on the Privacy Commissioner by Parliament. The scheme, object, and wording of the Act make clear that the intention of Parliament was not to grant the Privacy Commissioner the power to commence such a suit.

Fifth, while the Privacy Commissioner is appointed under the Great Seal of Canada and considers himself "an officer of Parliament," this does not confer any capacity to sue. The Privacy Commissioner is not a servant of the Crown. He is considered an employee of the Crown only for the purposes of certain compensation claims (subs. 54(4) of the *Privacy Act*). I am satisfied that the Privacy Commissioner's appointment under the Great Seal of Canada does not confer on him a power that Parliament did not expressly grant, in particular the capacity to commence a lawsuit such as this one.

Sixth, any residual discretion in the courts to decide cases of public importance on their merits even where the plaintiff appears to lack the status to maintain the action (*Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157) is confined to issues of standing and does not go to the remedying of a lack of jurisdiction, which is the issue here. Without the capacity to commence the action, there is no question for the Court to consider, as the statement of claim would be a nullity.

Finally, it is proper for the issue of legal capacity or jurisdiction to be considered here rather than by the trial judge as the Privacy Commissioner may have no business bringing the action at all.

Comments

The Office of the Privacy Commissioner has withdrawn its appeal in this case.

WYETH-AYERST CANADA INC. V. ATTORNEY GENERAL OF CANADA INDEXED AS: WYETH-AYERST CANADA INC. V. CANADA (ATTORNEY GENERAL)

File No.:	**A-130-02**
References:	**2003 FCA 257; [2003] F.C.J. No. 916 (QL)**
Date of decision:	**June 6, 2003**
Before:	**Richard C.J., Noël and Sexton JJ.A.**
Sections of ATIA / PA:	**Ss. 4(1), 20(1), 44(1) Access to Information Act (ATIA)**

Abstract

- Pragmatic and functional approach to be used to review administrative decisions
- Standard of correctness
- Eligibility of requester to make request under ATIA
- S. 20(1) criteria not met

Issues

(1) What is the appropriate standard of review to be applied to the Minister's decision and by the appellate court?

(2) Was the requester entitled to make his request access under the ATIA?

(3) Was the evidence weighed correctly by the reviewing judge in relation to subs. 20(1)?

Facts

In 1997, Health Canada gave notice of proposed regulations that would create a single standard applicable to both natural and synthetic source conjugated estrogen products, thereby amending the Regulations under the *Food and Drugs Act*, R.S.C. 1985, c. F-27, s.1. Health Canada invited the public to make representations regarding the proposed regulations.

Wyeth-Ayerst responded to Health Canada's request by sending two letters in relation to Premarin®, a natural source estrogen product. Shortly thereafter, a request pursuant to the *Access to Information Act* was received by Health Canada's Access to Information and Privacy Office. Health Canada advised Wyeth-Ayerst that the two letters would be released, a decision disputed by Wyeth-Ayerst who made representations to the ATIP Office on the basis that the information fell within the exemptions set out in subs. 20(1) of the ATIA. Since the ATIP Office disagreed, Wyeth-Ayerst sought judicial review of the decision on the basis of s. 18.1 of the *Federal Court Act*.

The reviewing judge dismissed the application (2003 FCT 133; [2003] F.C.J. No. 173 (QL)). The reviewing judge held that there was sufficient evidence to establish that the requester was eligible to make his request under the ATIA. She further held that since the Minister's decision to disclose was an exercise of discretion, the applicable standard of review was that of deference. Based on that standard, the judge saw no evidence to establish that the information was entitled to the exemptions pursuant to subs. 20(1) of the ATIA.

This is an appeal of that decision.

Decision

The appeal was dismissed with costs.

Reasons

Issue 1 – Standard of review

Basing itself on the Supreme Court of Canada decision in *Dr. Q.*[5] the Court of Appeal reiterated the primacy of the pragmatic and functional approach in the review of administrative decisions. It is not acceptable to base the standard of review on a single criterion, such as jurisdiction or discretion. Rather, whenever a court is to review a decision of an administrative body, the pragmatic and functional approach demands a more nuanced analysis that considers a number of factors (*Dr. Q.*, para. 25).

At the appellate level, since the question of the proper standard of review is a question of law, the Court of Appeal must determine, on a correctness standard, whether the reviewing judge erred in applying the standard of review. If the reviewing judge did not apply the proper standard of review, it is up to the appellate court to substitute the appropriate standard of review and assess or remit the administrative body's decision on that basis.

Based on the pragmatic and functional approach, the Court held that the standard of review applicable to the Minister's decision is correctness. In the Court's view, the statutory right to review supports a more searching standard. In reaching this conclusion, the Court looked at the following elements: (1) the absence of a privative clause in the ATIA; (2) the explicit review provision found in subs. 44(1); and (3) the importance ascribed by subs. 2(1) (the purpose clause) to the independent review of refusals to give access.

The Court's skills in interpreting and applying statutory exemptions, combined with the fact that subs. 20(1) is a mandatory exemption (as opposed to a discretionary one) and the fact that the nature of the question in the instant case is one of mixed fact and law, all pointed to a less deferential standard of review.

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[5] *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; [2003] S.C.J. No.18 (QL).

Issue 2 – Eligibility of the requester

Wyeth-Ayerst argued that the records could not be disclosed since sufficient evidence was not provided by the Minister to demonstrate that the access requester had satisfied the eligibility requirements pursuant to subs. 4(1) of the ATIA. However, following the decision in *Cyanamid Canada Inc.,*[6] the Court determined that the government institution must be reasonably satisfied that the requester is qualified. In the present case, the Minister provided sufficient evidence to discharge his burden. The affidavit evidence of the ATIP officer showed that she had turned her mind to the eligibility of the requester and, based on the information before her, concluded that the requester was entitled to access.

Issue 3 – Applicability of the exemptions

Since it is well established that the party requesting the exemption bears the burden of proof and that exceptions to access should be limited, it was up to Wyeth-Ayerst to provide the Minister with a reasonable explanation for exempting each record. Affidavit evidence that is vague or speculative in nature cannot be relied upon. In the present case, the affidavit failed to elaborate on how or why the information contained in the letters is confidential. Therefore, since Wyeth-Ayerst did not establish that the information should be exempted pursuant to subs. 20(1), only the parts of the letter that the Minister has agreed to exercise are to be redacted.

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[6] *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), 45 C.P.R. (3d) 390 (F.C.A.).

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